

Holland, James

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**From:** Holland, James  
**Sent:** Tuesday, April 25, 2017 2:49 PM  
**To:** ryan.newman@usdoj.gov  
**Subject:** Reconnecting and (b) (6)  
**Attachments:** (b) (6) - Narrative.pdf; (b) (6) Resume.pdf

Ryan,

I've heard that you've moved over to DoJ. Congratulations! I was wondering if you had any time for a chat/coffee/lunch/drinks in the near future? We're interested in recommending good District and Circuit judges as well as getting conservative pro-2<sup>nd</sup> Amendment US Attorneys placed throughout the country that will focus on prosecuting gun crimes. In that vein, I've attached the resume and some supporting documents for (b) (6) who—to the best of my knowledge—(b) (6). Hopefully I'm not wasting your time and you're the right guy to send this stuff to.

All the best,

James P. Holland  
Federal Liaison  
National Rifle Association  
(b) (6)

Holland, James

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**From:** Holland, James  
**Sent:** Monday, May 1, 2017 11:37 AM  
**To:** Newman, Ryan (OLP)  
**Subject:** RE: Reconnecting and (b) (6)

A little birdie told me that you may not be at this same email address for very long. Whatever the truth, we should meet up for a drink at your convenience sometime soon.

Best,

James

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**From:** Newman, Ryan (OLP) [mailto:Ryan.Newman@usdoj.gov]  
**Sent:** Tuesday, April 25, 2017 7:42 PM  
**To:** Holland, James <JHolland@nrahq.org>  
**Subject:** RE: Reconnecting and (b) (6)

James, great to hear from you. Feel free to pass along recommendations.

We should definitely catch up soon. Let me know when you have some free time.

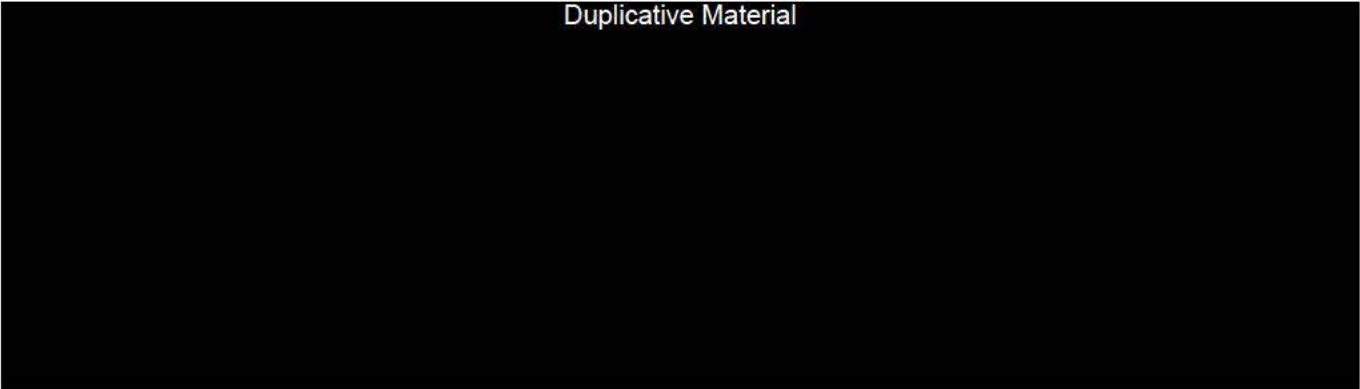
Take care,  
Ryan

Ryan Newman  
Acting Assistant Attorney General  
Office of Legal Policy  
U.S. Department of Justice  
950 Pennsylvania Ave, N.W.  
Washington, DC 20530  
office: (202) 514-6131 | cell: (b) (6)

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**From:** Holland, James [mailto:JHolland@nrahq.org]  
**Sent:** Tuesday, April 25, 2017 2:49 PM  
**To:** [ryan.newman@usdoj.gov](mailto:ryan.newman@usdoj.gov)  
**Subject:** Reconnecting and (b) (6)

Duplicative Material



**Abegg, John (McConnell)**

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**Subject:** SCOTUS

**Location:** S-230

**Start:** Thursday, June 28, 2018 2:00 PM

**End:** Thursday, June 28, 2018 3:00 PM

**Show Time As:** Tentative

**Recurrence:** (none)

**Organizer:** Abegg, John (McConnell)

**Required Attendees:** Davis, Mike (Judiciary-Rep); Lehman, Ted (Tillis); 'Luther, Robert EOP/WHO'; Fragoso, Michael (OLP)

I hope you will be able to attend a meeting tomorrow in our office to discuss the forthcoming vacancy on the Supreme Court. Please come to S-230 in the Capitol. Thank you.

**Abegg, John (McConnell)**

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**Subject:** SCOTUS

**Location:** S-230

**Start:** Thursday, June 28, 2018 2:00 PM

**End:** Thursday, June 28, 2018 3:00 PM

**Recurrence:** (none)

**Meeting Status:** Accepted

**Organizer:** Abegg, John (McConnell)

**Required Attendees:** Davis, Mike (Judiciary-Rep); Lehman, Ted (Tillis); 'Luther, Robert EOP/WHO'; Fragoso, Michael (OLP)

I hope you will be able to attend a meeting tomorrow in our office to discuss the forthcoming vacancy on the Supreme Court. Please come to S-230 in the Capitol. Thank you.



**Abegg, John (McConnell)**

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**From:** Abegg, John (McConnell)  
**Sent:** Thursday, June 28, 2018 10:50 AM  
**To:** 'Luther, Robert EOP/WHO'; 'Fragoso, Michael (OLP)'  
**Subject:** 'President's Nominee Should Be Considered Fairly'

Please see below Leader McConnell's remarks from this morning, especially the following parts:

"The Senate will vote to confirm Justice Kennedy's successor this fall. This is not 2016. These aren't the final months of a second-term, constitutionally lame-duck presidency with a presidential election fast approaching. We are right in the middle of this president's first term.

"To my knowledge, nobody on either side has ever suggested before yesterday that the Senate should only process Supreme Court nominations in odd-numbered years. The situation today is much like when Justice Kagan was confirmed in 2010. And when Justice Breyer was confirmed in 1994. And Justice Souter, in 1990. In each case, the president was about a year and a half into his first term. . . .

"The president's nominee should be considered fairly and not be subjected to personal attacks. Unfortunately, far-left special interest groups are already calling on Senate Democrats to oppose anyone on President Trump's long list of potential nominees. The ink wasn't even dry on Justice Kennedy's resignation letter before my friend the Democratic Leader seemed to echo that, right here on the floor -- that none of the exceptional legal minds on this list would be tolerable to him.

"Think of that. These are 25 Americans from all over the country who have excelled in their professions. The idea that any of them -- let alone all of them -- would be automatically unacceptable is totally absurd. Unfortunately, I'm afraid this may just be a precursor of all the unfair attacks to come, both from inside and outside the Senate."

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**From:** Majority Leader McConnell Press (McConnell)  
**Sent:** Thursday, June 28, 2018 10:19 AM  
**Subject:** 'President's Nominee Should Be Considered Fairly'

**MITCH McCONNELL**

**SENATE MAJORITY LEADER  
U.S. SENATOR for KENTUCKY**

For Immediate Release, Thursday, June 28, 2018

Contacts: Don Stewart, David Popp

Robert Steurer, Stephanie Penn

Release: <https://bit.ly/2MurzOw>

YouTube: <https://bit.ly/2yX5zKy>

## **'President's Nominee Should Be Considered Fairly'**

*'Unfortunately, far-left special interest groups are already calling on Senate Democrats to oppose anyone on President Trump's long list of potential nominees... Fortunately, we have every reason to expect an outstanding selection. President Trump's judicial nominations to date have reflected a keen understanding of the vital role that judges play in our constitutional order -- interpreting the law fairly.'*

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**WASHINGTON, D.C.** – U.S. Senate Majority Leader Mitch McConnell (R-KY) delivered the following remarks today on the Senate floor regarding yesterday's announcement from Supreme Court Justice Anthony Kennedy that he will retire on July 31, 2018:

"First, I want to take another opportunity to pay tribute to Justice Anthony Kennedy, who announced yesterday that he'll retire from active service and assume senior status at the end of July. Justice Kennedy deserves our sincere thanks for his service and our congratulations on a remarkable career. He has served our nation on the federal bench for 43 years, thirty of which he spent as an Associate Justice on the U.S. Supreme Court.

"His contributions to American jurisprudence have been many. In particular, he's earned our gratitude for his steadfast defense of the vital First Amendment right to political speech. So we congratulate Justice Kennedy, his wife Mary, and their entire family on this well-earned retirement. We wish them every happiness during the additional time they'll get to spend together in the years ahead.

"As I stated yesterday, the Senate stands ready to fulfill our constitutional role by offering advice and consent on President Trump's nominee to fill the vacancy that Justice Kennedy's retirement will create. The Senate will vote to confirm Justice Kennedy's successor this fall. This is not 2016. These aren't the final months of a second-term, constitutionally lame-duck presidency with a presidential election fast approaching. We are right in the middle of this president's first term.

"To my knowledge, nobody on either side has ever suggested before yesterday that the Senate should only process Supreme Court nominations in odd-numbered years. The situation today is much like when Justice Kagan was confirmed in 2010. And when Justice Breyer was confirmed in 1994. And Justice Souter, in 1990. In each case, the president was about a year and a half into his first term.

"So, just like in numerous other occasions, the process to confirm Justice Kennedy's successor will take place this year. As in the case of Justice Gorsuch, Senators will have the opportunity to meet with President Trump's nominee, examine his or her qualifications, and debate the nomination. I'm confident Chairman Grassley will capably lead the Judiciary Committee through the confirmation process that lies before us.

"The president's nominee should be considered fairly and not be subjected to personal attacks. Unfortunately, far-left special interest groups are already calling on Senate Democrats to oppose anyone on President Trump's long list of potential nominees. The ink wasn't even dry on Justice Kennedy's resignation letter before my friend the Democratic Leader seemed to echo that, right here on the floor -- that none of the exceptional legal minds on this list would be tolerable to him.

"Think of that. These are 25 Americans from all over the country who have excelled in their professions. The idea that any of them -- let alone all of them -- would be automatically unacceptable is totally absurd. Unfortunately, I'm afraid this may just be a precursor of all the unfair attacks to come, both from inside and outside the Senate.

"Fortunately, we have every reason to expect an outstanding selection. President Trump's judicial nominations to date have reflected a keen understanding of the vital role that judges play in our constitutional order -- interpreting the law fairly. Applying it even-handedly. Setting aside personal preferences and assessing what the law actually says. These traits have characterized the excellent nominees the president has already sent to the Senate. I look forward to another such nomination."

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**Talley, Brett (OLP)**

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**From:** Talley, Brett (OLP)  
**Sent:** Sunday, July 8, 2018 7:21 PM  
**To:** Abegg, John (McConnell); Davis, Mike (Judiciary-Rep)  
**Subject:** Short form packages  
**Attachments:** BK Short Bio.pdf; BK Top Talkers.pdf; (b) (6) Short Bio.pdf; (b) (6) Top Line.pdf; (b) (6) Top Line.pdf; (b) (6) Short Bio.pdf; (b) (6) Short Bio.pdf; (b) (6) Top Line.pdf; (b) (6) Short Bio.pdf (b) (6) Top Talkers.pdf

Sorry for the delay. This gives you some background on each candidate and our thinking on messaging.

Brett

# Judge Brett M. Kavanaugh

## **Federal Judicial Service**

Judge, U.S. Court of Appeals for the D.C. Circuit

Nominated by President George W. Bush on January 25, 2006, to a seat vacated by Hon. Laurence H. Silberman; Confirmed on May 26, 2006.

## **Education**

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Yale Law School, J.D., 1990

## **Professional History**

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Law clerk, Hon. Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, 1991-1992

Bristow Fellow, Office of the Solicitor General, U.S. Department of Justice, 1992-1993

Law Clerk, Associate Justice Anthony M. Kennedy, Supreme Court of the United States, 1993-1994

Associate, Office of Independent Counsel Ken Starr, 1994-1997, 1998

Partner, Kirkland & Ellis, LLP, 1997-1998, 1999-2001

Associate Counsel, President George W. Bush, 2001-2003; Senior Associate Counsel, 2003

Assistant to the President and Staff Secretary, President George W. Bush, 2003-2006

Samuel Williston Lecturer in Law, Harvard Law School, 2009-present

**Judge Brett M. Kavanaugh**  
**U.S. Court of Appeals for the D.C. Circuit**

- Judge Kavanaugh is the single most qualified person in the country to serve on the Supreme Court. His credentials are impeccable. He currently sits on the D.C. Circuit the “Second Highest Court in the Land” and serves as the Samuel Williston Lecturer in Law at Harvard Law School. He graduated from Yale Law School and clerked for Justice Kennedy.
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- Judge Kavanaugh’s respect for people threatened by government overreach has demonstrated itself again and again, and he has often rejected attempts by the federal government to impose onerous regulations on private citizens.
- Judge Kavanaugh is a true “judge’s judge.” He’s a thought leader among his peers on the appellate courts and deeply respected by the Supreme Court. The Supreme Court has endorsed his opinions 11 times, including Kavanaugh dissents that have become the law of the land. His opinions are regularly cited by courts across the country. Of his 48 clerks, 39 have gone on to clerk at the Supreme Court. And one of his clerks (Britt Grant) is even on the President’s list of potential Supreme Court nominees.
- Together with Justice Gorsuch and others, Judge Kavanaugh coauthored *The Law of Judicial Precedent*, a lengthy treatise on the role and importance of *stare decisis*.
- Judge Kavanaugh has devoted his life to public service. He has spent 25 of the last 28 years serving the American people, most notably as Associate Independent Counsel, Associate White House Counsel, Assistant and Staff Secretary to President George W. Bush, and of course as a judge.
- Judge Kavanaugh is active in his community. He coaches CYO (Catholic Youth Organization) Basketball, acts as a lector at his church, serves meals to needy families, and tutors at local elementary schools.



**Davis, Mike (Judiciary-Rep)**

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**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Sunday, July 8, 2018 7:46 PM  
**To:** Talley, Brett (OLP); Abegg, John (McConnell)  
**Cc:** Kenny, Steve (Judiciary-Rep)  
**Subject:** RE: Short form packages

Roger. We are circulating to the SJC chief counsels our own roll-out packages for the 5 finalists.

Thank you,  
Mike Davis

Mike Davis, Chief Counsel for Nominations  
United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
202-224-(b) (6) (direct)  
(b) (6) (cell)  
202-224-9102 (fax)  
(b) (6)

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**From:** Talley, Brett (OLP) [mailto:Brett.Talley@usdoj.gov]  
**Sent:** Sunday, July 08, 2018 7:44 PM  
**To:** Davis, Mike (Judiciary-Rep) (b) (6); Abegg, John (McConnell)  
(b) (6) >  
**Subject:** RE: Short form packages

We'd rather you hold for now. Wanted to make sure the Chairman and Leader knew the thinking.

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**From:** Davis, Mike (Judiciary-Rep) (b) (6)  
**Sent:** Sunday, July 8, 2018 7:39 PM  
**To:** Talley, Brett (OLP) <btalley@jmd.usdoj.gov>; Abegg, John (McConnell)  
(b) (6)  
**Subject:** RE: Short form packages

Can we send these to SJC GOP counsels?

