

ALLIANCE FOR JUSTICE

SUPREME COURT NOMINEE REPORT: FIRST LOOK

BRETT KAVANAUGH



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EXECUTIVE SUMMARY

On June 27, 2018, Justice Anthony Kennedy announced his intention to retire from the U.S. Supreme Court on July 31. The announcement created an opportunity for President Donald Trump to make a second appointment to the high court following the appointment of Justice Neil Gorsuch in 2017, and to cement a 5-4 conservative majority on the Court for decades to come. The stakes for the Court and for the nation were immediately thrown into sharp relief: the future of access to health care, to reproductive rights, and to civil rights that had been gradually won over many decades are clearly in jeopardy. Within days, on July 9, President Trump nominated D.C. Circuit Court Judge Brett Michael Kavanaugh for the seat to be vacated by Kennedy, confirming the Administration's intent to push the high court farther to the right. This report reflects the results of a preliminary look at Kavanaugh's record, which forms the basis for Alliance for Justice's (AFJ) strong opposition to his confirmation.

It is worth noting that AFJ also opposed Kavanaugh's appointment to the D.C. Circuit when he was first nominated by President George W. Bush in July of 2003. In opposing his confirmation to the circuit court, AFJ wrote that "Kavanaugh's career is distinguished only by its extreme partisanship. There is nothing in his record to suggest that he

would show the independence of thought necessary for a seat" as a federal judge.¹

It took three years for Kavanaugh, a highly partisan and controversial nominee, to be confirmed to the D.C. Circuit seat. Prior to his nomination, Kavanaugh's career as a partisan political operative blossomed. He worked for Republicans on the election recount at the heart of the *Bush v. Gore* case;² helped with the investigation of President Bill Clinton's relationship with Monica Lewinsky;³ drafted grounds for President Clinton's impeachment with Independent Counsel Ken Starr;⁴ led the independent counsel's investigation into the alleged murder of Vince Foster;⁵ and served as a lawyer for Jeb Bush.⁶

Kavanaugh also served for five years as a top official in the George W. Bush White House, working in the White House Counsel's office and as White House Staff Secretary.⁷ As Kavanaugh described in his April 2004 confirmation hearing, "throughout my career in the White House as Staff Secretary, one of my jobs is to be the honest broker for competing views that come in on memos to the President."⁸ While he concluded that his job was "ultimately to carry out the direction of my superiors without regard to whether I might have chosen a different path," he also acknowledged that **"my job is to give recommendations and advice[.]"**⁹ (emphasis added)

Kavanaugh's service in the White House is of exceptional interest and relevance today, as he aspires to join the nation's highest court. His tenure there overlapped with numerous controversial Bush Administration policies and decisions, including those involving [warrantless wiretapping](#), [torture](#), and the use of [signing statements](#). He was [reportedly involved](#) in internal [discussions](#) about the Bush Administration's unconstitutional detention policies, and [senators](#) have previously [accused](#) Kavanaugh of "misleading" the Senate Judiciary Committee during his previous confirmation hearings about his involvement in these issues. Most documents from this period of his career have [yet to be released](#).

In the meantime, this summary report examines key issue areas Kavanaugh addressed during his twelve years as a judge. There is no shortage of troubling indicators; his writings and rulings attack the right to health care, to reproductive freedom, to clean air and water, and to fair wages and safe working conditions – all highly significant issues in every state in the country. In addition, Kavanaugh's writings and statements exhibit his belief that there are instances in which the President should not be subjected to the rule of law that applies to ordinary citizens: that there are, in fact, instances in which the President should be above the law. The danger of this view at a time when the President himself seems disdainful of the rule of law cannot be overstated.

In short, the consequences of this nomination for the American people,

for decades to come, simply could not be higher.

HEALTH CARE

President Trump explicitly stated he was looking for nominees who are hostile to the Affordable Care Act (ACA). Trump [said](#) "my judicial appointments will do the right thing unlike Bush's appointee John Roberts on ObamaCare." Brett Kavanaugh meets Donald Trump's test.

Tragically, the stakes for the health and wellbeing of millions of people are all too real. Since the Republican Congress failed in its attempts to repeal the Affordable Care Act, Trump is trying now to use the courts to do so. Trump's Justice Department has already attacked the law that ensures insurance companies cannot deny coverage or charge higher rates to people with [preexisting conditions](#). Trump's legal attack would reportedly take health care away from [52 million Americans](#), including cancer survivors, people with diabetes, and pregnant women. As the American Medical Association and other physician groups made clear, it "would have a [devastating impact](#) on doctors, patients, and the American health care system as a whole."

On July 3, 2018, one of Kavanaugh's former law clerks wrote an article [titled](#) "Brett Kavanaugh Said Obamacare Was Unprecedented And Unlawful." In the article, describing Kavanaugh's dissent in [Seven-Sky v. Holder](#), 661 F.3d 1 (D.C. Cir. 2011), where the D.C. Circuit upheld the

constitutionality of the Affordable Care Act, the clerk argued:

Kavanaugh's thorough and principled takedown of the mandate was indeed a roadmap for the Supreme Court—the *Supreme Court dissenters*, justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, who explained that the mandate violated the Constitution. I am very familiar with that opinion, because I served as Kennedy's law clerk that term. **I can tell you with certainty that the only justices following a roadmap from Brett Kavanaugh were the ones who said Obamacare was unconstitutional.** (italics in original; emphasis added)

On July 3, 2018, another former Kavanaugh clerk [wrote](#), “[a]lthough he ultimately determined that a challenge to Obamacare had to be brought later, he left no doubt about where he stood. **No other contender on President Trump’s list is on record so vigorously criticizing the law.**” (emphasis added)

