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**Eoin Higgins of The Intercept argues that had Obama investigated and prosecuted Bush administration officials, Brett Kavanaugh would probably never have made it to the Supreme Court**

GREG WILPERT: It's The Real News Network, and I'm Greg Wilpert coming to you from Baltimore.

Could the appointment of Judge Brett Kavanaugh to the Supreme Court have been prevented? Many progressives are now asking what could have been done differently, and even whether Kavanaugh could be impeached on charges of perjury, should Democrats win control over Congress in the upcoming midterm elections. One writer, though, argues that looking back at the Senate confirmation hearings is not good enough. Instead we need to look at how President Obama actually paved the road that led to Kavanaugh's appointment. More specifically, Obama's unwillingness to investigate and prosecute Bush administration officials for the torture and warrantless surveillance that took place under President Bush made it more likely that someone like Kavanaugh would eventually become confirmed to the Supreme Court. Here's what Obama said back in January 2009, shortly before he was inaugurated, in an interview with George Stephanopoulos on ABC's This Week.

GEORGE STEPHANOPOULOS: Will you appoint a special prosecutor, ideally Patrick Fitzgerald, to independently investigate the gravest crimes of the Bush administration, including torture and warrantless wiretapping?

BARACK OBAMA: We're still evaluating how we're going to approach the whole issue of interrogations, detentions, and so forth. And obviously we're going to be looking at past practices. And I don't believe that anybody is above the law. On the other hand, I also have a belief that we need to look forward, as opposed to looking backwards.

GREG WILPERT: Joining me now is Eoin Higgins, the author of the article “Obama’s Resistance to Investigating the Bush Administration Allowed Brett Kavanaugh to Skate Onto the Supreme Court,” which was published by the Intercept earlier this week. Owen is a historian whose work regularly appears in the Intercept. Thanks for joining us, Eoin.

EOIN HIGGINS: Thanks for having me.

GREG WILPERT: So exactly how did the fact that no real investigation and no prosecution whatsoever took place under Obama for the torture and surveillance practices that were widespread under Bush? How did that make Kavanaugh’s appointment to the Supreme Court possible?

EOIN HIGGINS: Well, I think you have to look at Kavanaugh’s confirmation as part of this long story of the Bush administration, how they’ve been treated in the last decade. And as you mentioned, Obama refused to prosecute or go after the members of the Bush administration for their crimes having to do with torture, detainee policies, warrantless wiretapping. And because he refused to do that, because his administration refused to do that, it allowed these members of the administration, the Bush administration to kind of slowly reintegrate themselves back into society, and the government, and the- I guess you kind of call it the discourse.

Kavanaugh, who was already a judge, who had become a judge in 2006 in the Court of Appeals for the D.C. Circuit, while he was with the Bush administration as associate counsel and later as staff secretary, was- at least there’s a lot, there are a lot of indications that he was involved with the detainee policies, the torture policies, and warrantless wiretapping, as evidenced by some email titles that have been released by the National Archives. The full emails and all the documents will be released at the end of October. But the names of some of these emails indicate that Kavanaugh was involved with creating these policies that were in direct violation of both international and U.S. law. And if the Bush administration and members of the Bush administration had been prosecuted by Obama and his administration, I think we would have seen a situation where someone like Kavanaugh, who again was involved with all of these policies, would have been considered maybe politically too toxic to appoint to the Supreme Court. And this is, of course, setting aside everything else about him that that raises questions, including his drinking and his allegations of sexual assault.

GREG WILPERT: All right. Now, during the Kavanaugh hearings, Kavanaugh denied any responsibility for the torture program. We have a short clip here for this.

BRETT KAVANAUGH: I was not involved. I was not read into that program. Not involved in crafting that program, nor crafting the legal justifications for that program. In addition to Senator Feinstein's report, the Justice Department did a lengthy Office of Professional Responsibility report about the legal memos that have been involved to justify some of those programs. My name is not in that report, Senator, because I was not read into that program and not involved.

GREG WILPERT: So, clearly Kavanaugh is denying any kind of responsibility or involvement in at least the torture program. But he reacted similarly with regard to the surveillance. But what do we know? I mean, you've mentioned that many documents haven't been released yet that are aren't going to come out until later. But I what can we say that we do know, and to what extent might he have been lying here?

EOIN HIGGINS: Well, you know, I think what we can say that we do know is that as a member of the Bush administration, as an associate counsel under Alberto Gonzales in the early years the Bush administration, as they were developing these torture and detainee policies and surveillance policies, the suggestion that Kavanaugh was not involved with developing these policies, it just doesn't, it doesn't really pass the smell test. I mean, even if, even if he wasn't, say, directly involved in writing the policy itself, he was definitely read into this stuff. You know, again, these email titles that we have from the National Archives show this.