Thank you,  
Mike Davis

Mike Davis, Chief Counsel for Nominations  
United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
202-224-(b) (6) (direct)  
(b) (6) (cell)  
202-224-9102 (fax)  
(b) (6)



**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Sunday, July 08, 2018 7:37 PM  
**To:** 'Talley, Brett (OLP)' <[Brett.Talley@usdoj.gov](mailto:Brett.Talley@usdoj.gov)>; Abegg, John (McConnell)  
(b) (6)  
**Subject:** RE: Short form packages

Roger.

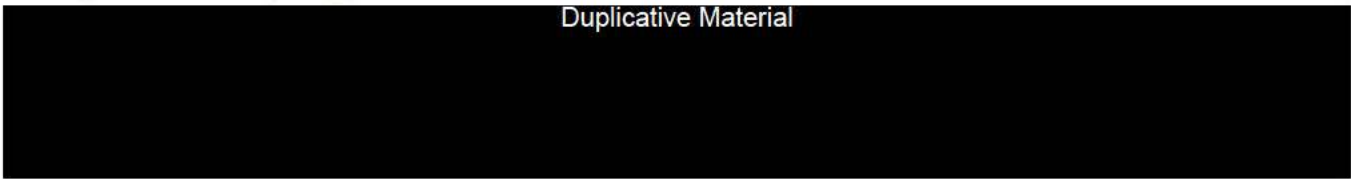
Thank you,  
Mike Davis

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United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
202-224-(b) (6) (direct)  
(b) (6) (cell)  
202-224-9102 (fax)  
(b) (6)

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**From:** Talley, Brett (OLP) [<mailto:Brett.Talley@usdoj.gov>]  
**Sent:** Sunday, July 08, 2018 7:21 PM  
**To:** Abegg, John (McConnell) (b) (6) Davis, Mike (Judiciary-Rep)  
(b) (6)  
**Subject:** Short form packages

Duplicative Material



**Talley, Brett (OLP)**

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**From:** Talley, Brett (OLP)  
**Sent:** Monday, July 9, 2018 5:15 PM  
**To:** Abegg, John (McConnell); Davis, Mike (Judiciary-Rep)  
**Subject:** RE: Short form packages  
**Attachments:** (b) (6) Top Line.docx; (b) (6) Top Line.docx; BK Top Talkers.docx; (b) (6) Top Talkers.docx; (b) (6) Top Line.docx

Sorry about that. Here you go.

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**From:** Abegg, John (McConnell) (b) (6)  
**Sent:** Monday, July 9, 2018 4:51 PM  
**To:** Talley, Brett (OLP) <btalley@jmd.usdoj.gov>; Davis, Mike (Judiciary-Rep) (b) (6)  
(b) (6) >  
**Subject:** RE: Short form packages

Hey Brett,

Could we get updated versions of these documents, so we're ready to go tonight?

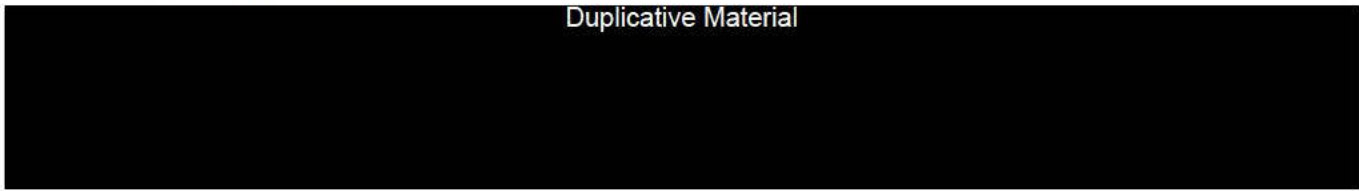
Thanks.

John

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**From:** Talley, Brett (OLP) <[Brett.Talley@usdoj.gov](mailto:Brett.Talley@usdoj.gov)>  
**Sent:** Sunday, July 8, 2018 7:21 PM  
**To:** Abegg, John (McConnell) (b) (6) >; Davis, Mike (Judiciary-Rep)  
(b) (6)  
**Subject:** Short form packages

Duplicative Material



**Judge Brett M. Kavanaugh**  
**U.S. Court of Appeals for the D.C. Circuit**

- Judge Kavanaugh is the single most qualified person in the country to serve on the Supreme Court. His credentials are impeccable. He currently sits on the D.C. Circuit – the “Second Highest Court in the Land” – and serves as the Samuel Williston Lecturer in Law at Harvard Law School. He graduated from Yale Law School and clerked for Justice Kennedy.
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- Judge Kavanaugh is active in his community. He coaches CYO (Catholic Youth Organization) Basketball, acts as a lector at his church, serves meals to needy families, and tutors at local elementary schools.

**Davis, Mike (Judiciary-Rep)**

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**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Monday, July 9, 2018 5:30 PM  
**To:** Talley, Brett (OLP); Abegg, John (McConnell)  
**Subject:** RE: Short form packages

Roger.

Thank you,  
Mike Davis

Mike Davis, Chief Counsel for Nominations  
United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
202-224-(b) (6) (direct)  
(b) (6) (cell)  
202-224-9102 (fax)  
(b) (6)

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**From:** Talley, Brett (OLP) [mailto:Brett.Talley@usdoj.gov]  
**Sent:** Monday, July 09, 2018 5:27 PM  
**To:** Davis, Mike (Judiciary-Rep) (b) (6); Abegg, John (McConnell)  
(b) (6) >  
**Subject:** RE: Short form packages

Just you two.

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**From:** Davis, Mike (Judiciary-Rep) (b) (6) >  
**Sent:** Monday, July 9, 2018 5:25 PM  
**To:** Talley, Brett (OLP) <[btalley@jmd.usdoj.gov](mailto:btalley@jmd.usdoj.gov)>; Abegg, John (McConnell)  
(b) (6) >  
**Subject:** RE: Short form packages

Can we send these out to SJC GOP chief counsels? Just McConnell and Grassley?

Thank you,  
Mike Davis

Mike Davis, Chief Counsel for Nominations  
United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
202-224-(b) (6) (direct)  
(b) (6) (cell)  
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(b) (6)

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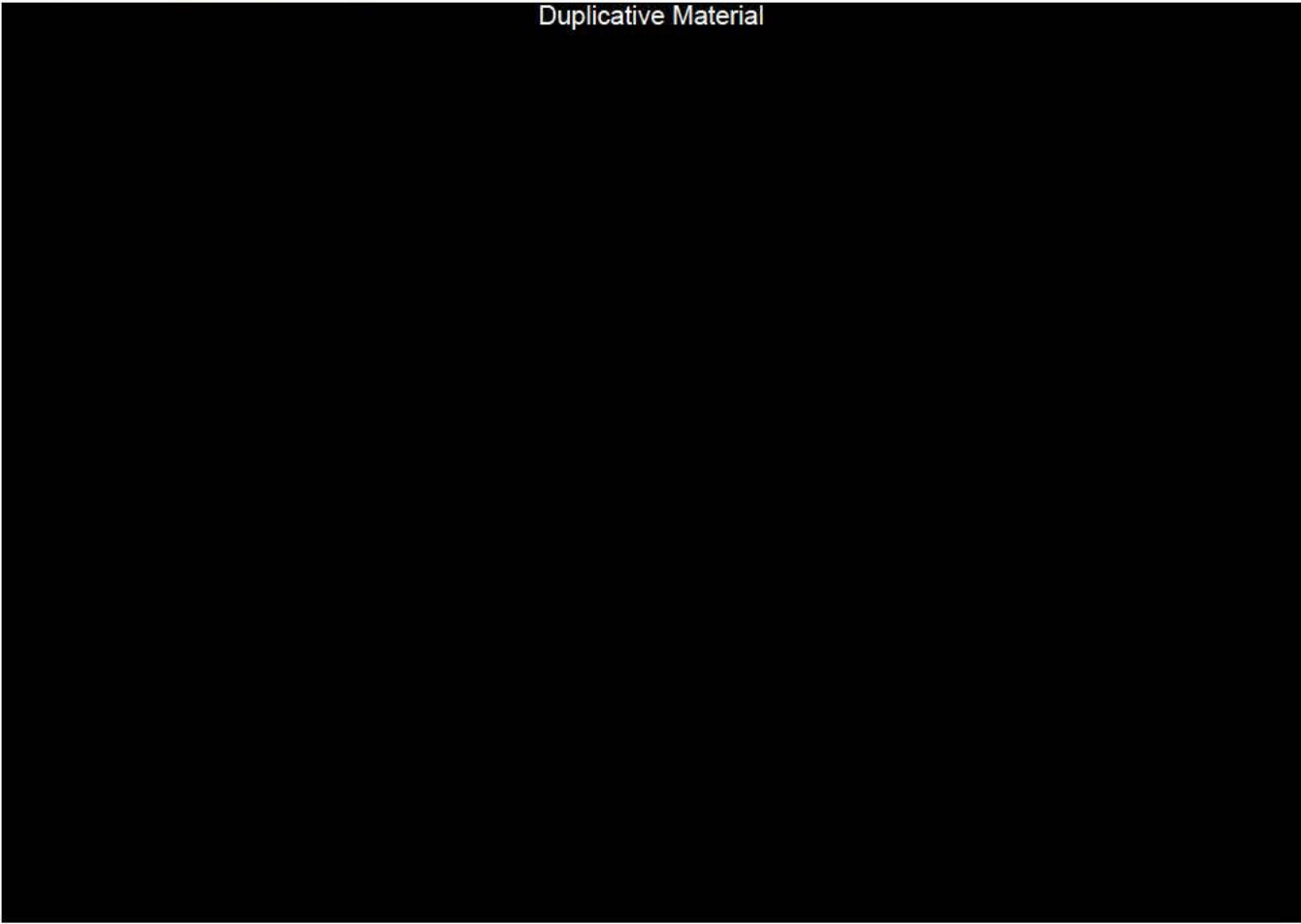
**From:** Talley, Brett (OLP) [mailto:Brett.Talley@usdoj.gov]

Sent: Monday, July 09, 2018 5:15 PM

To: Abegg, John (McConnell) <(b) (6)>; Davis, Mike (Judiciary-Rep)  
(b) (6)

Subject: RE: Short form packages

Duplicative Material



**Abegg, John (McConnell)**

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**From:** Abegg, John (McConnell)  
**Sent:** Monday, July 9, 2018 6:28 PM  
**To:** Talley, Brett (OLP)  
**Subject:** Re: Short form packages

I'll call in 10 minutes. Thanks.

Sent from my iPhone

On Jul 9, 2018, at 6:26 PM, Talley, Brett (OLP) <[Brett.Talley@usdoj.gov](mailto:Brett.Talley@usdoj.gov)> wrote:

Just gave you a ring. Call when you can. (b) (6)

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**From:** Abegg, John (McConnell) <(b) (6)>  
**Sent:** Monday, July 9, 2018 6:25 PM  
**To:** Talley, Brett (OLP) <[btalley@jmd.usdoj.gov](mailto:btalley@jmd.usdoj.gov)>  
**Subject:** Re: Short form packages

Can you talk briefly?

Sent from my iPhone

On Jul 9, 2018, at 6:20 PM, Talley, Brett (OLP) <[Brett.Talley@usdoj.gov](mailto:Brett.Talley@usdoj.gov)> wrote:

That is correct. And I'm hoping to get you a longer document as well. I neglected to pdf the top lines I sent you, so if you don't mind doing that I'd appreciate it.

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**From:** Abegg, John (McConnell) <(b) (6)>  
**Sent:** Monday, July 9, 2018 6:16 PM  
**To:** Talley, Brett (OLP) <[btalley@jmd.usdoj.gov](mailto:btalley@jmd.usdoj.gov)>; Davis, Mike (Judiciary-Rep) <(b) (6)>  
**Subject:** RE: Short form packages

Brett,

I assume that, at the appropriate time, we can disseminate to the GOP Conference the Top Line talkers that you just sent, as well as the pertinent bio that you sent yesterday, correct?

Thanks.

John

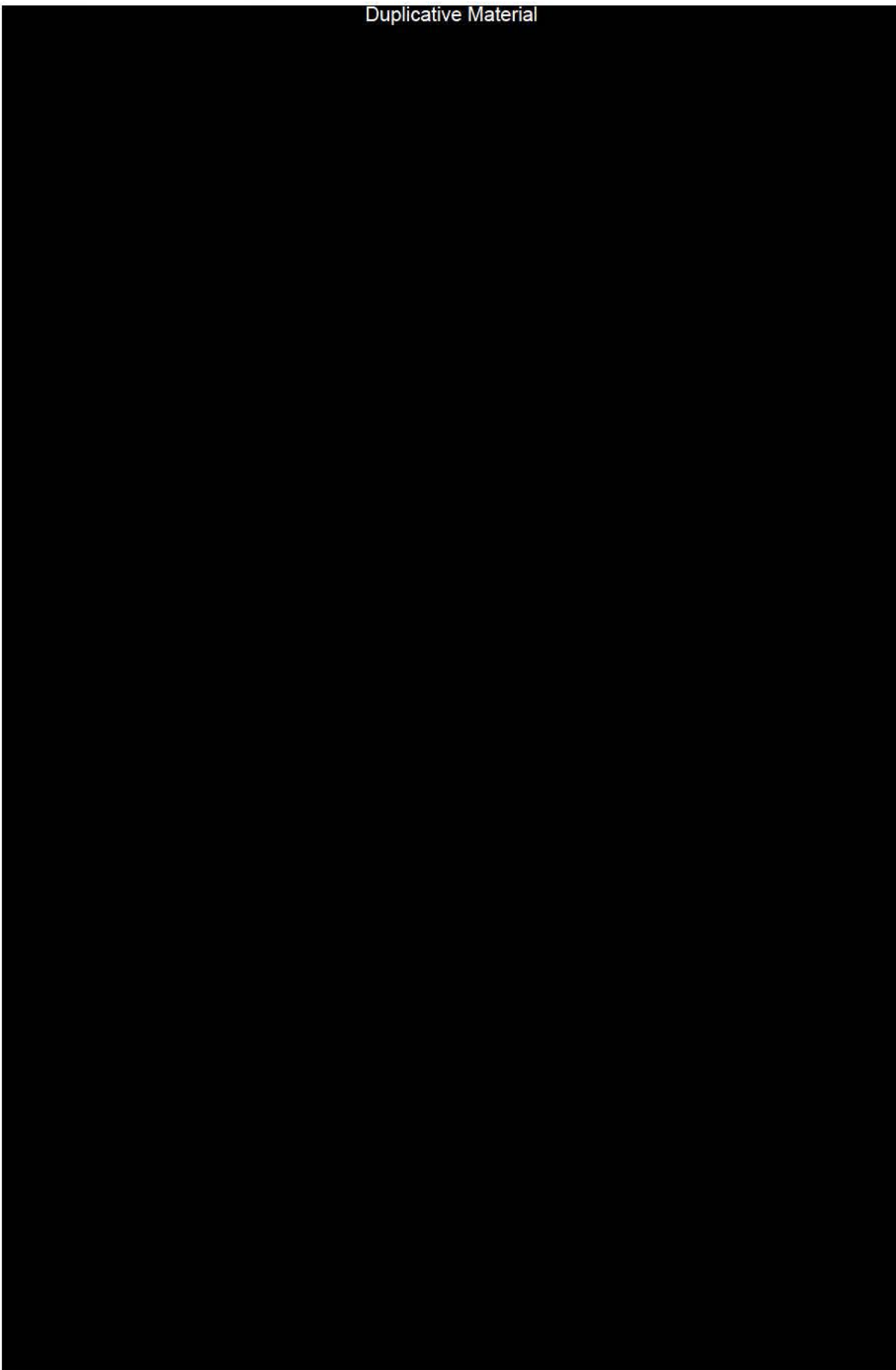
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**Sent:** Monday, July 9, 2018 5:27 PM  
**To:** Davis, Mike (Judiciary-Rep) <(b) (6)> Abegg, John (McConnell) <(b) (6)>



Subject: RE: Short form packages

Duplicative Material



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**From:** Talley, Brett (OLP)  
**Sent:** Monday, July 9, 2018 7:27 PM  
**To:** Abegg, John (McConnell)  
**Subject:** With slight updates  
**Attachments:** BK Short Bio.pdf; BK Top Talkers.pdf

# Judge Brett M. Kavanaugh

## **Federal Judicial Service**

Judge, U.S. Court of Appeals for the D.C. Circuit

Nominated by President George W. Bush on January 25, 2006, to a seat vacated by Hon. Laurence H. Silberman; Confirmed on May 26, 2006.