Indeed, Kavanaugh dissented from two rulings upholding the Affordable Care Act. In [Seven-Sky v. Holder](#), Kavanaugh dissented from a decision concluding that the court had jurisdiction to decide the constitutionality of the ACA and that the ACA was ultimately constitutional. In his dissent, Kavanaugh argued that the court did not have jurisdiction to address the merits of the law because the Anti-Injunction Act barred the suit

from being decided until the first ACA “taxes” were imposed and collected. He also commented that the ACA was “a law that is unprecedented on the federal level in American history”¹⁰ and “could usher in a significant expansion of congressional authority with no obvious principled limit.”¹¹

Additionally, in [Sissel v. HHS](#), 799 F.3d 1035 (D.C. Cir. 2015), challengers claimed that the ACA violated the Origination Clause, which says that all bills for raising revenue must originate in the House. A three-judge panel of the D.C. Circuit dismissed the case, and Kavanaugh dissented from the denial of rehearing en banc. Kavanaugh issued a complicated opinion that three of his fellow judges on the D.C. Circuit criticized as “flawed,” “empty formalism,” and “misread[ing] the Supreme Court’s Origination Clause precedent.”¹²

REPRODUCTIVE RIGHTS

President Trump has repeatedly reminded us that he will only put justices on the Supreme Court who pass his [litmus test](#) of gutting and overturning *Roe v. Wade*. The President said overturning *Roe* “will happen [automatically](#) . . . because I am putting pro-life justices on the court.” We should believe him.

The evidence available on Brett Kavanaugh's record to date reinforces this conclusion. As one of Kavanaugh's former clerks [wrote](#) in the National Review on July 3, 2018:

On the vital issues of protecting religious liberty and enforcing restrictions on abortion, **no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh.** On these issues, as on so many others, he has fought for his principles and stood firm against pressure. **He would do the same on the Supreme Court.** . . . Judge Kavanaugh has a clear, consistent, and rock-solid record on the issues that matter most to social conservatives. (emphases added)

Kavanaugh's former clerk goes on to describe Kavanaugh's record in [Garza v. Hagan](#), 874 F.3d 735 (D.C. Cir. 2017) (en banc), *vacated as moot*. In this case, Kavanaugh dissented from a full D.C. Circuit decision that allowed "Jane Doe," an undocumented minor in government custody, to exercise her right to access abortion care. Judge Patricia Millett's opinion concurring in the full D.C. Circuit's order noted that Doe's "capacity to make the decision about what is in her best interests by herself was approved by a Texas court consistent with state law. She did everything that Texas law requires to obtain an abortion."¹³

At an earlier stage in the case, when three judges on the D.C. Circuit [originally](#) considered it, Kavanaugh ruled in favor of allowing additional delays in Doe's abortion care, as sought by the Trump Administration.¹⁴ When the full D.C. Circuit considered the case, overruling

Kavanaugh's order, Kavanaugh [argued](#) in dissent that the D.C. Circuit created "a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision."¹⁵ As Judge Millett stated, however, "[w]e are told that waiting even another week could increase the risk to J.D.'s health, the potential complexity of the procedure, and the great difficulty of locating an abortion provider in Texas."¹⁶

Also notable is the fact that just one month before this decision, in September 2017, Kavanaugh delivered a [speech](#) at the American Enterprise Institute on "The Constitutional Statesmanship of Chief Justice William Rehnquist."¹⁷ In his remarks, Kavanaugh [discussed](#) a 1997 Rehnquist opinion on the right to die and telegraphed his own skepticism towards *Roe*¹⁸ when he [said](#):

Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*. But he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition.¹⁹

Kavanaugh's record on reproductive rights also extends to other cases in which access to contraception is at issue. Under the Affordable Care Act's contraceptive coverage policy, religious

nonprofits are permitted to “opt-out” of providing direct contraceptive coverage to their employees by submitting either a form to their insurer or a letter to the Department of Health and Human Services. Kavanaugh supported challenges to the “opt-out” policy which claimed that the act of submitting this form substantially burdened the religious employers’ religious freedom.

One such case was [*Priests for Life v. U.S. Dep’t of Health and Human Services*](#), 808 F.3d 1 (D.C. Cir. 2015). After a three-judge panel ruled against Priests for Life, a religious nonprofit organization challenging the opt-out requirement, the full D.C. Circuit declined to review that decision. Kavanaugh disagreed in dissent, arguing that “[w]hat the panel opinion misses is that submitting this form is *itself* an act that contravenes the organizations’ sincere religious beliefs.”²⁰ Other judges on the court criticized the dissents as “perceiv[ing] in *Hobby Lobby* a potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works.”²¹ In 2016, the U.S. Supreme Court in [*Zubik v. Burwell*](#), 136 S. Ct. 1557 (2016) vacated the D.C. Circuit and other decisions to allow the parties an opportunity “to arrive at an approach going forward.”²²

PRESIDENTIAL POWER

The Trump Administration has frequently taken actions that demonstrate its contempt for the rule of law and that call into question its commitment to the Constitution. The President himself has repeatedly demanded “loyalty” from government officials, including the FBI director. It was [reported](#) that Trump asked the deputy attorney general in a conversation about the Russia investigation whether he was “on my team.” The President has frequently tried to [undermine](#) an independent investigation into Trump’s and his associates’ personal and campaign ties to Russia, including by firing former FBI Director James Comey. In the President’s [own words](#), he decided to fire Comey because of “this Russia thing,” and “regardless of [the] recommendation, I was going to fire Comey.” And, most recently, in Helsinki, the President publicly [sided with Vladimir Putin](#) over America’s own intelligence agencies.