But the thing is, and I think that this is very important, is that it would be very easy for us to have all these answers if there had been any kind of investigation, any kind of prosecution from the Obama administration. However, there was not. And the reason that it would have been easy is because those documents would have been released in discovery. They would have been allowed to be released from Freedom of Information Act. However, because there was no investigation, that's allowed I think it's around 400,000 documents to be withheld, for two reasons. Now, 100,000 of them are being withheld by the Trump administration. They're citing executive privilege. And then 300,000 of them are being, as I referred to before, looked through by the National Archives in advance of their release at the end of this month.

Now of course, that's too late. He's already been confirmed. But the point is that had Obama looked into this stuff, had the Democratic majority both in Congress and in the executive branch looked into this, you know, this stuff would have been clear already. And the fact that we still

don't know, you know, almost 20 years on how these policies were developed, what went into them, and even in some cases what these policies were and are, I think really speaks to a disappointing failure or lost opportunity on the part of the Obama administration to actually hold the Bush administration accountable. And you know, in many ways, as I say in the piece, I would really argue that that may end up to be one of the more, one of the defining moments of the 21st century.

GREG WILPERT: I'm wondering, though, to what extent this is really perhaps just a failure of somehow a, you know, something that they missed to do, for some reason. What might be behind that? That is, to what extent could it be that the Obama administration might be thinking ahead, actually, in the sense of that, well, if we leave office, what if our successor tries to get us on with something? And therefore I better not go after our predecessors, because we're just going to set a precedent for, for the next president. So in other words, this unaccountability and impunity is self-perpetuating to some extent. And the more they can engage in misdeeds, are the more likely they will be also to actually forgive their predecessors. What do you think about that?

EOIN HIGGINS: I mean, I think that that is probably at least part of it. It really kind of begs the question of whether or not this is, you know, this behavior by Obama and his administration- which is definitely not unique to them at all. I mean, I would hate to give the impression that, you know, before this there was any kind of accountability from administration to administration. There hasn't been. It makes you wonder how much of this stuff is just baked into the American system, baked into the presidency, that when you come into office, or even before you do that, you know, as that clip shows- that was before Obama had been sworn in- that you just kind of, you know, let this stuff kind of go.

You know, we can even look at this with Trump, who is now the president, and promised on multiple occasions on the campaign trail that his administration would look into the Obama years and look into Hillary Clinton's time as secretary of state to do some kind of, in this case, undefined investigation. And I think that we can all say that that Trump himself personally would probably love nothing more than to do that. But he hasn't.

And I don't think we can honestly say that there's maybe, like, a throughline from A to B, between any kind of thought, whether or not it's Trump, or Obama, or Bush, or whoever, where they actually really think this kind of stuff through, and in a way that refers to their own successor and their own place in not getting in trouble. I think that it's more this is just the way that things are done. Political power in the U.S. is just not accountable, and that's just the way it is.

Yeah. That actually brings me to my next point, because before the- after the 2009 Stephanopoulos interview, Obama also expressed the desire not to look back but to look forward during the 2009 Summit of the Americas in Trinidad and Tobago. That is, President Obama was forced to listen to a whole slew of left-of-center presidents who recited the history of U.S. imperial ambitions towards Latin America and interventions. And Obama's speech to those speeches from the presidents was, quote: I didn't come here to debate the past. I came here to deal with the future. As a historian, what role do you see this type of approach, of ignoring history and of not taking responsibility for past actions, what role do you see it playing in the way the U.S. governs?

EOIN HIGGINS: Well, I think it's very American to do that. You know, the U.S. has always approached the rest of the world and treated the rest of the world as if actual material reality and past actions were completely irrelevant to the vision of the world that the U.S. wanted to encounter. You know, you can see this through Obama's time in office in the interventions in the Middle East, the drone wars, the continuation of warrantless wiretapping, even in the face of denying that that was happening.

There's an interesting part- I think every country has its own propaganda, its ideology. And every country approaches the rest of the world and their past in a way that they would like to have it be, rather than the way that it actually is. The difference with the U.S. is that we are the most powerful country in the world and so the way that we approach the rest of the world and the way that we encounter them has a real effect on how the rest of the world operates. And if the U.S. is always thinking that, you know, we're going to look ahead, not backward, we're not going to learn from our past, we're not going to really consider history when we when we deal with the rest of the world.

I think that that has two effects. One, it has the effect of basically what we've seen in the years since the Cold War, with the U.S. just kind of treating the rest of the world as if, like that Fukuyama quote, where he says, you know, that that's the end of history. I'm kind of mangling the quote a little bit, but that's the general gist of it. And that the history is over, and we're just kind of recreating the world as we like to see it. And then the other one is that that we just kind of disregard alliances and disregard promises, and treat the rest of the world in a way that is very unilateral. And I think that our refusal to consider our history has a lot to do with that.

GREG WILPERT: OK. Well, we're going to leave it there. I was speaking to and Eoin Higgins, writer and historian for the Intercept. Thanks again for having joined us today.

EOIN HIGGINS: Thank you so much.

GREG WILPERT: And thank you for joining The Real News Network.