## **Education**

Yale College, B.A., *cum laude*, 1987

Yale Law School, J.D., 1990

## **Professional History**

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Bristow Fellow, Office of the Solicitor General, U.S. Department of Justice, 1992-1993

Law Clerk, Associate Justice Anthony M. Kennedy, Supreme Court of the United States, 1993-1994

Associate, Office of Independent Counsel Ken Starr, 1994-1997, 1998

Partner, Kirkland & Ellis, LLP, 1997-1998, 1999-2001

Associate Counsel, President George W. Bush, 2001-2003; Senior Associate Counsel, 2003

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**Talley, Brett (OLP)**

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**From:** Talley, Brett (OLP)  
**Sent:** Monday, July 9, 2018 8:07 PM  
**To:** Abegg, John (McConnell)  
**Subject:** Longer public packet  
**Attachments:** Kavanaugh Packet for Public.pdf

The bio in this one should not be different from the short bio file you have already received. The ask is for you not to distribute to Senate offices until the nominee is on stage and announced. This is also the package that will be distributed by Raj over here. Will give you a call in a second.

Brett

# Judge Brett M. Kavanaugh

## **Federal Judicial Service**

Judge, U.S. Court of Appeals for the D.C. Circuit

Nominated by President George W. Bush on January 25, 2006, to a seat vacated by Hon. Laurence H. Silberman; confirmed on May 26, 2006.

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Law Clerk, Associate Justice Anthony M. Kennedy, Supreme Court of the United States, 1993-1994

Associate, Office of Independent Counsel Ken Starr, 1994-1997, 1998

Partner, Kirkland & Ellis, LLP, 1997-1998, 1999-2001

Associate Counsel, President George W. Bush, 2001-2003; Senior Associate Counsel, 2003

Assistant to the President and Staff Secretary, President George W. Bush, 2003-2006

Samuel Williston Lecturer in Law, Harvard Law School, 2009-present



**Judge Brett M. Kavanaugh**  
**U.S. Court of Appeals for the D.C. Circuit**

- Judge Kavanaugh is the single most qualified person in the country to serve on the Supreme Court. His credentials are impeccable. He currently sits on the D.C. Circuit the “Second Highest Court in the Land” and serves as the Samuel Williston Lecturer in Law at Harvard Law School. He graduated from Yale Law School and clerked for Justice Kennedy.
- Judge Kavanaugh has a proven track record as the type of jurist that President Trump has promised to put on the Supreme Court. With over 300 published opinions, what you see is what you get: a judge who will apply the law as written and enforce the text, structure, and original understanding of the Constitution.
- Judge Kavanaugh’s respect for people threatened by government overreach has demonstrated itself again and again, and he has often rejected attempts by the federal government to impose onerous regulations on private citizens.
- Judge Kavanaugh is a true “judge’s judge.” He’s a thought-leader among his peers on the appellate courts and deeply respected by the Supreme Court. The Supreme Court has endorsed his opinions more than a dozen times, including Kavanaugh dissents that have become the law of the land. His opinions are regularly cited by courts across the country. Of his 48 clerks, 39 have gone on to clerk at the Supreme Court. And one of his clerks (Britt Grant) is even on the President’s list of potential Supreme Court nominees.
- Together with Justice Gorsuch and others, Judge Kavanaugh coauthored *The Law of Judicial Precedent*, a lengthy treatise on the role and importance of *stare decisis*.
- Judge Kavanaugh has devoted his life to public service. He has spent 25 of the last 28 years serving the American people, most notably as Associate Independent Counsel, Associate White House Counsel, Assistant and Staff Secretary to President George W. Bush, and of course as a judge.
- Judge Kavanaugh is active in his community. He coaches CYO (Catholic Youth Organization) basketball, acts as a reader at his church, serves meals to needy families, and tutors children at local elementary schools.

**Judge Brett M. Kavanaugh**  
**U.S. Court of Appeals for the D.C. Circuit**

Brett M. Kavanaugh has served for over a decade as a federal judge on the U.S. Court of Appeals for the D.C. Circuit – referred to as the “Second Highest Court in the Land” – building a first-rate judicial record and reputation.

Judge Kavanaugh is a brilliant jurist with impeccable legal credentials and a clear, effective writing style. He is universally respected for his intellect, persuasiveness, and ability to build consensus. He understands that the role of a judge is to faithfully interpret the law, not to legislate from the bench. His authoritative legal opinions are known to shape the law and are often cited by judges around the country.

Alongside his long career of public service, he is a youth basketball coach, a church volunteer, a family man, and a mentor in local schools. He stays active, playing basketball and running. His mother, Maryland Circuit Court Judge Martha Kavanaugh, blazed a trail for women in the legal profession. He and his wife Ashley have two school-aged children.

**Judge Kavanaugh is the best of the best, who builds consensus and decides cases based on the law, not personal policy preferences.**

Judge Kavanaugh once wrote, “The judge’s job is to interpret the law, not to make the law or make policy. So read the words of the statute as written. Read the text of the Constitution as written, mindful of history and tradition. Don’t make up new constitutional rights that are not in the text of the Constitution. Don’t shy away from enforcing constitutional rights that are in the text of the Constitution.”

**Judge Kavanaugh has an impressive career of public service.**

Judge Kavanaugh was confirmed by the U.S. Senate on May 26, 2006, to the U.S. Court of Appeals for the D.C. Circuit. Sixteen current Senators – including one sitting Democrat – voted to confirm him.

Prior to serving on the court, Judge Kavanaugh had broad experience in private practice and in government service. He served in the White House as Senior Associate White House Counsel and eventually as Staff Secretary to President George W. Bush. Earlier in his career, he served as Associate Counsel to the Independent Counsel, Ken Starr; a Bristow fellow in the Office of Solicitor General; and a partner at Kirkland & Ellis LLP, where he specialized in appellate litigation.

**Judge Kavanaugh’s academic credentials are superb.**

After graduating with honors from Yale College in 1987, Judge Kavanaugh graduated from Yale Law School in 1990, where he was a Notes Editor on the *Yale Law Journal*. He clerked for Justice Anthony Kennedy of the Supreme Court, Ninth Circuit Judge Alex Kozinski, and Third Circuit Judge Walter Stapleton.

## **Judge Brett M. Kavanaugh**

Judge Kavanaugh has impeccable academic credentials and professional experience.

- Yale College, B.A., *cum laude*; Yale Law School, J.D.
- Law Clerk to Justice Kennedy, Judge Stapleton (3d Cir.), Judge Kozinski (9th Cir.)
- Bristow Fellow, Office of the Solicitor General, U.S. Department of Justice
- Assistant to the President and Staff Secretary; Senior Associate White House Counsel; Associate White House Counsel
- Partner, Kirkland & Ellis LLP
- Associate Independent Counsel, authored parts of the Starr Report
- Samuel Williston Lecturer in Law, Harvard Law School

Judge Kavanaugh is an All-American Judge with a commitment to his country and community.

- Life-long member of the D.C. community
- Avid sports fan, who plays and coaches basketball and runs marathons
- Involved in his community through extensive charity work

Judge Kavanaugh has an outstanding judicial record from his 12 years on the bench.

- Exactly the sort of judge the President promised, and exactly what the American people want: follows the law, not his policy preferences.
- A judge's judge:
  - The Supreme Court has endorsed his opinions more than a dozen times
  - His 100 most-cited opinions have been cited by more than 210 judges across the country
  - More than 50 circuit court opinions discuss or cite one of his concurrences or dissents

Judge Kavanaugh is a mainstream judge who should be easily confirmed.

- Senators from both parties told the White House they wanted a real judge with outstanding credentials, who will respect precedent
- Judge Kavanaugh is all of that and then some
- Confirmed to the D.C. Circuit with bipartisan support

## **The Nomination Process**

**Top Line: The nomination of Judge Brett Kavanaugh resulted from the most thorough, wide-ranging selection process in history.**

- No Administration has ever launched a more thorough selection process for a Supreme Court nominee.
- President Trump chose from a public list of 25 of the finest legal minds in our country last updated in November 2017, after the confirmation of Neil Gorsuch and after the President had confirmed a number of his own lower court nominees.
- A team of lawyers from the White House Counsel's Office and the Department of Justice studied and analyzed the writings and backgrounds of these candidates.
- Starting immediately after Justice Kennedy's announcement that he was taking senior status, President Trump, the Vice President, and the White House Counsel met and spoke with numerous Senators Republican and Democrat over the past two weeks, seeking their advice.
- Dozens of Senators provided their advice. Many asked the President to pick a nominee who has impeccable credentials, a brilliant legal mind, and has exhibited integrity, humility, and a judicial temperament in his or her career.
- President Trump, working with the Vice President and the White House Counsel, narrowed the list over the ten days since Justice Kennedy's announcement.
- The President selected Judge Brett Kavanaugh a mainstream judge with impeccable credentials who has twelve years of distinguished service on the U.S. Court of Appeals for the D.C. Circuit.
- During the selection process, Judge Kavanaugh made no commitments on positions he would take on particular legal issues, and he was not asked to do so. As a Justice, he will decide cases independently and according to the law, exactly as he has done on the D.C. Circuit.
- President Trump has nominated a mainstream candidate with a proven record of deciding cases carefully and with due respect for precedent. He should be swiftly confirmed to the Supreme Court.

**Lacy, Megan M. EOP/WHO**

---

**From:** Lacy, Megan M. EOP/WHO  
**Sent:** Tuesday, July 24, 2018 4:39 PM  
**To:** Abegg, John (McConnell); Davis, Mike (Judiciary-Rep); Kenny, Steve (Judiciary-Rep)  
**Cc:** Fragoso, Michael (OLP); Talley, Brett (OLP)  
**Subject:** One-pagers on Judge Kavanaugh  
**Attachments:** (b) (5).pdf; (b) (5).pdf

John, Mike, Steve,

Attached (b) (5)

Welcome any comments or edits. (b) (5)

Thanks,  
Megan

**Lacy, Megan M. EOP/WHO**

---

**From:** Lacy, Megan M. EOP/WHO  
**Sent:** Tuesday, July 24, 2018 4:45 PM  
**To:** Abegg, John (McConnell); Davis, Mike (Judiciary-Rep); Kenny, Steve (Judiciary-Rep)  
**Cc:** Fragoso, Michael (OLP); Talley, Brett (OLP)  
**Subject:** RE: One-pagers on Judge Kavanaugh  
**Attachments:** Two more Kavanaugh one-pagers.msg; One-pagers on Judge Kavanaugh.msg

Four documents in total—(b) (5)—all four attached here. I can discuss edits at your convenience.

Thanks,  
Megan

---

**From:** Abegg, John (McConnell) (b) (6)  
**Sent:** Tuesday, July 24, 2018 4:42 PM  
**To:** Lacy, Megan M. EOP/WHO (b) (6); Davis, Mike (Judiciary-Rep)  
(b) (6) Kenny, Steve (Judiciary-Rep) (b) (6)  
**Cc:** 'Fragoso, Michael (OLP)' <Michael.Fragoso@usdoj.gov>; Talley, Brett (OLP) <Brett.Talley@usdoj.gov>  
**Subject:** RE: One-pagers on Judge Kavanaugh

Megan,

Are these the same as the ones we received this morning?

And who should we speak with about suggested edits?

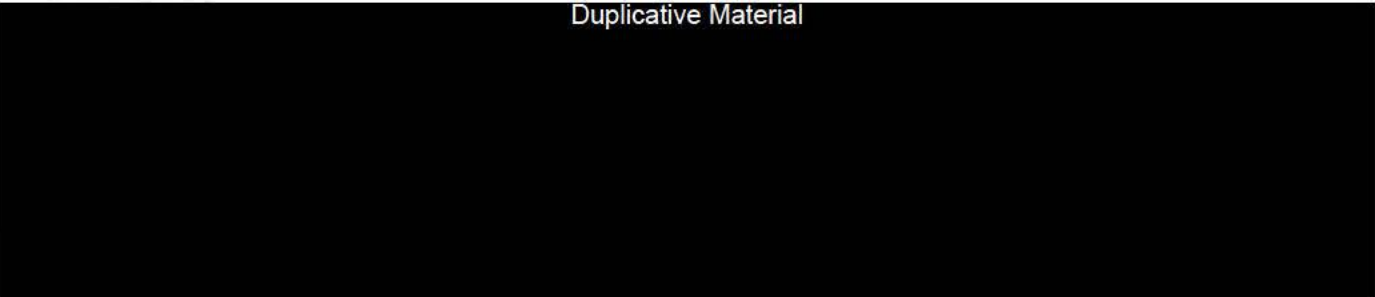
Thanks.

John

---

**From:** Lacy, Megan M. EOP/WHO (b) (6)  
**Sent:** Tuesday, July 24, 2018 4:39 PM  
**To:** Abegg, John (McConnell) (b) (6); Davis, Mike (Judiciary-Rep)  
(b) (6); Kenny, Steve (Judiciary-Rep) (b) (6)  
**Cc:** 'Fragoso, Michael (OLP)' <Michael.Fragoso@usdoj.gov>; Talley, Brett (OLP) <Brett.Talley@usdoj.gov>  
**Subject:** One-pagers on Judge Kavanaugh

Duplicative Material





**Lacy, Megan M. EOP/WHO**

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**From:** Lacy, Megan M. EOP/WHO  
**Sent:** Tuesday, July 24, 2018 4:41 PM  
**To:** Abegg, John (McConnell); Davis, Mike (Judiciary-Rep); Kenny, Steve (Judiciary-Rep)  
**Cc:** Fragoso, Michael (OLP); Talley, Brett (OLP)  
**Subject:** Two more Kavanaugh one-pagers  
**Attachments:** (b) (5).pdf; (b) (5).pdf

John, Mike, Steve,

Two more one-pagers from Steve's list attached here for your review.