In such perilous times, Kavanaugh’s personal writings and speeches raise concerns that he would insulate the president from accountability and allow Trump’s abuses of power to go unchecked. The following are examples of positions Kavanaugh has taken:

[Presidents should be able to remove a special counsel at will.](#) Kavanaugh has strongly suggested that he believes that

an independent counsel should be hired or fired by the President. As part of a 1998 law review article proposing that Congress adopt a statute giving the President broad authority to hire and fire the independent counsel at will, Kavanaugh [wrote](#) that “Congress should give back to the President the full power to act when he believes that a particular independent counsel is ‘out to get him’”²³ and that “the President should have absolute discretion (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel.”²⁴

Kavanaugh [argued](#) that the nation’s founders “suggest[ed] the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel.”²⁵ In a recorded appearance before the American Enterprise Institute in 2016, Kavanaugh stated that he wanted to “[put the final nail in](#)” the Supreme Court’s decision in [Morrison v. Olson](#), 487 U.S. 654 (1988), which upheld the constitutionality of the independent counsel statute passed after Watergate.²⁶

Presidents should not be prosecuted while in office. When asked on a [panel](#) at Georgetown Law School in [1998](#), “How many of you believe, as a matter of law, that a sitting president cannot be indicted during the term of office?” Kavanaugh raised his hand. As part of the aforementioned [1998 law review article](#), Kavanaugh proposed that Congress also adopt a statute “to establish that a sitting President cannot be indicted.”²⁷ Kavanaugh argued that “[t]he Constitution itself seems to dictate, in addition, that

congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.”²⁸ Kavanaugh reiterated his preference that Presidents should not be indicted while in office in a [speech](#) in 1998.²⁹

A decade later, Kavanaugh made a similar proposal in a [2009 article](#), writing that “it would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents . . . be deferred while the President is in office,”³⁰ and that “Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President. In particular, Congress might consider a law exempting a President – while in office – from criminal prosecution and investigation, including from questioning by criminal prosecutors[.]”³¹

In 1999, Kavanaugh also participated in a roundtable discussion where he questioned the Supreme Court’s decision in [U.S. v. Nixon](#), 418 U.S. 683 (1974). In this watershed case during the Watergate scandal, the judicial branch weighed in on a situation where “the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution.”³² Making clear that no one is above the law, the Court held in *Nixon* that “when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands

of due process of law in the fair administration of criminal justice.”³³

During the 1999 panel, Kavanaugh [reportedly stated](#), “But maybe *Nixon* was wrongly decided — heresy though it is to say so . . . Maybe the tension of the time led to an erroneous decision,” and “[s]hould *U.S. v. Nixon* be overruled on the ground that the case was a nonjusticiable intrabranched dispute? Maybe so.”³⁴ These views raise serious questions about Kavanaugh’s willingness to enforce checks and balances on a President who thinks he is above the law.

As AFJ [noted](#) in 2004, “Kavanaugh’s views of executive privilege reveal his excessive partisanship. In the Independent Counsel’s office, Kavanaugh was responsible for challenging the Clinton Administration’s claims of privilege, testing the boundaries of executive and other privileges in order to gain more information for the Starr investigation. His actions as one of Starr’s deputies alone compel the conclusion that he would be incapable of bringing the kind of fairness and independence to the bench that are essential to the equal dispensation of justice and to the long-term viability of our federal judiciary. Since joining the Bush Administration, however, Kavanaugh has become a zealous defender of executive privilege working to shield the White House from inquiries from the public, Congress and even historians wanting to see the papers of past presidents.”³⁵

CONSUMER RIGHTS

When the Trump Administration announced Kavanaugh’s nomination, press [reported](#) that “the White House wrote that Kavanaugh has overruled federal regulators 75 times on cases involving clean air, consumer protections, net neutrality and other issues.” In talking points that appear to mirror this language, it was [argued](#) that Kavanaugh “Respects Corporate Entities’ First Amendment Rights.” This and other evidence indicates that Kavanaugh will continue to protect corporations, the wealthy, and the powerful over the rights of all.

Sides with Banks. Kavanaugh has argued that the Consumer Financial Protection Bureau – the entity created to protect consumers from unscrupulous banks after the biggest financial crisis since the Great Depression – is unconstitutional. Although the full D.C. Circuit later [reversed](#) Kavanaugh’s decision,³⁶ in [PHH Corp. v. Consumer Fin. Prot. Bureau](#), 839 F.3d 1 (D.C. Cir. 2016) Kavanaugh held that the consumer protection agency “is unconstitutionally structured.”³⁷ In [Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.](#), 537 F.3d 667 (D.C. Cir. 2008), *aff’d in part and rev’d in part*, 561 U.S. 477 (2010), Kavanaugh also dissented from a majority opinion upholding the constitutionality of the Public Company Accounting Oversight Board, an entity

created by the Sarbanes-Oxley Act of 2002.

Sides Against a Free and Open Internet.

When the D.C. Circuit upheld the Federal Communications Commission's net neutrality rule, in [United States Telecom Ass'n v. FCC](#), 855 F.3d 381 (D.C. Cir. 2017), Kavanaugh wrote a dissenting opinion arguing that the full D.C. Circuit should hear the case because “[t]he net neutrality rule is unlawful and must be vacated[.]”³⁸ One scholar [described](#) Kavanaugh's views as representing the “fringe of First Amendment jurisprudence.”

Sides Against Consumer Protections. In [Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.](#), 489 F.3d 1279 (D.C. Cir. 2007), Public Citizen and the tire industry petitioned for review of a new federal motor vehicle standard that required automakers to manufacture cars with a minimum tire pressure monitoring system. Public Citizen argued that the new tire safety standard was too weak. While Kavanaugh allowed Public Citizen to present additional information, he also questioned whether they had standing to bring the case at all, critiquing standing claims based on an “increased-risk-of harm” to the plaintiffs.³⁹ Kavanaugh ultimately found that Public Citizen lacked standing and dismissed the case in [Public Citizen, Inc. v. Nat'l Highway Safety Admin.](#), 513 F.3d 234 (D.C. Cir. 2008).

ENVIRONMENT

On the D.C. Circuit, Kavanaugh consistently overturned protections for clean air, routinely putting corporate interests over safeguards for the health of families and the environment. For example, in [EME Homer City Generation, LP v. Environmental Protection Agency](#), 696 F.3d 7 (D.C. Cir. 2012), Kavanaugh rejected an Environmental Protection Agency (EPA) rule requiring that upwind states bear responsibility for their fair share of pollution they cause in downwind states. The Supreme Court [overturned](#) Kavanaugh in a 6-2 decision, upholding the rule and chiding Kavanaugh for reading “unwritten” requirements into the Clean Air Act: “However sensible (or not) the Court of Appeals' position, a reviewing court's task is to apply the text [of the statute], not to improve upon it.”⁴⁰

Similarly, Kavanaugh sided with industry over clean air in [White Stallion Energy Center v. EPA](#), 748 F.3d 1222 (D.C. Cir. 2014). Kavanaugh dissented in part from a ruling that upheld regulation of mercury and other hazardous pollution from power plants as “appropriate and necessary” under the Clean Air Act. In his dissent, where he also concurred in part on a question of standing, Kavanaugh criticized the EPA for failing to consider costs to industry. The Supreme Court eventually reversed the D.C. Circuit in a 5-4 decision in [Michigan v. EPA](#), 135 S. Ct. 2699 (2015).

Kavanaugh has also threatened efforts to combat climate change. In [Coalition for Responsible Regulation, Inc. v. EPA](#), 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012), Kavanaugh sided against the EPA's authority to regulate greenhouse gases. Kavanaugh dissented from an en banc decision to deny rehearing of a challenge to the Clean Air Act. Kavanaugh argued that the EPA's authority to regulate "any air pollutant" in the context of certain permitting requirements excluded certain greenhouse gases and only referred to "six air pollutants." Kavanaugh cited "significantly higher cost on businesses" as one source of his concern.⁴¹

Later, in [Mexichem Fluor, Inc. v. EPA](#), 866 F.3d 451 (D.C. Cir. 2017), Kavanaugh concluded that the EPA exceeded its authority in restricting manufacturers from making certain products that contain greenhouse gases known as "hydrofluorocarbons" (HFCs), which contribute to climate change.

Kavanaugh also sided with disgraced ex-EPA Administrator Scott Pruitt and the Trump Administration in [Clean Air Council v. Pruitt](#), No. 17-1145 (D.C. Cir. Aug. 10, 2017). There, an en banc panel of the D.C. Circuit upheld a three-judge panel decision finding that the Trump Administration had engaged in unreasonable delays when it stayed the implementation of an Obama-era EPA rule curbing emissions of methane and other greenhouse gases. See [Clean Air Council v. Pruitt](#), 862 F.3d 1 (D.C. Cir. 2017). The three-judge panel had previously granted a motion to vacate the EPA's stay of the

rule, citing environmental organizations that alleged Pruitt's reasons for delaying the rule were false "because 'all of the issues Administrator Pruitt identified could have been, *and actually were*, raised (and extensively deliberated) during the comment period.'"⁴² When the full D.C. Circuit denied the EPA's appeal, Kavanaugh and two other judges dissented from that decision.

WORKERS' RIGHTS

During his time on the bench, Kavanaugh has routinely ruled against workers and their families. On the Supreme Court, Kavanaugh would dismantle workplace protections and safety laws, as well as undermine the power of unions. In [SeaWorld of Fla., LLC v. Perez](#), 748 F.3d 1202 (D.C. Cir. 2014), the Occupational Safety and Health Administration (OSHA) fined SeaWorld \$75,000 after a SeaWorld trainer was [killed](#) during a live performance with a killer whale. The killer whale had "[known aggressive tendencies](#)" and had killed a trainer in the past.⁴³

The Occupational Safety and Health Review Commission found that SeaWorld had failed to adopt sufficient safety measures to limit the trainer's physical contact with the whales. The majority opinion upheld the safety citation against SeaWorld, deferring to

OSHA's findings. Kavanaugh dissented, arguing that the idea that employees should be protected from death or significant injury was "paternalistic[.]"⁴⁴ He also asserted that OSHA was breaking with precedent in regulating an entertainment show. According to one scholar, Kavanaugh's dissent in this [case](#) "reflects [his] deep skepticism of the institutions that Congress designed to protect American workers."