Thanks,  
Megan

(b) (6)

**Fragoso, Michael (OLP)**

---

**Subject:** FW: SCOTUS meeting  
**Location:** S-230  
  
**Start:** Friday, July 27, 2018 2:00 PM  
**End:** Friday, July 27, 2018 3:00 PM  
**Show Time As:** Tentative  
  
**Recurrence:** (none)  
  
**Organizer:** Fragoso, Michael (OLP)  
**Required Attendees:** Champoux, Mark (OLP)

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From: Abegg, John (McConnell)  
Sent: Thursday, July 26, 2018 8:06:53 PM UTC  
To: Abegg, John (McConnell); Davis, Mike (Judiciary-Rep); Kenny, Steve (Judiciary-Rep); Foy, Taylor (Judiciary-Rep); Stewart, Don (McConnell); Ferrier, Antonia (McConnell); 'Lacy, Megan M. EOP/WHO'; Fragoso, Michael (OLP); Talley, Brett (OLP); (b)(6) - Raj Shah Email Address'  
Subject: SCOTUS meeting  
When: Friday, July 27, 2018 6:00 PM-7:00 PM.  
Where: S-230

**Lacy, Megan M. EOP/WHO**

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**From:** Lacy, Megan M. EOP/WHO  
**Sent:** Monday, July 30, 2018 2:40 PM  
**To:** Abegg, John (McConnell); Davis, Mike (Judiciary-Rep); Kenny, Steve (Judiciary-Rep); (b)(6) - Andrew Ferguson Email Address  
**Cc:** Fragoso, Michael (OLP)  
**Subject:** Kavanaugh Opinions -- Page Length  
**Attachments:** Judge Kavanaugh Opinions\_Complete.pdf

Following on our conversation Friday, the attached document reflects the more than 3,000 pages of opinions Judge Kavanaugh has written.

A couple points on that figure – (1) it includes unpublished and published opinions; (2) it reflects the full page length of all cases in which Judge Kavanaugh wrote an opinion (e.g. if he dissented, the page count includes both the majority opinion and the dissent); (3) it does not include cases in which he voted on the panel or as part of the en banc court but did not author any opinion.

Happy to discuss any questions you may have.

Thanks,  
Megan

**Lacy, Megan M. EOP/WHO**

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**From:** Lacy, Megan M. EOP/WHO  
**Sent:** Tuesday, July 31, 2018 2:51 PM  
**To:** (b)(6) - John Abegg Email Address ; (b)(6) - Mike Davis Email Address ;  
(b)(6) - Steve Kenny Email Address  
**Cc:** Fragoso, Michael (OLP)  
**Subject:** Kavanaugh one-pager— (b) (5)  
**Attachments:** (b) (5) .docx; ATT00001.txt

John, Mike, Steve,

Attached is another one-pager on (b) (5)

Happy to discuss.

Megan

**Davis, Mike (Judiciary-Rep)**

---

**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Friday, August 3, 2018 11:04 AM  
**To:** Judiciary Nominations Republican; (b)(6) - Beth Williams Email Address  
(b)(6) - Megan Lacy Email Address; (b)(6) - Sean Sandozski Email Address;  
Mark.Champoux@usdoj.gov; Michael.Fragoso@usdoj.gov;  
Brett.Talley@usdoj.gov; (b)(6) - Stephen Boyd Email Address Jill.C.Tyson@usdoj.gov;  
David.F.Lasseter@usdoj.gov; Prim.F.Escalona@usdoj.gov  
**Cc:** Steitz, John (Kennedy); Flanz, Ken (Crapo); Ferguson, Andrew (Judiciary-Rep);  
Camacho, Dario (Judiciary-Rep); Hartmann, George (Judiciary-Rep); Gallagher,  
Nick (Judiciary-Rep); Jackson, Katie (Judiciary-Rep); Adkisson, Sam (Judiciary-  
Rep); Kenny, Steve (Judiciary-Rep); Zona, Michael (Grassley); St. Maxens, Colin  
(Crapo); Chestnut, Brendan (Judiciary-Rep); Ventry, Garrett (Judiciary-Rep);  
Abegg, John (McConnell); Hawatmeh, Nick (Kennedy); Lari, Rita (Judiciary-  
Rep); Stone, Judd (Judiciary-Rep); Giaier, Steven (Judiciary-Rep); Payne,  
William (Sasse); Oberan, Elizabeth (Judiciary-Rep); Foster, Ethan (Judiciary-  
Rep); Burwell, Carter (Judiciary-Rep)  
**Subject:** Weekly Nominations Briefing (SCOTUS and non-SCOTUS)  
**Attachments:** Weekly Nominations Briefing (SCOTUS and non-SCOTUS)



**Davis, Mike (Judiciary-Rep)**

---

**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Friday, August 3, 2018 11:04 AM  
**To:** Judiciary Nominations Republican; (b)(6) - Beth Williams Email Address;  
(b)(6) - Megan Lacy Email Address (b)(6) - Sean Sandoloski Email Address  
Mark.Champoux@usdoj.gov; Michael.Fragoso@usdoj.gov;  
Brett.Talley@usdoj.gov; (b)(6) - Stephen Boyd Email Address; Jill.C.Tyson@usdoj.gov;  
David.F.Lasseter@usdoj.gov; Prim.F.Escalona@usdoj.gov  
**Cc:** Steitz, John (Kennedy); Flanz, Ken (Crapo); Ferguson, Andrew (Judiciary-Rep);  
Camacho, Dario (Judiciary-Rep); Hartmann, George (Judiciary-Rep); Gallagher,  
Nick (Judiciary-Rep); Jackson, Katie (Judiciary-Rep); Adkisson, Sam (Judiciary-  
Rep); Kenny, Steve (Judiciary-Rep); Zona, Michael (Grassley); St. Maxens, Colin  
(Crapo); Chestnut, Brendan (Judiciary-Rep); Ventry, Garrett (Judiciary-Rep);  
Abegg, John (McConnell); Hawatmeh, Nick (Kennedy); Lari, Rita (Judiciary-Rep);  
Stone, Judd (Judiciary-Rep); Giaier, Steven (Judiciary-Rep); Payne, William  
(Sasse); Oberan, Elizabeth (Judiciary-Rep); Foster, Ethan (Judiciary-Rep); Burwell,  
Carter (Judiciary-Rep)  
**Subject:** Weekly Nominations Briefing (SCOTUS and non-SCOTUS)

Reminder, we are having our weekly nominations meeting in about 30 minutes.

**Davis, Mike (Judiciary-Rep)**

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**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Tuesday, August 7, 2018 11:13 AM  
**To:** Nominations Strategy; Abegg, John (McConnell); Lacy, Megan M. EOP/WHO; Talley, Brett (OLP); Mark.Champoux@usdoj.gov; Fragoso, Michael (OLP)  
**Subject:** SCOTUS -- Meeting re Hearing Themes and Logistics (Grassley, McConnell, WHCO, OLP)

**Davis, Mike (Judiciary-Rep)**

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**Subject:** SCOTUS -- Meeting re Hearing Themes and Logistics (Grassley, McConnell, WHCO, OLP)

**Location:** SD-B40B

**Start:** Wednesday, August 8, 2018 2:30 PM

**End:** Wednesday, August 8, 2018 3:30 PM

**Recurrence:** (none)

**Meeting Status:** Accepted

**Organizer:** Davis, Mike (Judiciary-Rep)

**Required Attendees:** Nominations Strategy; Abegg, John (McConnell); Lacy, Megan M. EOP/WHO; Talley, Brett (OLP); Champoux, Mark (OLP); Fragoso, Michael (OLP)

**Optional Attendees:** Kenny, Steve (Judiciary-Rep); Ventry, Garrett (Judiciary-Rep); Ferguson, Andrew (Judiciary-Rep); Mehler, Lauren (Judiciary-Rep)

Let's keep this meeting to 1 hour. I have an off-campus meeting at 4 pm.



**Davis, Mike (Judiciary-Rep)**

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**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Friday, August 10, 2018 10:25 AM  
**To:** Judiciary Nominations Republican; (b)(6) - Megan Lacy Email Address;  
(b)(6) - Sean Sandomoski Email Address; (b)(6) - Beth Williams Email Address  
Mark.Champoux@usdoj.gov; Michael.Fragoso@usdoj.gov;  
Brett.Talley@usdoj.gov; (b)(6) - Stephen Boyd Email Address; Jill.C.Tyson@usdoj.gov;  
David.F.Lasseter@usdoj.gov; Prim.F.Escalona@usdoj.gov  
**Cc:** Steitz, John (Kennedy); Flanz, Ken (Crapo); Ferguson, Andrew (Judiciary-Rep);  
Camacho, Dario (Judiciary-Rep); Hartmann, George (Judiciary-Rep); Gallagher,  
Nick (Judiciary-Rep); Jackson, Katie (Judiciary-Rep); Adkisson, Sam (Judiciary-  
Rep); Kenny, Steve (Judiciary-Rep); Zona, Michael (Grassley); St. Maxens, Colin  
(Crapo); Chestnut, Brendan (Judiciary-Rep); Ventry, Garrett (Judiciary-Rep);  
Abegg, John (McConnell); Hawatmeh, Nick (Kennedy); Lari, Rita (Judiciary-  
Rep); Stone, Judd (Judiciary-Rep); Payne, William (Sasse); Oberan, Elizabeth  
(Judiciary-Rep); Foster, Ethan (Judiciary-Rep); Burwell, Carter (Judiciary-Rep);  
Cooksey, Sean (Judiciary-Rep); Peeples, Camille (Judiciary-Rep); White, Collin  
(Judiciary-Rep); Watts, Brad (Judiciary-Rep); Pugh, Sean (Judiciary-Rep)  
**Subject:** Canceled: Weekly Nominations Briefing (SCOTUS and non-SCOTUS)  
**Attachments:** Canceled: Weekly Nominations Briefing (SCOTUS and non-SCOTUS)  
**Importance:** High

**Davis, Mike (Judiciary-Rep)**

---

**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Friday, August 10, 2018 10:25 AM  
**To:** Judiciary Nominations Republican; (b)(6) - Megan Lacy Email Address;  
(b)(6) - Sean Sandoloski Email Address; (b)(6) - Beth Williams Email Address;  
Mark.Champoux@usdoj.gov; Michael.Fragoso@usdoj.gov;  
Brett.Talley@usdoj.gov; (b)(6) - Stephen Boyd Email Address; Jill.C.Tyson@usdoj.gov;  
David.F.Lasseter@usdoj.gov; Prim.F.Escalona@usdoj.gov  
**Cc:** Steitz, John (Kennedy); Flanz, Ken (Crapo); Ferguson, Andrew (Judiciary-Rep);  
Camacho, Dario (Judiciary-Rep); Hartmann, George (Judiciary-Rep); Gallagher,  
Nick (Judiciary-Rep); Jackson, Katie (Judiciary-Rep); Adkisson, Sam (Judiciary-  
Rep); Kenny, Steve (Judiciary-Rep); Zona, Michael (Grassley); St. Maxens, Colin  
(Crapo); Chestnut, Brendan (Judiciary-Rep); Ventry, Garrett (Judiciary-Rep);  
Abegg, John (McConnell); Hawatmeh, Nick (Kennedy); Lari, Rita (Judiciary-Rep);  
Stone, Judd (Judiciary-Rep); Payne, William (Sasse); Oberan, Elizabeth (Judiciary-  
Rep); Foster, Ethan (Judiciary-Rep); Burwell, Carter (Judiciary-Rep); Cooksey,  
Sean (Judiciary-Rep); Peebles, Camille (Judiciary-Rep); White, Collin (Judiciary-  
Rep); Watts, Brad (Judiciary-Rep); Pugh, Sean (Judiciary-Rep)  
**Subject:** Canceled: Weekly Nominations Briefing (SCOTUS and non-SCOTUS)  
**Importance:** High

Because we are in recess and our next non-SCOTUS hearing is moved back from 8/15 to 8/22, we do not need to meet today. Please email or call me, if you want a SCOTUS update.

**Fragoso, Michael (OLP)**

---

**From:** Fragoso, Michael (OLP)  
**Sent:** Friday, August 24, 2018 8:54 AM  
**To:** Davis, Mike (Judiciary-Rep); Kenny, Steve (Judiciary-Rep)  
**Cc:** Abegg, John (McConnell)  
**Subject:** New Talkers  
**Attachments:** Bipartisan Support for SCT Nominees (final).pdf; Federalist Society (final).pdf; Judge Kavanaugh's Record at the Supreme Court (final).pdf; Kavanaugh-Garland Rates of Agreement (final).pdf

Here are some fresh ones. More to come.

Michael A. Fragoso  
Deputy Assistant Attorney General  
Office of Legal Policy  
U.S. Department of Justice  
(202) 514-2456  
[michael.fragoso@usdoj.gov](mailto:michael.fragoso@usdoj.gov)

**SUMMARY:**  
**SENATE TRADITION OF BIPARTISAN SUPPORT FOR SUPREME COURT NOMINEES**

**Democratic support for highly regarded Judge Brett Kavanaugh would continue the tradition of bipartisan support for Supreme Court nominees.**

- **Every sitting member of the Supreme Court received some measure of bipartisan support** in her or his confirmation vote.
  - 33 Republicans crossed party lines to confirm Justice Breyer 87-9.
  - 41 Republicans voted to confirm Justice Ginsburg 96-3.
  - Both Justice Kagan and Justice Sotomayor were confirmed with over 60 votes in the Senate:
    - Nine Republicans voted for Justice Sotomayor; and
    - Five Republicans voted for Justice Kagan.
  - Chief Justice Roberts received 22 votes from Democrats on his way to a 78-22 confirmation.
  - Justice Alito was confirmed 58-42 with four votes from Democrats.
  - 11 Democrats voted to confirm Justice Clarence Thomas (52-48).
  - Last year, Justice Neil Gorsuch earned three votes from Democrats on his way to confirmation (54-45).
- **Justice Ruth Bader Ginsburg recently called for a return to bipartisanship** in judicial confirmations.<sup>1</sup>
  - On a recent trip to Israel after Justice Anthony Kennedy's retirement, **Justice Ginsburg recalled her 96-3 confirmation, noting that Republican Senator Orrin Hatch of Utah was her "biggest supporter."**

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<sup>1</sup> <https://www.haaretz.com/israel-news/.premium-ruth-bader-ginsburg-in-israel-i-pity-your-supreme-court-justices-1.6245868>

- Justice Ginsburg noted that although she “was considered a controversial person” because of her “affiliation with the ACLU,” she was still confirmed with overwhelming bipartisan support.
- She stated **her hope that “someday we will get back to the bipartisan spirit that once prevailed when it came to the confirmation of judges.”**
- **Judge Kavanaugh himself received bipartisan support in his 2006 confirmation** to the D.C. Circuit Court of Appeals.
- **Many current Senators have crossed party lines to support a Supreme Court nominee.**
  - Justice Gorsuch (2017): Senators Joe Donnelly (IN), Heidi Heitkamp (ND), and Joe Manchin (WV) voted to confirm.
  - Justice Kagan (2010): Senators Susan Collins (ME) and Lindsey Graham (SC) voted to confirm.
  - Justice Sotomayor (2009): Senators Lamar Alexander (TN), Susan Collins (ME), and Lindsey Graham (SC) voted to confirm.
  - Chief Justice Roberts (2005): Senators Tom Carper (DE), Patrick Leahy (VT), Patty Murray (WA), Bill Nelson (FL), and Ron Wyden (OR) voted to confirm.
  - Justice Breyer (1994): Majority Leader Mitch McConnell (KY), Judiciary Committee Chairman Chuck Grassley (IA), Orrin Hatch (UT), and John McCain (AZ) voted to confirm.
  - Justice Ginsburg (1993): Majority Leader Mitch McConnell (KY), Judiciary Committee Chairman Chuck Grassley (IA), Orrin Hatch (UT), and John McCain (AZ) voted to confirm.