Also illustrative are just a few of Kavanaugh's cases opposing the rights of American workers to join together to protect their rights and hold employers and corporations accountable. In [AFGE v. Gates](#), 486 F.3d 1316 (D.C. Cir. 2007), Kavanaugh wrote an opinion upholding regulations that undermined the collective bargaining rights of hundreds of thousands of civilian employees at the Department of Defense (DOD). As noted by The Washington Post, these DOD regulations [were](#) "some of the most dramatic workplace changes planned for civil service employees in 30 years." Judge David Tatel dissented in part, arguing that according to Kavanaugh's opinion, the Secretary of Defense could simply establish a new personnel system and "abolish collective bargaining altogether – a position with which even the Secretary disagrees."⁴⁵

In [Verizon New England v. NLRB](#), 826 F.3d 480 (D.C. Cir. 2016), Kavanaugh wrote a decision finding for Verizon in a labor dispute with union members who were prohibited from displaying pro-union signs in their cars. The union argued that Verizon violated the employees' rights under the National Labor Relations Act (NLRA). Kavanaugh

held that the National Labor Relations Board was "unreasonable" in rejecting an arbitration decision which held that a union's agreement to waive its members' right to "picket" also waived workers' right to display pro-union signs in their cars while they were at work.⁴⁶ Judge Sri Srinivasan, concurring in part and dissenting in part, emphasized that Kavanaugh was not properly deferential to the Board's determination.⁴⁷

In [Venetian Casino Resort, LLC v. NLRB](#), 793 F.3d 85 (D.C. Cir. 2015), the NLRB found that a hotel engaged in unfair labor practices after it requested that police officers issue criminal citations to union demonstrators who were legally protesting. Kavanaugh reversed, vacating part of the NLRB's order.

Finally, in [NLRB v. CNN Am., Inc.](#), 865 F.3d 740 (D.C. Cir. 2017), Kavanaugh dissented in part from Chief Judge Merrick Garland's majority opinion upholding part of an NLRB order. The NLRB had found that CNN needed to recognize and bargain with a workers' union and that CNN violated the NLRA by discriminating against union members in hiring.

CIVIL RIGHTS

Kavanaugh's record on civil rights is troubling. Before the Supreme Court gutted the Voting Rights Act in *Shelby County v. Holder*, Kavanaugh [upheld](#) a South Carolina law where the state sought approval for changes to its voter ID law in [South Carolina v. U.S.](#),

898 F. Supp.2d 30 (D.C. Cir. 2012). The Justice Department (DOJ) challenged the law, arguing that it would disenfranchise [tens of thousands](#) of people of color. The Justice Department had previously [blocked](#) the law in 2011 for violating the Voting Rights Act, after it found that over 80,000 people of color who were registered voters in South Carolina did not have the newly required DMV-issued identification. [According](#) to DOJ, “minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by [the act’s] new requirements.”⁴⁸

When South Carolina then made adjustments to how the voter ID requirements would be implemented, the state sought approval under the Voting Rights Act from a three-judge panel. Kavanaugh [wrote](#) the opinion upholding South Carolina’s law, concluding that it did “not have a discriminatory retrogressive effect” and “was not enacted for a discriminatory purpose.”⁴⁹

However, Judges John Bates and Colleen Kollar-Kotelly wrote separately – in an opinion that Kavanaugh did not join – emphasizing that “one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive.”⁵⁰ Moreover, “The Section 5 process here,” the judges wrote, “did

not force South Carolina to jump through unnecessary hoops. Rather, the history of [South Carolina’s new law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.”⁵¹ Kavanaugh failed to join this separate opinion, and just eight months later, the Supreme Court issued its decision gutting Section 5 of the Voting Rights Act.

Kavanaugh has denied employees protections under anti-discrimination laws. For example, in [Jackson v. Gonzales](#), 496 F.3d 703 (D.C. Cir. 2007), Kavanaugh dismissed an African-American employee’s claim alleging race discrimination during a promotion decision at the Federal Bureau of Prisons. Kavanaugh found that the plaintiff failed to show that he was significantly more qualified than the white individual who had been promoted. Judge Judith Rogers, who dissented, wrote that Kavanaugh mischaracterized the issue as “who was more qualified for a promotion,” when the real question was whether the employer’s “asserted nondiscriminatory reason for selecting another candidate was fabricated to mask unlawful discrimination.”⁵² Here, the employer asserted that it promoted the white candidate because she had experience with a “Key Indicators” system, but evidence showed that the job announcement and job description made no reference to that system.

Also relevant is [Howard v. Office of the Chief Admin. Officer](#), 720 F.3d 939 (D.C. Cir. 2013), where Kavanaugh dissented from a majority decision that allowed a black woman who was fired from her position as a senior advisor to the Chief Administrative Officer of the U.S. House of Representatives to pursue claims of race discrimination and retaliation under the Congressional Accountability Act. In [Miller v. Clinton](#), 687 F.3d 1332 (D.C. Cir. 2012), Kavanaugh dissented from the majority which found that the State Department violated the Age Discrimination in Employment Act when it terminated an employee on his sixty-fifth birthday.

GUN VIOLENCE

Kavanaugh has taken a narrow view of the lawfulness of modern-day gun safety measures. After the Supreme Court's 2008 ruling in [District of Columbia v. Heller](#), 554 U.S. 570, the District of Columbia updated its firearm regulations to prohibit possession of certain military-style semi-automatic rifles and to require registration of firearms. When the D.C. Circuit upheld several of those gun safety measures, Kavanaugh dissented from his Republican-appointed colleagues, finding, "[i]n my judgment, both D.C.'s ban on semi-automatic rifles and its gun registration requirement are unconstitutional under *Heller*."⁵³ [Heller v. District of Columbia \(Heller II\)](#), 670 F.3d 1244 (D.C. Cir. 2011).

Rather than taking an approach rooted in the real world and the ways in which the law impacts all Americans, Kavanaugh argued that "courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."⁵⁴ In Kavanaugh's view, "[s]emi-automatic rifles have not traditionally been banned and are in common use today, and are thus protected under *Heller*."⁵⁵ While Kavanaugh's views have been described as "[radical](#)" and "[an extreme outlier](#)," he maintained that "holding these D.C. laws unconstitutional would not lead to nationwide tumult. Rather, such a holding would maintain the balance historically and traditionally struck in the United States between public safety and the individual right to keep arms[.]"⁵⁶

IMMIGRATION

As previously noted, Kavanaugh's opinion in *Garza v. Hargan* is relevant to his treatment of constitutional rights and immigrants.

In another case, [Agri Processor Co. v. NLRB](#), 514 F.3d 1 (D.C. Cir. 2008), Agri Processor employees in Brooklyn decided to join a union to improve their working conditions. When their employer argued that the union vote was invalid due to some of the workers' immigration status, Kavanaugh sided with the company. At the D.C. Circuit, Kavanaugh dissented from a decision affirming that the company needed to

bargain with the union. The majority noted arguments that the National Labor Relations Act (NLRA) “helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.”⁵⁷

Relying on other statutory language, Kavanaugh would have agreed with the company that undocumented immigrants are not “employees” under the labor law and were therefore ineligible to vote in “the tainted union election.”⁵⁸ The majority opinion harshly criticized Kavanaugh’s dissent as ignoring the plain language of the NLRA and as a “misread[]”⁵⁹ of Supreme Court precedent in [Sure-Tan, Inc. v. NLRB](#), 467 U.S. 883 (1984), noting concerns about “creat[ing] a subclass of workers.”⁶⁰

This case involved the same company where nearly 400 immigrant workers were swept up in a 2008 Immigration and Customs Enforcement [raid](#) in Postville, Iowa. After the Postville raid, it came to light that there were serious abusive conditions at the company, including allegations of [child labor](#). The Iowa Labor Commissioner [fined](#) the company nearly \$10 million for unpaid wage violations and the company’s CEO, Shalom Rubashkin, was criminally convicted of bank fraud, mail fraud and money laundering (President Trump later [commuted](#) his sentence).

NATIONAL SECURITY AND CIVIL LIBERTIES

In the context of national security and civil liberties, Kavanaugh has also expressed an expansive view of the government’s power.

When the D.C. Circuit considered a challenge to the government’s bulk collection of phone metadata in [Klayman v. Obama](#), 805 F.3d 1148 (D.C. Cir. 2015), Kavanaugh wrote separately to express his agreement with the government. In a concurring opinion, Kavanaugh concluded that “the Government’s metadata collection program is entirely consistent with the Fourth Amendment.”⁶¹ He argued, “The Government’s collection of telephony metadata from a third party such as a telecommunications service provider is not considered a search under the Fourth Amendment,” and that “the Government’s metadata collection program readily qualifies as reasonable under the Supreme Court’s case law.”⁶² According to Kavanaugh, the “critically important special need” of preventing terrorist attacks on the United States “outweighs the impact on privacy occasioned by this program.”⁶³

Kavanaugh has also taken an aggressive stance on the authority of military commissions. As Stephen Vladeck has

[noted](#), “[t]here’s no one on the D.C. Circuit who has played a larger role in defending the legality of the military commissions than Judge Kavanaugh.”

In [Bahlul v. United States](#), 840 F.3d 757 (D.C. Cir. 2016) Kavanaugh concurred in a per curiam opinion for the en banc D.C. Circuit upholding the expansion of the jurisdiction of military tribunals to include the crime of “conspiracy” typically heard by Article III civilian courts. Kavanaugh’s concurrence argued that “the Supreme Court has long recognized an exception to Article III for military commissions to try enemy war crimes[,]” including an exception for conspiracy.⁶⁴ Three judges dissenting in the case took issue with the decision by Kavanaugh and the majority to cede power from the courts to the executive branch, writing, “historically, the military has not been in the business of prosecuting individuals for crimes and locking them up for life. Its primary mission has always been to defeat our enemies on the battlefield,” and “The challenges of the war on terror do not necessitate truncating the judicial power to make room for a new constitutional order. ‘The laws and Constitution are designed to survive, and remain in force, in extraordinary times.’”⁶⁵

Kavanaugh has also issued opinions pertaining to detention and torture. In [Omar v. McHugh](#), 646 F.3d 13 (D.C. Cir. 2011), Kavanaugh [rejected](#) the habeas claim of a U.S. citizen, Shawqi Omar, who had been held in U.S. military custody in Iraq under suspicion of terrorist activity. Omar

sought to avoid a transfer to Iraqi custody, where he claimed that he was likely to be tortured. Kavanaugh concluded that Omar did not have a statutory or constitutional “right to judicial review of conditions in the receiving country before he could be transferred,” demurring that “Congress remains free to provide military transferees such as Omar with [that] right.”⁶⁶

In [Meshal v. Higgenbotham](#), 804 F.3d 417 (D.C. Cir. 2015), Kavanaugh concurred in a decision that affirmed a district court’s dismissal of a *Bivens* action against federal officials when U.S. citizen Amir Meshal alleged they had violated his constitutional rights. Meshal claimed that U.S. agents detained him, interrogated him, and threatened him with torture over the course of four months and in three African countries. In his concurrence dismissing Meshal’s suit, Kavanaugh wrote, “courts should not – under the guise of *Bivens* – *unilaterally* recognize new limits that restrict U.S. officers’ wartime activities.”⁶⁷