- **Supreme Court nominees routinely receive bipartisan support in midterm election years.**
  - Justice Breyer’s 87-9 confirmation occurred in July of 1994, garnering 33 Republican votes ahead of a midterm election that flipped control of the Senate from the Democrats to the Republicans.
  - Justice Kagan’s 63-37 confirmation occurred in August of 2010; Justice Kagan earned five Republican votes just months before a midterm election favorable to the Republicans.
- **On average, Republicans have been more open to supporting the Supreme Court nominee of a President from the opposing party.**
  - Of the current members of the Supreme Court, Democrat-appointed Justices received an average of 22 Republican “crossover” votes in their confirmations.
  - By contrast, the current Republican-appointed Justices received an average of 10 “crossover” confirmation votes from Democrats.
  - **Every Democrat-appointed Justice received at least one Republican vote out of the Senate Judiciary Committee. Justices Breyer and Ginsburg were supported unanimously in their Committee votes.**



## FEDERALIST SOCIETY

- **The Federalist Society is a mainstream legal group dedicated to a free exchange of ideas in the legal profession and law schools.** It has chapters in law schools across the country that host events open to everyone. It has annual meetings of lawyers, students, and professors that are open to anyone to attend. Its website posts publications and audio and video records of its events. It doesn't take political positions.
- Federalist Society events typically include people on **all sides of the political spectrum**, discussing interesting legal questions and recent Supreme Court opinions.
  - Recent participants in Federalist Society events have included:
    - Nadine Strossen, former President of the ACLU
    - Paul Watford, a 9th Circuit Judge appointed by President Obama
    - Deepak Gupta, currently lead litigator in the Emoluments Clause litigation
    - Neil Eggleston, Counsel to both President Obama and President Clinton
  - Judge Kavanaugh participated in a panel at the 2017 Federalist Society National Convention. Others who appeared that year were:
    - Heather Gerken, Dean of Yale Law School
    - Paulette Brown, former President of the American Bar Association
    - Ted Shaw, former President of the NAACP Legal Defense Fund
    - Lisa Heinzerling, who served in various roles in President Obama's EPA
- The Federalist Society has been praised by many liberals over the years for its commitment to spirited, intellectual dialogue about the Constitution and the laws of our country:
  - Justice Elena Kagan, then-dean of Harvard Law School, at their annual student conference: "I love the Federalist Society!"
  - Alan Dershowitz, Harvard Law School: "I am a tremendous admirer of this organization... it has served an enormously valuable function, in getting the debate going about the meaning of the constitution."
  - Jerome Shestak, former president of the ABA: "I have often disagreed with the Federalist Society but I applaud the way they foster dialogue."
  - Geoffrey Stone, Dean, Chicago Law School: "Their ideas are absolutely legitimate ideas. They are respectable ideas that need to be debated, and that is the valuable function that the Society serves. I don't happen to agree with many of their conclusions, but the debate is important and valid."
  - Bert Neuborn, former president of the ACLU: "I have never been at a Federalist Society debate that has not been fairly run, that has not aimed high, that has not asked the hard questions and confronted the intellectual problems."

## **Judge Kavanaugh's Record at the Supreme Court**

**Topline:** The Supreme Court has adopted positions advanced in Judge Kavanaugh's opinions at least 13 times, and has overruled him only once.

\* \* \*

On at least 13 separate occasions, the Supreme Court has adopted positions advanced in Judge Kavanaugh's opinions. Those opinions (in chronological order) are:

1. ***Free Enterprise Fund v. Public Company Accounting Oversight Board***, 537 F.3d 667 (D.C. Cir. 2008): Judge Kavanaugh's dissent concluded that an agency's unprecedented insulation from executive accountability through two levels of for-cause removal protection violated the separation of powers. His position was adopted by the Supreme Court and quoted in Chief Justice Roberts' majority opinion in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).
2. ***Republican National Committee v. Federal Election Commission***, 698 F. Supp. 2d 150 (D.D.C. 2010): Judge Kavanaugh wrote a unanimous majority opinion for a three-judge district court upholding limits on soft money contributions to political parties. His opinion relied heavily on Supreme Court precedent rejecting similar challenges. The Supreme Court summarily affirmed his decision in *Republican National Committee v. FEC*, 561 U.S. 1040 (2010).
3. ***El-Shifa Pharmaceutical Industries Co. v. United States***, 607 F.3d 836 (D.C. Cir. 2010) (en banc): Judge Kavanaugh's opinion advanced a narrow reading of the political question doctrine, which allows courts to avoid deciding certain claims. He stressed the importance of the judiciary's role in adjudicating claims that the executive violated a federal statute. His position was vindicated by the Supreme Court in Chief Justice Roberts' opinion joined in full by Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012).
4. ***Jones v. United States***, 625 F.3d 766 (D.C. Cir. 2010): Judge Kavanaugh's opinion highlighted that the Fourth Amendment, as construed by longstanding Supreme Court precedent, applies to the placement of a GPS tracker on a defendant's vehicle. That position was vindicated by the Supreme Court in an opinion by Justice Scalia joined by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Sotomayor in *United States v. Jones*, 564 U.S. 400 (2012).
5. ***Bluman v. Federal Election Commission***, 800 F. Supp. 2d 281 (D.D.C. 2011): Judge Kavanaugh wrote a unanimous opinion for a three-judge district court panel (including a judge appointed by President Clinton) holding that foreign nationals have no First Amendment right to contribute to U.S. candidates or make expenditures advocating their election. The Supreme Court summarily and unanimously affirmed the decision in *Bluman v. FEC*, 132 S. Ct. 1087 (2012).
6. ***United States v. Papagno***, 639 F.3d 1093 (D.C. Cir. 2011): Judge Kavanaugh wrote a unanimous majority opinion concluding that the Mandatory Victims Restitution Act does not require defendants to pay the costs of internal (as opposed to governmental) investigations. His position was adopted by the Supreme Court in a unanimous opinion by Justice Breyer in *Lagos v. United States*, 138 S. Ct. 1684 (2018).
- 7 & 8. ***Doe v. Exxon Mobil Corp.***, 654 F.3d 11 (D.C. Cir. 2011): Judge Kavanaugh's dissent concluded that the Alien Tort Statute does not apply extraterritorially or to suits against corporations.

The Supreme Court vindicated his position on extraterritoriality in *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), in which Chief Justice Roberts' majority opinion cited Judge Kavanaugh's opinion. The Supreme Court subsequently vindicated Judge Kavanaugh's position with respect to foreign corporations in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), in which Justice Kennedy wrote the opinion for the Court.

9. ***Coalition for Responsible Regulation v. Environmental Protection Agency***, 2012 WL 6621785 (D.C. Cir. 2012): Judge Kavanaugh's dissent concluded that EPA had exceeded its statutory authority in issuing sweeping regulations of greenhouse gas emissions. His opinion was vindicated by the Supreme Court in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), in which Justice Scalia's opinion for the Court cited and quoted Judge Kavanaugh's dissent.

10. ***Grocery Manufacturers Association v. Environmental Protection Agency***, 704 F.3d 1005 (D.C. Cir. 2013): Judge Kavanaugh's dissent emphasized the narrow scope of the judge-made doctrine of prudential standing, which constrains the range of plaintiffs who can bring suit under federal statutes. His approach was vindicated by the Supreme Court in *Lexmark International Inc. v. Static Control Components*, 134 S. Ct. 1377 (2014), in which Justice Scalia's unanimous opinion for the Court quoted Judge Kavanaugh's opinion.

11. ***White Stallion Energy Center LLC v. EPA***, 748 F.3d 1222 (D.C. Cir. 2014): Judge Kavanaugh's dissent concluded that the relevant statute required EPA to consider costs when imposing burdensome emissions regulations. His position was vindicated by the Supreme Court in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), in which Justice Scalia cited his opinion.

12. ***Priests for Life v. Department of Health & Human Services***, 808 F.3d 1 (D.C. Cir. 2015): Judge Kavanaugh's dissent concluded that the contraceptive mandate "accommodation" adopted by HHS violated the Religious Freedom Restoration Act because the government could satisfy its asserted compelling interest in facilitating the availability of contraception through means that were less restrictive of religious exercise. Judge Kavanaugh's position was vindicated when the panel opinion was vacated by a unanimous Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

13. ***Wesby v. District of Columbia***, 816 F.3d 96 (D.C. Cir. 2016): Judge Kavanaugh's dissent concluded that police officers were entitled to qualified immunity from suit because they did not violate any clearly established constitutional law by arresting people partying late at night in a vacant home. His position was vindicated by the Supreme Court in a unanimous opinion by Justice Thomas in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

\* \* \*

On one occasion, the Supreme Court overruled a portion of an opinion by Judge Kavanaugh. In ***EME Homer City Generation, L.P. v. Environmental Protection Agency***, 696 F.3d 7 (D.C. Cir. 2012), Judge Kavanaugh's majority opinion concluded that an EPA rule exceeded the agency's statutory authority by requiring upwind States to reduce emissions by more than their own significant contributions to pollution in downwind States. In *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), the Supreme Court agreed that the rule could be unlawful in some applications, but concluded that wholesale invalidation of the rule was unwarranted. On remand, Judge Kavanaugh wrote a unanimous opinion upholding narrower challenges to some applications of the rule. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).

RATES OF AGREEMENT BETWEEN JUDGE KAVANAUGH AND CHIEF JUDGE GARLAND

**Judge Kavanaugh and Chief Judge Merrick Garland have agreed with one another in the overwhelming majority of cases.**

- Chief Judge Garland joined **96.43%** (27 of 28) of the published majority opinions authored by Judge Kavanaugh when the two sat together, dissenting only in a single case.
- Judge Kavanaugh joined **93.55%** (28 of 30) of the published majority opinions authored by Chief Judge Garland when the two sat together, dissenting only twice.
- Judge Kavanaugh and Chief Judge Garland have voted the same way in approximately **93%** of the matters that they have heard together.<sup>1</sup>

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<sup>1</sup> This figure accounts for published and unpublished decisions and orders, as drawn from Appendix 13C of Judge Kavanaugh's Senate Judiciary Questionnaire.

**Fragoso, Michael (OLP)**

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**From:** Fragoso, Michael (OLP)  
**Sent:** Wednesday, August 29, 2018 8:33 AM  
**To:** Abegg, John (McConnell)  
**Cc:** Lacy, Megan M. EOP/WHO  
**Subject:** TPs  
**Attachments:** Dark Money - BMK.docx; Ginsburg Standard - BMK.docx; Federalist Society - BMK.docx; Pro Bono Work - BMK.docx; Record at the Supreme Court.docx; Staff Secretary Role - BMK.docx; Garza v Hargan - BMK.docx; Abortion - BMK.docx; Racial Diversity - BMK.docx; Setting the Record Straight - Environmental Law.docx; Setting the Record Straight - Workers' Rights.docx; Respecting Precedent - BMK.docx; Stare Decisis - BMK.docx

Hi John,

Here's a slew of TPs that went over to SJC last night.

Best,  
Mike

Michael A. Fragoso  
Deputy Assistant Attorney General  
Office of Legal Policy  
U.S. Department of Justice  
(202) 514-2456  
[michael.fragoso@usdoj.gov](mailto:michael.fragoso@usdoj.gov)

## **Judge Kavanaugh and Abortion**

In his 12 years on the bench, Judge Kavanaugh has not addressed the merits of either *Roe v. Wade* or *Planned Parenthood v. Casey*. It would not be appropriate for him to do so in this hearing.

### **Facts:**

- During his tenure on the D.C. Circuit, Judge Kavanaugh has faced only one case directly involving abortion: *Garza v. Hargan*. In that case, the court considered whether a pregnant unaccompanied alien minor in U.S. custody had a constitutional right to an abortion facilitated by the federal government or whether that minor could be expeditiously placed with a sponsor to decide whether to pursue an abortion on her own.
  - Both litigating parties agreed that *Roe* and *Casey* applied; neither precedent was challenged in the case.
  - In his opinion, Judge Kavanaugh recognized the difficult situation confronting the pregnant minor and applied existing Supreme Court precedent. He refused to expand the Supreme Court's precedents in *Roe* and *Casey* to create a new constitutional right for undocumented alien minors to obtain an immediate abortion facilitated by the government.
  - Judge Kavanaugh also declined to make any broad rulings about the abortion rights of undocumented alien minors in Government custody when the question before the court did not require the court to do so.
  - Instead, he held that the Government was permitted to expeditiously transfer a pregnant, undocumented minor to an immigration sponsor (usually a family member or friend) before that minor made a final decision to have an abortion.
  - Given the narrow question resolved by *Garza*, liberal law professor Steve Vladeck noted, "I don't know that we can read too much one way or another" into Judge Kavanaugh's views. *CNN Newsroom w/ Poppy Harlow*, July 10, 2018.



- *Doe ex rel. Tarlow v. D.C.* (2007) was not about abortion.
  - *Tarlow* involved a class-action challenge to a 2003 D.C. policy permitting the Administrator of D.C.'s Mental Retardation and Developmental Disabilities Administration (MRDDA) under certain limited circumstances to authorize medical treatment on behalf of the small subset of intellectually disabled persons who had *never in their lives* been mentally capable of making healthcare decisions.
  - Judge Kavanaugh wrote for a unanimous panel that the 2003 D.C. policy was consistent with the relevant D.C. statute and did not violate due process. The plaintiff class's contrary view would have been without precedent in the United States and potentially deadly.
  - Judge Kavanaugh's opinion did not discuss abortion. The plaintiffs sought only to enjoin MRDDA's 2003 policy (which, according to D.C. law that had governed since 1998, did not apply to abortions). The case therefore did not involve abortion.
  - The only reference to abortion in the opinion was in the statutory background section, which noted that a D.C. statute explicitly provided that the Administrator's authority generally does *not* extend to abortion.
  - Two of the plaintiffs had undergone abortions *under a precursor to the challenged 2003 D.C. policy*. Because the question presented was limited to the statutory legality and constitutionality of the 2003 D.C. policy, however, the individual damages claims brought by the class representatives based on incidents that had occurred *before adoption of the 2003 D.C. policy* (including surgical abortions that occurred in 1978 and 1984) were not before the court.
    - In a separate proceeding, the plaintiffs who underwent abortions ultimately prevailed in their claims for damages.

- Judge Kavanaugh’s speeches do not shed light on his judicial views on abortion.
  - In his 2017 speech to the American Enterprise Institute on Chief Justice Rehnquist, Judge Kavanaugh did not offer any opinion about *Roe v. Wade* or other abortion-related cases.
    - Judge Kavanaugh provided a description of Chief Justice Rehnquist’s *Roe* dissent in the context of saying that the area of “unenumerated rights” was one of five areas in which Rehnquist had “a massive and enduring impact on American law.” That is a factual statement.
    - Judge Kavanaugh voiced no opinion about the merits of Rehnquist’s *Roe* dissent one way or the other. Rather, his description of the *Roe* dissent simply framed his discussion of Rehnquist’s famous opinion in *Washington v. Glucksberg*—a case that was about assisted suicide, not abortion.
    - Judge Kavanaugh stressed the importance of stare decisis, noting that Rehnquist was unable to command a majority in *Casey*, “perhaps because of stare decisis.”

## **Dark Money?**

Judge Brett Kavanaugh has no role in or responsibility for the so-called “dark money” groups that support his nomination, just as he has no role in or responsibility for those that oppose his nomination.

### **Facts:**

- Recent headlines *Liberal Activists Embrace ‘Dark Money’ in Supreme Court Fight* (Washington Post), *Anti-Kavanaugh Campaign Makes Extensive Use of ‘Dark Money’ Donations* (FreeBeacon), *“Dark Money” Democrats Spend Millions to Stop Kavanaugh Confirmation* (Inside Sources) make clear that there are well-financed efforts on both sides of the confirmation effort.
  - Demand Justice – a group run by former aides to Hillary Clinton and President Obama – has stated that it will spend at least \$5 million to block Judge Kavanaugh’s confirmation. The names of its donors and the size of their contributions have not been disclosed to the public.
  - Demand Justice is housed within a nonprofit, the Sixteen Thirty Fund, which raises cash from undisclosed donors. In its most recent tax return, the Sixteen Thirty Fund listed 60 donors as having donated a total of \$21 million, in contributions of up to \$7.3 million.
- Just as Judge Kavanaugh has no special insight into the “who, why, and how” of those who oppose him, he has no special insight into the “who, why, and how” of those who support him.

### **Judge Brett Kavanaugh – Federalist Society**

- **The Federalist Society is a mainstream legal group dedicated to a free exchange of ideas in the legal profession and law schools.**
  - It has chapters in law schools across the country that host events open to everyone.
  - It has annual meetings of lawyers, students, and professors that are open to anyone to attend.
  - Its website posts publications and audio and video records of its events.
  - It doesn't take political positions.
- Federalist Society events typically include people from **across the political spectrum**, discussing interesting legal questions and recent Supreme Court opinions.
  - Events usually involve a debate of some sort, and everyone from members of the ACLU to members of Congress participate in those debates.
  - Recent participants in Federalist Society events have included:
    - Nadine Strossen, former President of the ACLU
    - Paul Watford, a 9th Circuit Judge appointed by President Obama
    - Deepak Gupta, currently lead litigator in the Emoluments Clause litigation
    - Neil Eggleston, Counsel to both President Obama and President Clinton
  - Judge Kavanaugh participated in a panel at the 2017 annual convention. Others who appeared that year were:
    - Heather Gerken, Dean of Yale Law School
    - Paulette Brown, former President of the American Bar Association
    - Ted Shaw, former President of the NAACP Legal Defense Fund
    - Lisa Heinzerling, who served in various roles in President Obama's EPA

- The Federalist Society has been praised by many liberals over the years for its commitment to spirited, intellectual dialogue about the Constitution and the laws of our country:
  - **Justice Elena Kagan**, then-Dean of Harvard Law School, at the Federalist Society's annual student conference: **"I love the Federalist Society!"**
  - Alan Dershowitz, Harvard Law School: "I am a tremendous admirer of this organization...it has served an enormously valuable function, in getting the debate going about the meaning of the constitution."
  - Jerome Shestak, former president of the ABA: "I have often disagreed with the Federalist Society but I applaud the way they foster dialogue."
  - Geoffrey Stone, Dean, Chicago Law School: "Their ideas are absolutely legitimate ideas. They are respectable ideas that need to be debated, and that is the valuable function that the Society serves. I don't happen to agree with many of their conclusions, but the debate is important and valid."
  - Bert Neuborn, former president of the ACLU: "I have never been at a Federalist Society debate that has not been fairly run, that has not aimed high, that has not asked the hard questions and confronted the intellectual problems."

### **Judge Brett Kavanaugh: *Garza v. Hargan***

In *Garza*, Judge Kavanaugh decided only the narrow question whether a pregnant unaccompanied alien minor in U.S. custody could be expeditiously placed with an immigration sponsor before deciding whether to pursue an abortion. **The issue was not whether she had a “right” to an abortion.** Judge Kavanaugh dissented because he would have permitted the Government 11 days to attempt to place the plaintiff with a sponsor, to ensure that she had the support of family and friends as she made this decision. As he made clear at argument, his interest was in resolving the case in a way “satisfactory to everyone” when time was of the essence.

#### **Background:**

- Jane Doe, a 17-year-old undocumented immigrant, was apprehended at the border and placed in HHS custody. When she was discovered to be pregnant, she requested an abortion, which HHS declined to facilitate based on its existing policy. On her behalf, the ACLU sued HHS and won a TRO ordering the Government to allow the abortion. The Government took an expedited emergency appeal to the D.C. Circuit, which ruled “in a day’s time.” Judge Kavanaugh was on the panel majority that vacated the TRO and allowed the Government 11 days to attempt to place the plaintiff with a sponsor. He dissented when the en banc court subsequently reinstated the TRO. The Supreme Court subsequently vacated the en banc court’s decision.

#### **Facts:**

- The question resolved by the D.C. Circuit was narrow: whether a pregnant unaccompanied alien minor in U.S. custody could be expeditiously placed with a sponsor to decide whether to pursue an abortion.
  - In Judge Kavanaugh’s view, Jane Doe’s status as a minor was the key legal fact, because “[t]he law does not always treat minors in the same way as adults, as the Supreme Court has repeatedly emphasized in the abortion context.”



- Both litigating parties agreed that *Roe* and *Casey* applied; neither precedent was challenged in the case.
  - For that reason, Judge Kavanaugh applied *Casey* and did not opine on whether Jane Doe had the right to obtain the abortion; it had been “assumed for purposes of this case” by “[a]ll parties,” including the Department of Justice, that the *Roe* right applies to undocumented immigrants.
  - Judge Kavanaugh did not join Judge Henderson’s separate opinion arguing that the plaintiff did not have a legal right to an abortion at all.
- Judge Kavanaugh would have permitted the Government 11 days to attempt to place the plaintiff with an immigration sponsor for that purpose.
  - Judge Kavanaugh’s primary concern was in providing the pregnant undocumented minor access to family or friends at a difficult time: “The minor is alone and without family or friends. She is in a U.S. Government detention facility in a country that, for her, is foreign. She is 17 years old. She is pregnant and has to make a major life decision. Is it really absurd for the United States to think that the minor should be transferred to her immigration sponsor ordinarily a family member, relative, or friend before she makes that decision?”
    - Judge Kavanaugh made clear that his approach would not have **required** the minor to “talk to the sponsor about the [abortion] decision, or to obtain consent.”
  - He noted that “[t]he Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes” including parental consent and parental notice laws for minors seeking abortions.
- Judge Kavanaugh adopted a measured approach and noted at oral argument that he sought “a way to resolve this case, in a way satisfactory to everyone” when time was of the essence:

- He specifically warned that “the Government cannot use the transfer process as some kind of ruse to unreasonably delay the abortion.”
- Per liberal law professor Steve Vladeck, “[t]he issue was such a specific question about procedure ... so I don’t know that we can read too much one way or another” into Kavanaugh’s views on abortion (*CNN Newsroom w/ Poppy Harlow*, July 10, 2018).

**Judge Kavanaugh’s 12-year record shows that he rules impartially and has often ruled in favor of female litigants in cases that have been lauded for the “empathy” displayed:**

- He reversed the district court over a dissent by Judge Sentelle on grounds that a female defendant was prejudiced by her lawyer’s failure to introduce expert evidence of her suffering from battered woman syndrome. *United States v. Nwoye* (2016).
  - “Judge Kavanaugh was *empathetic*, able to look at the duress defense both from the perspective of the battered woman’s fear of leaving and the perspective of jurors asking the common-sense question ‘why didn’t she leave?’” Dan McLaughlin, *Judge Kavanaugh on Battered Women*, National Review, 7/12/2018.
- Judge Kavanaugh sided with a Foreign Service candidate who was disqualified from entrance into the Foreign Service based on her diagnosis with stage-one breast cancer, even though the cancer was treated. The court reversed for the lower court to determine whether the State Department’s actions were discriminatory. *Adams v. Rice* (2008).

**Ginsburg Standard:**  
**Supreme Court Nominees Must Not Comment on Specific Cases**

In declining to answer questions about his personal views on specific cases that may come before the D.C. Circuit or the Supreme Court in the future, Judge Brett Kavanaugh has adopted an approach that protects the core constitutional value of judicial independence and ensures that future litigants can be confident that he has an open mind in deciding their cases. This approach follows the well-established tradition of judicial nominees.

- **The Canons of Judicial Ethics forbid judges from offering any comments on cases or legal principles that are before the court or might come before them in the future.**
- **Justice Ruth Bader Ginsburg gave the most thorough explanation of the importance of this doctrine, explaining that she couldn't even provide "hints" as to her views on legal questions that might come before the court.**

**Background**

- The ABA's Canons of Judicial Ethics forbid judges from making "public comment on the merits of a matter pending or impending in *any* court." Code of Conduct for U.S. Judges Canon 3(A)(6).
- Justices appointed by presidents of both parties have explained that this canon limits the comments that nominees may make about particular cases:

- **Justice Ginsburg:**

"Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview to this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously."

“Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. A judge sworn to decide impartially can offer **no forecasts, no hints**, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.”

“If you inquire about something I have written or an authority on which I have relied, I will do my best to respond. But if you ask how I would have voted on an issue that can come back, I must abstain.”

*“I do not want to offer here **any hints** on matters I have not already addressed.”*

- **Justice Breyer:**

“I do not want to predict or commit myself on an open issue that I feel is going to come up in the Court.”

- **Chief Justice Roberts:**

“Senator, my answer is that the independence and integrity of the Supreme Court requires that nominees before this Committee for a position on that Court not forecast, give predictions, give hints about how they might rule in cases that might come before the Court.”

- **Justice Alito:**

“I think it’s important to draw a distinction between issues that could realistically come up before the courts and issues that are very much, that are still very much in play which is to say, the subject of litigation in the courts. ... [O]n issues that could realistically come up, it would be improper for me to express a view and I would not reach a conclusion regarding any issue like that before going through the whole judicial process that I described.”

- **Justice Sotomayor:**

“The ABA rule says no judge should make comments on the merits of any pending or impending case, and this clearly would be an impending case.”

- **Justice Kagan:**

“I think that in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases, because those cases themselves might again come before the Court.”

“I’ve pretty consistently said that I don’t want to, you know, grade, or give a thumbs-up or a thumbs-down on particular Supreme Court cases.”

- **Justice Gorsuch:**

“[A]s a judge, my job is to decide cases as they come to me. And if I start suggesting that I prefer or not prefer dislike this or that precedent, I’m sending a signal – a hint, a promise, a preview, as Justice Ginsburg called it – about how I’d rule in future cases, or those principles from that case are going to be at issue.”

“[F]or a judge to start tipping his or her hand about whether they like or dislike this or that precedent would send the wrong signal. It would send a signal to the American people that the judge’s personal views have something to do with the judge’s job. . . . I believe this firmly, that once a judge starts committing, promising, hinting, previewing, forecasting, agreeing or disagreeing with precedent at this confirmation table, we’re in the process then of campaign promises. And we’re in that process, Senator, I fear, of judges having to make commitments, tacit promises, hints, previews, as Justice Ginsburg called them, in order to become confirmed. Once we do that, I’m fearful for the independence of our judiciary.”

- **Senators have historically respected nominees' need to abide by this canon of judicial conduct:**

- Senator Leahy to Justice Ginsburg: “Well, I certainly don’t want you to have to lay out a test here in the abstract which might determine what your vote or your test would be in a case you have yet to see that may well come before the Supreme Court.”
- Senator Biden to Justice Ginsburg: “I do think it is appropriate to point out, Judge, that you not only have a right to choose what you will answer and not answer, but in my view you should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms, probably, over your tenure on the Court.”
- Senator Cardin to Justice Kagan: “I want to give you high grades on being responsive to the questions. I think you’ve been very direct where you can be and I thank you for that openness to the committee.”
- Senator Whitehouse to Justice Kagan: “I thank you again for the candid and complete nature of the way in which you are responding to questions here today.”
- Senator Leahy to Justice Kagan: “I’ve been involved in hearings either as a member or conducting them for 35 years of various judicial nominees. I can’t remember when anybody’s been asked such a wide variety of questions or answered them as forthrightly as you have.”

### **Judge Kavanaugh: Pro Bono Work**

While in private practice, Judge Brett Kavanaugh represented *pro bono* a Jewish congregation that wanted to build a permanent synagogue building in Bethesda, Maryland after years of meeting in rented, temporary spaces.

His work on the case demonstrates his commitment to public service and to respecting diverse communities.

#### **Facts:**

- In the late 1990s, the Jewish congregation of Adat Shalom purchased land in the D.C. suburb of Bethesda in order to build a permanent synagogue.
- Some residents of the neighborhood bitterly opposed construction of the synagogue. See Lisa Fine, “Synagogue Plan Divides Neighborhood,” *Washington Post*, 8/15/96.
  - Opponents raised vague, stereotypical reasons to oppose building a synagogue in the neighborhood—that it would somehow decrease property values and “ruin the character of the area.”
  - Neighborhood supporters of the synagogue told the *Washington Post* that they had been intimidated by opponents into keeping quiet and did not even want their names printed in the newspaper for fear of retaliation.
- After the local zoning board approved construction, Judge Kavanaugh represented the congregation when opponents went to federal court to try to stop it. The opponents claimed that the ordinance that allowed construction of a religious institution in a residential area was an impermissible endorsement of religion in violation of the Constitution.
  - Because the same zoning law applied to a range of other facilities—including libraries, museums, adult foster care homes, farmers markets, and fire stations—Judge Kavanaugh and his team argued that the law merely treated the synagogue like any other comparable institution and that allowing the congregation to build was not a close call as a matter of constitutional law.
  - The district court ruled in favor of the congregation, stating that the opponents’ arguments were “insufficient as a matter of law” to stop the



construction. *See Concerned Citizens of Carderock v. Hubbard*, 84 F. Supp. 2d 668 (D. Md. 2000).

- The congregation told a local newspaper at the time, “[O]ur victory we think is not only for our synagogue but for religious freedom.” Scott Harris, “Judge dismisses lawsuit against Adat Shalom Reconstructionist. Residents promise to appeal decision,” *The Gazette*, 2/9/00.
  - No appeal was ultimately filed.
- One of the leaders of the synagogue is a former Obama Administration official who recently praised Judge Kavanaugh as “a well-known and skilled” constitutional litigator who “ably and skillfully represented us.” *See* Allison Kaplan Sommer, “How Supreme Court Nominee Brett Kavanaugh Helped Build a Synagogue in D.C.” *Ha’aretz*, 7/12/18
  - Acknowledging that the synagogue’s membership was and remains largely liberal Democrats, the former official stated, “In Washington, professional collaborations and personal relationships sometimes exist despite significant political or philosophical differences. In my experience, that has been the case with Brett.”

## **Judge Brett Kavanaugh: Racial Diversity**

Judge Brett Kavanaugh decides cases without regard to the identities of the parties, and has often ruled to protect the rights of minority groups and individuals when that is what the law requires. He has been lauded for his well-known commitment to diversity; more than one-quarter of the law clerks that he has hired are minorities.