In [Doe v. Exxon Mobil Corp.](#), 473 F.3d 345 (D.C. Cir. 2007), Kavanaugh dissented from a decision that dismissed an appeal by Exxon, which was seeking to have a case thrown out over whether the company could be held liable by Indonesian villagers. The villagers alleged that Exxon had knowingly hired Indonesian soldiers who had subjected the villagers to murder, torture, and sexual assault in the past. When the case appeared before him in 2007, Kavanaugh wrote that he would not have allowed the

case to go forward because the State Department believed the suit would harm U.S. foreign policy interests, and “the federal courts give deference to reasonable explanations by the Executive Branch that a civil lawsuit would adversely affect the foreign relations of the United States, and the courts dismiss such cases as non-justiciable political questions.”⁶⁸

Later, in [Doe v. Exxon Mobil Corp.](#), 654 F.3d 11 (D.C. Cir. 2011), Kavanaugh sided with Exxon again when the D.C. Circuit reversed the district court’s dismissal of the villagers’ claims, which had been brought under the Alien Tort Statute (ATS). Kavanaugh dissented in part, arguing that the ATS does not apply to conduct in foreign nations, that it does not apply to claims against corporations, and that the court must dismiss ATS cases “to heed Executive Branch statements of [foreign policy] interest.”⁶⁹ The Supreme Court later held in [Kiobel v. Royal Dutch Petro. Co.](#), 569 U.S. 108 (2012), that international conduct is presumed to be outside of the scope of the ATS unless claims “touch and concern the territory of the United States . . . with sufficient force.”⁷⁰

CRIMINAL JUSTICE

In [United States v. Askew](#), 482 F.3d 532 (D.C. Cir. 2007), Kavanaugh ruled in favor of law enforcement after a stop and frisk search. That decision was later

overturned by the full D.C. Circuit. In the case, Paul Askew was stopped by D.C. police because his clothing was similar to an armed robber’s. The police patted Askew down for weapons but found nothing. Later, the officers unzipped Askew’s coat without his consent and found a gun. Judge Harry Edwards dissented from Kavanaugh’s opinion upholding Askew’s firearm conviction, arguing that “this holding reflects an extraordinary departure from well-established Supreme Court precedent[.]”⁷¹ Edwards also stated, “I fear that, if this judgment survives as precedent, the Fourth Amendment soon will be a dead letter in our Constitution, at least with respect to cases brought before this court.”⁷² On rehearing en banc, a majority of the D.C. Circuit agreed with the dissent and [overturned](#) Kavanaugh’s decision.

Kavanaugh has also spoken about former Chief Justice William Rehnquist’s views of the exclusionary rule, which prohibits the government from using illegally obtained evidence in criminal prosecutions. In his September 2017 speech at the American Enterprise Institute, Kavanaugh [explained](#) how Rehnquist’s “most vehement objection to Warren Court Fourth Amendment law concerned the exclusionary rule” and that “it would be a mistake to call [Rehnquist’s] exclusionary rule project a failure . . . Rehnquist dramatically changed the law of the exclusionary rule. Led by Rehnquist, the Supreme Court created many needed exceptions to the exclusionary rule that endure to this day.”⁷³

CONCLUSION

Kavanaugh's record overwhelmingly demonstrates heightened partisanship. He meets the President's litmus test to overturn or gut *Roe v. Wade* and to take away health care from millions. He regularly sides with the wealthy and the powerful over the rights of all, and he will erode critical constitutional rights and legal protections, including environmental protections and safe working conditions. Kavanaugh believes that there are instances in which the President should not be subject to the rule of law that applies to ordinary citizens. Alliance for Justice strongly opposes his confirmation.

ENDNOTES

- 1 ALLIANCE FOR JUSTICE, Brett Kavanaugh Report (2004), available at https://www.afj.org/wp-content/uploads/2018/07/kavanaugh_report_final-2004.pdf.
- 2 Sen. Comm. on the Judiciary, 108th Cong., Brett Michael Kavanaugh Questionnaire for Judicial Nominees, 21, available at <https://www.afj.org/wp-content/uploads/2018/07/CHRG-108shrg24853-SJO.pdf>.
- 3 ALLIANCE FOR JUSTICE, Brett Kavanaugh Report, 4 (2004), available at https://www.afj.org/wp-content/uploads/2018/07/kavanaugh_report_final-2004.pdf.
- 4 Sen. Comm. on the Judiciary, 108th Cong., Brett Michael Kavanaugh Questionnaire for Judicial Nominees, 9–11, available at <https://www.afj.org/wp-content/uploads/2018/07/CHRG-108shrg24853-SJO.pdf>.
- 5 *Id.* at 10.
- 6 *Id.* at 11.
- 7 *Id.* at 8.
- 8 *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be Circuit Judge for the D.C. Circuit, Hearing before the Committee on the Judiciary*, 108th Cong., 65 (2004), available at <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/pdf/CHRG-108shrg24853.pdf>.
- 9 *Id.* at 59.
- 10 *Seven-Sky v. Holder*, 661 F.3d 1, 51 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
- 11 *Id.* at 52.
- 12 *Sissel v. HHS*, 799 F.3d 1035, 1036 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
- 13 *Garza v. Hargan*, 874 F.3d 735, 736–37 (D.C. Cir. 2017) (en banc).
- 14 *Garza v. Hargan*, No. 17-5236, (D.C. Cir. Oct. 20, 2017) (Order to Vacate and Remand).
- 15 *Garza*, 874 F.3d at 752 (Kavanaugh, J., dissenting).
- 16 *Id.* at 741 (Millett, J., concurring).
- 17 Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AMERICAN ENTERPRISE INSTITUTE (2017), available at <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.
- 18 Brett Kavanaugh, Transcript of *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AMERICAN ENTERPRISE INSTITUTE (2017), available at <https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf>. (Q: Judge Kavanaugh, thank you for coming today. My name is Chris Johnswick (ph). I just had a question for you. You spoke about the chief justice's role in both Roe and Casey. I wonder if you could elaborate as what would you say his biggest legacy is for us. You agreed with his dissent in those opinions).
- 19 Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AMERICAN ENTERPRISE INSTITUTE, 16 (2017), available at <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.
- 20 *Priests for Life v. U.S. Dep't of Health and Human Services*, 808 F.3d 1, 20 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
- 21 *Id.* at 2 (Pillard, J., concurring).
- 22 *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).
- 23 Brett Kavanaugh, *Symposium Contribution: The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2151 (1998), available at https://www.afj.org/wp-content/uploads/2018/06/SYMPOSIUM_-_CONTRIBUTION_-_The-President-and-the-Independ.pdf.
- 24 *Id.* at 2136.
- 25 *Id.* at 2160.
- 26 Brett Kavanaugh, Interview on *Federal Courts and Public Policy*, AMERICAN ENTERPRISE INSTITUTE (Mar. 31, 2016), available at <https://www.c-span.org/video/?407491-1/discussion-politics-supreme-court>.
- 27 Brett Kavanaugh, *Symposium Contribution: The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157 (1998), available at https://www.afj.org/wp-content/uploads/2018/06/SYMPOSIUM_-_CONTRIBUTION_-_The-President-and-the-Independ.pdf.
- 28 *Id.* at 2158.
- 29 Brett Kavanaugh, Panelist, *Independent Counsel Structure & Function*, Georgetown University Law Center (Feb. 19, 1998), recording available at <https://www.c-span.org/video/?101055-1/independent-counsel-structure-function> at 47:45.