### **Facts:**

- In discrimination cases, Judge Kavanaugh has faithfully applied legal protections for racial minorities.
  - The **ACLU** wrote that “Kavanaugh’s record on Title VII racial discrimination claims is sympathetic to such claims” and that he has an “expansive view of liability for racial discrimination under Title VII.”
  - In *Ayissi-Etoh v. Fannie Mae*, he voted to permit a hostile-work-environment claim to proceed where an employee claimed that his supervisor had called him the n-word. He wrote separately to note that, consistent with cases in other courts, **even a single incident** of racial discrimination can establish a hostile work environment. He emphasized the unique nature of the n-word in American history: “*No other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism and discrimination against African-Americans.*”
  - In *Ortiz-Diaz v. HUD*, he joined an opinion reversing a lower-court ruling that a federal employee claiming that he was denied a transfer on the basis of race and national origin had not stated an actionable claim. He wrote separately to emphasize that “[a]ll discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII,” and that suggestions otherwise contradicted the text of Title VII.
  - In *Artis v. Bernanke*, he reversed the dismissal of a Title VII race discrimination complaint filed by a group of African-American secretaries alleging discrimination by the Federal Reserve Board.
- Judge Kavanaugh’s unanimous opinion in *South Carolina v. United States* which upheld South Carolina’s voter ID law but delayed its implementation to ensure fair treatment of minority voters called the Voting Rights Act “among the most

significant and effective pieces of legislation in American history,” noting that “[i]ts simple and direct legal prohibition of racial discrimination in voting laws and practices has dramatically improved the Nation, and brought America closer to fulfilling the promise of equality espoused in the Declaration of Independence and the Fourteenth and Fifteenth Amendments.”

- He wrote that “[r]acial insensitivity, racial bias, and indeed outright racism are still problems throughout the United States as of 2012. We see that reality on an all-too-frequent basis.”
- Judge Kavanaugh stands out for the diversity of his law clerks.
  - Yale Law Professor Amy Chua wrote about his “extraordinary mentorship” of law clerks, and noted that “Judge Kavanaugh’s clerks are racially and ethnically diverse ... a quarter of his clerks have been members of a minority group.” Kavanaugh Is A Mentor to Women, *Wall Street Journal*, 7/12/2018.
  - 13 of his 48 clerks (27%) have been minorities – 6 have been Asian American; 5 have been African American; and 2 have been Hispanic American.
  - Judge Kavanaugh has actively engaged with Black Law Students Associations on campus to promote clerkship opportunities and recruit minority candidates.
  - By contrast, over her 13 years on the D.C. Circuit, then-Judge Ruth Bader Ginsburg had no African-American clerks. Over her 25 years on the Supreme Court, from 1993-2018, Justice Ginsburg has only hired one African-American law clerk at the Supreme Court. Supreme Court Clerks are Not a Particularly Diverse Lot, *Washington Post*, Dec. 12, 2017.
  - A recent series of articles in the National Law Journal reported that since 2005, 85% of all Supreme Court clerks have been white. As a judge who sends many of this clerks to the Supreme Court, Judge Kavanaugh has directly contributed to what degree of diversity there is.
- Judge Kavanaugh has long been concerned about issues of racial bias and wrote his 1989 *Yale Law Journal* Note on procedures for combatting racial discrimination in jury selection.
  - Entitled “*Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*,” the Note discussed “the importance of allowing the defendant to be present at a *Batson* hearing” under “the due process clause of the Fifth Amendment.” It explained that exclusion of the

defendant from a hearing, “besides presenting opportunities for actual bias, certainly creates the appearance of bias,” and noted that procedural protections were needed to ferret out both explicit and implicit racial bias.

- Judge Kavanaugh’s personal background and experiences reflect his commitment to equal opportunity.
  - Judge Kavanaugh’s mother was a history teacher at two largely African-American public high schools in D.C., and taught him about the importance of civil rights at an early age.
  - He has spent years tutoring low-income youth almost all of whom are African-American or Latino at Washington Jesuit Academy in D.C., for which he now serves on the board.
  - He volunteers for Catholic Charities in underserved minority communities.

## **Judge Brett Kavanaugh's Record at the Supreme Court**

**Topline:** The Supreme Court has adopted positions advanced in Judge Kavanaugh's opinions at least 13 times, and has overruled him only once.

\* \* \*

On at least 13 separate occasions, the Supreme Court has adopted positions advanced in Judge Kavanaugh's opinions. Those opinions (in chronological order) are:

1. ***Free Enterprise Fund v. Public Company Accounting Oversight Board***, 537 F.3d 667 (D.C. Cir. 2008): Judge Kavanaugh's dissent concluded that an agency's unprecedented insulation from executive accountability through two levels of for-cause removal protection violated the separation of powers. His position was adopted by the Supreme Court and quoted in Chief Justice Roberts' majority opinion in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).
2. ***Republican National Committee v. Federal Election Commission***, 698 F. Supp. 2d 150 (D.D.C. 2010): Judge Kavanaugh wrote a unanimous majority opinion for a three-judge district court upholding limits on soft money contributions to political parties. His opinion relied heavily on Supreme Court precedent rejecting similar challenges. The Supreme Court summarily affirmed his decision in *Republican National Committee v. FEC*, 561 U.S. 1040 (2010).
3. ***El-Shifa Pharmaceutical Industries Co. v. United States***, 607 F.3d 836 (D.C. Cir. 2010) (en banc): Judge Kavanaugh's opinion advanced a narrow reading of the political question doctrine, which allows courts to avoid deciding certain claims. He stressed the importance of the judiciary's role in adjudicating claims that the executive violated a federal statute. His position was vindicated by the Supreme Court in Chief Justice Roberts' opinion joined in full by Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012).
4. ***Jones v. United States***, 625 F.3d 766 (D.C. Cir. 2010): Judge Kavanaugh's opinion highlighted that the Fourth Amendment, as construed by longstanding Supreme Court precedent, applies to the placement of a GPS tracker on a defendant's vehicle. That position was vindicated by the Supreme Court in an opinion by Justice Scalia joined by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Sotomayor in *United States v. Jones*, 564 U.S. 400 (2012).
5. ***Bluman v. Federal Election Commission***, 800 F. Supp. 2d 281 (D.D.C. 2011): Judge Kavanaugh wrote a unanimous opinion for a three-judge district court panel (including a judge appointed by President Clinton) holding that foreign nationals have no First Amendment right to contribute to U.S. candidates or make expenditures advocating their election. The Supreme Court summarily and unanimously affirmed the decision in *Bluman v. FEC*, 132 S. Ct. 1087 (2012).
6. ***United States v. Papagno***, 639 F.3d 1093 (D.C. Cir. 2011): Judge Kavanaugh wrote a unanimous majority opinion concluding that the Mandatory Victims Restitution Act does not require defendants to pay the costs of internal (as opposed to governmental) investigations. His position was adopted by the Supreme Court in a unanimous opinion by Justice Breyer in *Lagos v. United States*, 138 S. Ct. 1684 (2018).
- 7 & 8. ***Doe v. Exxon Mobil Corp.***, 654 F.3d 11 (D.C. Cir. 2011): Judge Kavanaugh's dissent concluded that the Alien Tort Statute does not apply extraterritorially or to suits against corporations.

The Supreme Court vindicated his position on extraterritoriality in *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), in which Chief Justice Roberts' majority opinion cited Judge Kavanaugh's opinion. The Supreme Court subsequently vindicated Judge Kavanaugh's position with respect to foreign corporations in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), in which Justice Kennedy wrote the opinion for the Court.

9. ***Coalition for Responsible Regulation v. Environmental Protection Agency***, 2012 WL 6621785 (D.C. Cir. 2012): Judge Kavanaugh's dissent concluded that EPA had exceeded its statutory authority in issuing sweeping regulations of greenhouse gas emissions. His opinion was vindicated by the Supreme Court in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), in which Justice Scalia's opinion for the Court cited and quoted Judge Kavanaugh's dissent.

10. ***Grocery Manufacturers Association v. Environmental Protection Agency***, 704 F.3d 1005 (D.C. Cir. 2013): Judge Kavanaugh's dissent emphasized the narrow scope of the judge-made doctrine of prudential standing, which constrains the range of plaintiffs who can bring suit under federal statutes. His approach was vindicated by the Supreme Court in *Lexmark International Inc. v. Static Control Components*, 134 S. Ct. 1377 (2014), in which Justice Scalia's unanimous opinion for the Court quoted Judge Kavanaugh's opinion.

11. ***White Stallion Energy Center LLC v. EPA***, 748 F.3d 1222 (D.C. Cir. 2014): Judge Kavanaugh's dissent concluded that the relevant statute required EPA to consider costs when imposing burdensome emissions regulations. His position was vindicated by the Supreme Court in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), in which Justice Scalia cited his opinion.

12. ***Priests for Life v. Department of Health & Human Services***, 808 F.3d 1 (D.C. Cir. 2015): Judge Kavanaugh's dissent concluded that the contraceptive mandate "accommodation" adopted by HHS violated the Religious Freedom Restoration Act because the government could satisfy its asserted compelling interest in facilitating the availability of contraception through means that were less restrictive of religious exercise. Judge Kavanaugh's position was vindicated when the panel opinion was vacated by a unanimous Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

13. ***Wesby v. District of Columbia***, 816 F.3d 96 (D.C. Cir. 2016): Judge Kavanaugh's dissent concluded that police officers were entitled to qualified immunity from suit because they did not violate any clearly established constitutional law by arresting people partying late at night in a vacant home. His position was vindicated by the Supreme Court in a unanimous opinion by Justice Thomas in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

\* \* \*

On one occasion, the Supreme Court overruled a portion of an opinion by Judge Kavanaugh. In ***EME Homer City Generation, L.P. v. Environmental Protection Agency***, 696 F.3d 7 (D.C. Cir. 2012), Judge Kavanaugh's majority opinion concluded that an EPA rule exceeded the agency's statutory authority by requiring upwind States to reduce emissions by more than their own significant contributions to pollution in downwind States. In *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), the Supreme Court agreed that the rule could be unlawful in some applications, but concluded that wholesale invalidation of the rule was unwarranted. On remand, Judge Kavanaugh wrote a unanimous opinion upholding narrower challenges to some applications of the rule. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).

## Judge Brett Kavanaugh Respects Judicial Precedent

- Judge Brett Kavanaugh has long stressed the critical importance of following precedent to ensure stability in the law.
  - In his 2016 article *Judge as Umpire*, he wrote: “[T]o be a good judge and good umpire, you ... have to follow the established rules.... Following established rules includes stare decisis: we follow the cases that have been decided.” “We should not try to wriggle out of what the Supreme Court said, or to twist what the Supreme Court said, or to push the law in a particular direction, but to follow what the Supreme Court said in both letter and spirit.” 65 Cath. U. L. Rev. 683 (2016).
- Judge Kavanaugh’s 12-year record on the D.C. Circuit shows that he has stood firm on the importance of adhering even to Circuit precedents that he would not have decided the same way.
  - In *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013), for example, Judge Kavanaugh noted that the case was controlled by a D.C. Circuit precedent that he harbored some skepticism of. He wrote: “Although I respectfully think the case was wrongly decided on this issue, **that’s water over the dam in this Court. We are bound to apply that precedent.**”
- In fact, Judge Kavanaugh has consistently emphasized that judges must follow both the letter *and* spirit of precedents:
  - In *United States v. Martinez Cruz*, 736 F.3d 999 (D.C. Cir. 2013), Judge Kavanaugh dissented when the majority held that the government has the burden of persuasion in a case attacking a prior criminal conviction. He wrote: “[I]t is essential that we follow both the words and the music of Supreme Court opinions. This case is controlled by at least the music, if not also the words, of the Supreme Court’s decision in *Parke v. Raley*.”
- Judge Kavanaugh has **never** voted to overturn Circuit precedent while sitting as part of the en banc court.
- D.C. Circuit rules also allow D.C. Circuit panels to overrule precedents through a procedure known as an “*Irons* footnote.”



- Over 12 years on the bench, Judge Kavanaugh has **never once** included an *Irons* footnote in any of his hundreds of opinions.

## Setting the Record Straight—Judge Kavanaugh and Environmental Law

### Top-Line Summary:

- **Judge Kavanaugh’s 12-year record in environmental law cases shows that he is fair and independent. He decides cases impartially based on text and precedent.**
- **Judge Kavanaugh follows the law and does not show favoritism toward any particular side. He frequently upholds the EPA’s regulatory activity.**
- **MYTH:** Judge Kavanaugh is “consistently anti-environment” and would destroy the prospects for reasonable environmental regulation.
  - **FACT:** Judge Kavanaugh faithfully decides environmental cases as he decides all cases involving review of agency action: according to the laws enacted by Congress and consistent with precedent.
  - Professors and practitioners on all sides of environmental issues agree that Judge Kavanaugh applies the law evenhandedly in environmental cases.
    - Richard J. Lazarus, an environmental law professor at Harvard, explained that some environmental groups have mischaracterized Judge Kavanaugh’s record: “I don’t think you can look at all these cases and say this is someone who is single-mindedly hostile toward environmental lawmaking.” [NY Times](#) (July 10, 2018).
    - Jonathan Wood, an attorney at Pacific Legal Foundation, said that on administrative law (including environmental law cases), “Judge Kavanaugh has proven to be a thoughtful and careful judge, he’s trying to get the right result regardless of the politics or other underlying factors.” Judge Kavanaugh seeks “the right answer under the law” without imposing his views of “the best policy.” [Law360](#) (July 10, 2018).

- Judge Kavanaugh respects the separation of powers and the plain text of statutes enacted by Congress. He is thoughtful, concerned, and appropriately engaged with science.
- Judge Kavanaugh has upheld the EPA’s regulatory activity when it acts lawfully – consistent with statutory text. He decides each case based on the facts and applicable law.
  - In 2014, Judge Kavanaugh held for the EPA and Army Corps of Engineers when they promulgated guidance for permits under the Clean Water Act and the Surface Mining Control and Reclamation Act. [\*Nat’l Mining Ass’n v. McCarthy\*](#), 758 F.3d 243 (D.C. Cir. 2014).
  - In 2010, Judge Kavanaugh held for the EPA and rejected a challenge brought by trucking associations to a rule that regulated transportation refrigeration units in trucks. Reviewing the relevant statutory criteria, he concluded that the EPA acted reasonably. [\*American Trucking Ass’n v. EPA\*](#), 600 F.3d 624 (D.C. Cir. 2010).
- When the EPA acts beyond the scope of its statutory authority, Judge Kavanaugh faithfully applies the enacted law as well as D.C. Circuit and Supreme Court precedent regarding permissible agency rulemaking to set aside those agency actions.
  - Applying “bedrock separation of powers principles,” Judge Kavanaugh concluded that the EPA exceeded statutory authority from Congress when it issued a rule regulating the use of hydrofluorocarbons in [\*Mexichem Fluor v. EPA\*](#), 866 F.3d 451 (D.C. Cir. 2017).
    - “However much” the Court “might sympathize or agree with EPA’s policy objectives, EPA may act

only within the boundaries of its statutory authority.”

- Reviewing a proposed air quality regulation enacted by the EPA, Judge Kavanaugh wrote a separate opinion to explain why it was unreasonable for the EPA to exclude the consideration of costs in determining whether it is “appropriate” to impose significant new regulations on electric utilities. [\*White Stallion Energy Ctr. v. EPA\*](#), 748 F.3d 1222 (D.C. Cir. 2014).
  - Congress had amended the Clean Air Act to cabin EPA’s discretion. The EPA Administrator could regulate utilities only if such regulation was “appropriate and necessary.”
  - In determining whether it is “appropriate” for an agency to regulate an activity, Judge Kavanaugh explained that “it is well-accepted that consideration of costs is a central and well-established part of the regulatory decisionmaking process.”