ENDNOTES

- 30 Brett Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1460–61 (2009), available at www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.
- 31 *Id.* at 1461.
- 32 *United States v. Nixon*, 418 U.S. 683, 710 (1974).
- 33 *Id.* at 713.
- 34 Brett Kavanaugh, Panelist, *Lawyers' Roundtable: Attorney Client Privilege, Does it Pertain to the Government?*, THE WASHINGTON LAWYER (Jan/Feb 1999), available at https://www.afj.org/wp-content/uploads/2018/07/Kavanaugh_Roundtable_USvNixon.pdf.
- 35 ALLIANCE FOR JUSTICE, Brett Kavanaugh Report, 1 (2004), available at https://www.afj.org/wp-content/uploads/2018/07/kavanaugh_report_final-2004.pdf.
- 36 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018)(en banc).
- 37 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 8 (D.C. Cir. 2016).
- 38 *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017).
- 39 *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 (D.C. Cir. 2007).
- 40 *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584, 1600 (2014).
- 41 *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 U.S. App. LEXIS 25997, at *64–65 (D.C. Cir. Dec. 20, 2012).
- 42 *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (emphasis in original).
- 43 ASSOCIATED PRESS, *OSHA fines SeaWorld \$75,000 in death of trainer* (Aug. 24, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/23/AR2010082305767.html>.
- 44 *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1217 (D.C. Cir. 2014), (Kavanaugh, J., dissenting).
- 45 *AFGE v. Gates*, 486 F.3d 1316, 1331 (D.C. Cir. 2007) (Tatel, J., dissenting).
- 46 *Verizon New England v. NLRB*, 826 F.3d 480, 488 (D.C. Cir. 2016).
- 47 *Id.* at 491-92 (Srinivasan, J., concurring in part, dissenting in part).
- 48 Letter from Thomas E. Perez, Assistant Att. General, U.S. Department of Justice, Civil Rights Division, 2 (Dec. 23, 2011), available at <https://action.naacp.org/page/-/DOJ%20SC%20memo.pdf>.
- 49 *South Carolina v. U.S.*, 898 F. Supp.2d 30, 32 (D.C. Cir. 2012).
- 50 *Id.* at 53-54 (Bates, J., concurring).
- 51 *Id.* at 54.
- 52 *Jackson v. Gonzales*, 496 F.3d 703, 710 (D.C. Cir. 2007) (Rogers, J., dissenting).
- 53 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269 (D.C. Cir. 2011).
- 54 *Id.* at 1271.
- 55 *Id.* at 1287.
- 56 *Id.* at 1271.
- 57 *Agri Processor Co. v. NLRB*, 514 F.3d 1, 5 (D.C. Cir. 2008) (internal citations omitted).
- 58 *Id.* at 10 (Kavanaugh, J., dissenting).
- 59 *Id.* at 6 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984)).
- 60 *Id.* at 8 (citing *Sure-Tan, Inc.* 467 U.S. at 892).
- 61 *Klayman v. Obama*, 805 F.3d 1148, 1149 (D.C. Cir. 2015).
- 62 *Id.*
- 63 *Id.*
- 64 *Bahlul v. United States*, 840 F.3d 757, 768 (D.C. Cir. 2016).
- 65 *Id.* at 829, 805 (D.C. Cir. 2016) (citing *Boumediene v. Bush*, 553 U.S. 723 (2008)).
- 66 *Omar v. McHugh*, 646 F.3d 13, 15 (D.C. Cir. 2011).
- 67 *Meshal v. Higgenbotham*, 804 F.3d 417, 431 (D.C. Cir. 2015).
- 68 *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 357 (D.C. Cir. 2007).
- 69 *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 73–74 (D.C. Cir. 2011).
- 70 *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124-35 (2012).
- 71 *United States v. Askew*, 482 F.3d 532, 548 (D.C. Cir. 2007) (Edwards, J., dissenting).
- 72 *Id.* at 560.
- 73 Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AMERICAN ENTERPRISE INSTITUTE, 10 (2017), available at <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.