## **Setting the Record Straight on Judge Kavanaugh and Workers' Rights**

### **Top-Line Summary:**

- **Judge Kavanaugh's 12-year-record in employment and workers' rights cases shows that he is fair and independent. He decides cases impartially based on text and precedent.**
- **Judge Kavanaugh does not show favoritism toward any particular side and follows the law. He has ruled for American workers, plaintiffs alleging discrimination, and victims of unfair labor practices.**

### **Judge Kavanaugh rules in favor of workers, consistent with the law.**

- **He does not stand for racially hostile work environments.** In *Ayissi-Etoh v. Fannie Mae* (2013), Judge Kavanaugh voted to reverse a lower court decision rejecting the discrimination claims of a black employee who had been called a racial epithet.
  - Judge Kavanaugh also wrote separately to say even a single use of the n-word by a supervisor suffices to create a racially hostile work environment: "No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans."
- **He urged his court to further recognize race-based employment transfers as discrimination.** In *Ortiz-Diaz v. HUD* (2017), Judge Kavanaugh called on the D.C. Circuit to recognize that all race-based decisions to transfer an employee out of his or her office "plainly constitute[] discrimination."
- **He reversed the dismissal of a Title VII race discrimination complaint filed by a group of African-American secretaries alleging discrimination by the Federal Reserve Board** (*Artis v. Bernanke* (2011)).
- **He has granted numerous petitions for enforcement of NLRB orders prohibiting employers' unfair labor practices:**

- *Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB* (2008) (employer had engaged in an unfair labor practice by withdrawing recognition of a union following a merger);
  - *United Food & Commercial Workers, AFL-CIO v. NLRB* (2008) (employer committed an unfair labor practice by failing to engage in a particular type of bargaining);
  - *Veritas Health Services, Inc. v. NLRB* (2012) (employer had committed an unfair labor practice by refusing to bargain collectively with the employee union);
  - *E.I. du Pont de Nemours v. NLRB* (2007) (employer failed to provide relevant information to a union about cost-saving measures at a factory);
  - *Fort Dearborn Co. v. NLRB* (2016) (joined opinion written by Judge Rogers; employer acted with anti-union animus by threatening employee during collective bargaining negotiations and then suspending and firing the employee).
- **He joined an opinion holding that D.C. government workers were entitled to higher wages** (*Cannon v. District of Columbia* (2013)).
  - **MYTH:** Judge Kavanaugh’s decisions show bias against workers.
    - **FACT:** This charge is baseless. Judge Kavanaugh rules in favor of employees when the law warrants such a ruling and he has done so repeatedly. In their desperation to further a predetermined “anti-worker” narrative, Judge Kavanaugh’s opponents have cobbled together a smattering of cases that have very little to do with “workers’ rights.”
      - *Rattigan v. Holder* involved an employee of the FBI whose eligibility for a security clearance was investigated. Longstanding Supreme Court precedent established that decisions denying security clearances are not judicially reviewable, and the dispute between the majority and Judge Kavanaugh’s dissenting opinion simply concerned the scope of that prohibition.

- *American Federation of Government Employees v. Gates* involved an issue of statutory interpretation, namely, whether a 2004 statute granted the Department of Defense *temporary* authority to curtail collective bargaining practices. Judge Kavanaugh concluded that the statute did grant the Department such authority, but that collective bargaining was required to resume beginning in November 2009.
- *NLRB v. CNN* likewise did not principally involve “workers’ rights” but instead two highly technical and fact-bound questions, namely, whether CNN had been a joint employer of employees that worked for another entity, and whether CNN was a “successor employer” to that entity.
- Judge Kavanaugh’s dissent in *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives* involved a claim against a component of Congress. Judge Kavanaugh concluded that the Constitution’s Speech or Debate Clause barred a lawsuit based on the plaintiff’s performance of a legislative activity.
  - It is absurd to contend that this conclusion reflects hostility to discrimination claims since, as Judge Kavanaugh observed, the federal statute at issue supplied an alternative procedure that would give the plaintiff all of the remedies available in a federal district-court action.



## **Judge Brett Kavanaugh White House Staff Secretary**

The White House Staff Secretary manages the flow of documents and information to the President. It is not a legal or policy role.

### **Facts:**

- Judge Brett Kavanaugh served for nearly three years as White House Staff Secretary after being named to the role in July 2003.
- **The Staff Secretary plays an important procedural role (rather than a substantive role) in the White House. The Staff Secretary is a “traffic cop” that coordinates the paper flow in the White House.**
  - Judge Kavanaugh was **responsible for managing paper** that crossed the President’s desk, such as speeches, memorandums, and the nightly briefing book. **He ensured that archiving requirements were satisfied, that the President received advice and opinions from a full range of staff, and that nothing was lost in the shuffle.**
  - He also **staffed the President on many trips**, visiting more than 30 countries and over 40 states.
  - **The job of Staff Secretary requires the even hand of an honest broker, prudent judgment, and attention to detail.**
- The Staff Secretary **does not inject his personal views** into the paper-flow process. His role requires him to maintain strict neutrality and impartiality.
  - “[T]he staff secretary’s job is not to influence the president but to ensure he gets a balanced diet of viewpoints from all the relevant people on staff. . . . You’re certainly not trying to put your thumb on the scale between options. The point is to say, ‘Here’s the issues, here’s the options, here’s what people think.’” Todd Stern, President Clinton’s Staff Secretary from June 1995-March 1998 *USA Today*, Aug. 15, 2018.
  - “[T]he nature of the job of the White House staff secretary means that most documents that ‘circulated through Kavanaugh’s office’ while he had that job wouldn’t really tell senators anything about him, and

shouldn't be considered on par with documents he himself produced.”  
Yuval Levin, *The Kavanaugh Paper Flow*, National Review

- “[M]any a time I heard somebody say, you know what, Brett Kavanaugh, his edits made my arguments stronger and better, and they had no idea what his personal views were but he understood what theirs were and crystalized it.” Karl Rove, Newsweek 7/10/2018
- In the Bush White House, the Staff Secretary was not an originator of documents. He did not, for example, produce presidential decision memos or other policy memos. See Theodore Ullyot, *On Kavanaugh, the Senate Shouldn't Take The Democrats' Bait*, Washington Post 8/3/2018
- The Senate Intelligence Committee, under the leadership of Senator Dianne Feinstein, conducted a comprehensive review of the CIA's detention and interrogation program involving 6.3 million documents. **Judge Kavanaugh was not mentioned in the Committee's public report.**

### **Judge Brett Kavanaugh Respects Judicial Precedent**

Judge Brett Kavanaugh respects precedent. He is an impartial and even-handed judge who exercises judicial power prudently and with restraint.

#### **Judge Kavanaugh has long spoken and written about the importance of precedent.**

- He has written: “[T]o be a good judge and good umpire, you ... have to follow the established rules.... Following established rules includes stare decisis: we follow the cases that have been decided.” “We should not try to wriggle out of what the Supreme Court said, or to twist what the Supreme Court said, or to push the law in a particular direction, but to follow what the Supreme Court said in both letter and spirit.” *Judge as Umpire*, 65 Cath. U. L. Rev. 683 (2016).
- He has stated that for a precedent to be overruled, it must be “not just wrong but a case with serious practical consequences.” *Speech, Remembering Justice Scalia*, Scalia Law School (2016).

#### **Judge Kavanaugh’s 12-year record on the bench shows that he has faithfully applied precedent.**

- Judge Kavanaugh has expressly invoked stare decisis in at least 9 opinions he has authored.
- Judge Kavanaugh has adhered to precedents even when he views them as “wrongly decided” or open to fair criticism. In *Center for Biological Diversity v. EPA* (2013), for example, he described a D.C. Circuit precedent as “wrongly decided,” yet emphasized that his view of the correct reading of the statute was “water over the dam” because he was “bound to apply that precedent.”

#### **Judge Kavanaugh has applied a broad view of stare decisis, following both the result *and* the reasoning of precedents.**

- In *United States v. Duvall* (2013), he stated that “stare decisis” applies not just to the “result” but also “the reasoning” of Supreme Court cases. In *Winslow v. FERC* (2009), he said “stare decisis both in letter and in spirit ... [is] a critical aspect of our hierarchical Judiciary.”

**Judge Kavanaugh co-authored an 800-page book on precedent—“The Law of Judicial Precedent”—with several other judges, appointed by Presidents of both parties.** The book makes clear that:

- a change in a court’s personnel should “should *not* throw former decisions open to reconsideration or justify their reversal except on grounds that would have warranted such a course if the makeup of the court had remained the same” (p. 415);
- “judges are traditionally exhorted to keep the law stable” (p. 411); and
- “a court on which certain judges have come to determine that a prior case was wrongly decided . . . cannot properly overrule the prior case without considering both the doctrine of stare decisis and the factors that it requires” (p. 416).

**FULL VERSION:  
JUDGE KAVANAUGH RESPECTS JUDICIAL PRECEDENT**

**Judge Kavanaugh respects precedent:**

- **Judge Kavanaugh has long spoken and written about the importance of precedent:**
  - **Upon his nomination to the D.C. Circuit:** “I will interpret the law as written and not impose personal policy preferences. I’ll exercise judicial power prudently and with restraint. I’ll follow precedent in all cases fully and fairly.” (May 2006 Judiciary Committee Hearing)

“It is crucial . . . for a lower court judge to follow Supreme Court precedent faithfully in all instances. Whether you might agree with it, you might have decided differently, you have to follow that precedent faithfully.” (April 2004 Judiciary Committee Hearing)
  - **Upon his nomination to the Supreme Court:** “A judge must be independent and must interpret the law, not make the law.... And a judge must interpret the Constitution as written, informed by history and tradition and precedent.” (July 9, 2018)
  - ***Judge as Umpire*, 65 Cath. U. L. Rev. 683 (2016):** “[T]o be a good judge and good umpire, you ... have to follow the established rules.... Following established rules includes stare decisis: we follow the cases that have been decided.” “We should not try to wriggle out of what the Supreme Court said, or to twist what the Supreme Court said, or to push the law in a particular direction, but to follow what the Supreme Court said in both letter and spirit.”
  - **2013 Sumner Canary Memorial Lecture**, 64 Case W. Res. L. Rev. 711 (2014): “It is ... essential for courts to be as consistent as we possibly can.” Courts, in wartime cases especially, should “not pull the rug out from under the executive branch when it has relied on what the courts have said before.”
  - **Judge Kavanaugh has publicly stated that for a precedent to be overruled, it must be “not just wrong but a case with serious practical consequences.”** Speech, *Remembering Justice Scalia*, Scalia Law School (June 2, 2016).

**Judge Kavanaugh’s cases, over 12 years, show that he has faithfully applied precedent:**

- **Judge Kavanaugh has expressly invoked “stare decisis” in at least 9 opinions he authored.<sup>1</sup>**

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<sup>1</sup> *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 736 (D.C. Cir. 2016) (dissent); *Winslow v. F.E.R.C.*, 587 F.3d 1133, 1135 (D.C. Cir. 2009); *United States v. Martinez Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (dissent); *Klayman v. Obama*, 805 F.3d 1148, 1149 (D.C. Cir. 2015) (concurring in the denial of rehearing en banc); *Omar v. McHugh*, 646 F.3d 13, 21 (D.C. Cir. 2011); *Agape Church, Inc. v. FCC*, 738

- **Judge Kavanaugh has adhered to precedents, even when he views them as “wrongly decided” or subject to sincere criticism:**
  - In *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013), Judge Kavanaugh explicitly described a D.C. Circuit precedent upholding a broad statutory reading by the EPA as “wrongly decided,” yet nonetheless adhered to it. He emphasized that his view of the correct reading was “water over the dam” and that he was “bound to apply that precedent.”
  - In *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011) where the court dismissed a challenge to the Department of Energy’s attempted withdrawal from an application submitted to the Nuclear Regulatory Commission for the Yucca Mountain nuclear waste project Judge Kavanaugh (in a concurrence) observed that the NRC, an independent agency, had the final word on whether to terminate the project. He noted that *Humphrey’s Executor v. United States* (1935), which approved the creation of independent agencies, was “protected by stare decisis” even as he noted that the Supreme Court’s later “wording and reasoning” in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010) were “in tension” with it. He further noted the various pitfalls and problematic “repercussions” of the precedent, but nonetheless concluded that the case was an “entrenched Supreme Court precedent, protected by stare decisis” and emphasized that he was not “suggest[ing] that the case should be overturned.” *Id.* at 446.
  - In *Morley v. CIA*, 719 F.3d 689 (D.C. Cir. 2013) (concurring), Judge Kavanaugh observed that the D.C. Circuit’s test for whether a winning FOIA plaintiff gets attorney’s fees lacks a “basis in the statutory text” and has caused “real-world problems.” But he faithfully applied the precedent, noting that “we of course have to adhere to the ... standard set forth in our precedents.” When the case recently came back up on appeal, the Judge again reiterated, in a *per curiam* opinion, that “we of course must and do adhere to our circuit precedent” notwithstanding these concerns. *Morley v. CIA*, No. 17-5114, slip op. at 6 n.1 (D.C. Cir. July 9, 2018).
  - In *Klayman v. Obama*, 805 F.3d 1148 (D.C. Cir. 2015), Judge Kavanaugh concurred in the denial of rehearing en banc because then-applicable law, *Smith v. Maryland* (1979), prevented plaintiffs despite “sincere and passionate concerns” about a government metadata collection program from prevailing. He stated: “That precedent remains binding on lower courts in our hierarchical system of absolute vertical stare decisis.”

**Judge Kavanaugh has endorsed a broad view of stare decisis, following both the letter and spirit of precedents:**

- In *United States v. Duvall*, 740 F.3d 604 (D.C. Cir. 2013), he stated that “stare decisis applies to Supreme Court precedent in two ways. First, the *result* in a given Supreme Court case binds all lower courts. Second, the reasoning of a Supreme Court case also binds lower courts. So

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F.3d 397, 414 (D.C. Cir. 2013) (concurring); *In re Aiken Cty.*, 645 F.3d 428, 446 (D.C. Cir. 2011) (concurring); *Americans for Clean Energy v. EPA*, 864 F.3d 691, 696 (D.C. Cir. 2017).

once a rule, test, standard, or interpretation has been adopted by the Supreme Court, that same rule, test, standard, or interpretation must be used by lower courts in later cases.”

- In *United States v. Martinez-Cruz*, 736 F.3d 999 (D.C. Cir. 2013) where the majority held that the government has the burden of persuasion in a case attacking a prior criminal conviction Judge Kavanaugh dissented on grounds that the decision “deviate[d] from Supreme Court precedent and create[d] an unwarranted circuit split.” He wrote: “[I]t is essential that we follow both the words and the music of Supreme Court opinions. This case is controlled by at least the music, if not also the words, of the Supreme Court’s decision in *Parke v. Raley*.”
- In *Winslow v. FERC*, 587 F.3d 1133 (D.C. Cir. 2009) where the court held a motion for prejudgment interest was time-barred the plaintiff argued that unhelpful language in *Osterneck v. Ernst & Whinney* (1989) was “dicta,” urged the court to “take a different course,” and argued that his position better comported with anti-discrimination policies. The Judge “decline[d] Winslow’s invitation to flout the Supreme Court’s decision,” calling “stare decisis both in letter and in spirit ...a critical aspect of our hierarchical Judiciary.” *Id.* The Judge further noted that “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *Id.*
- In *Omar v. McHugh*, 646 F.3d 13, 21 (D.C. Cir. 2011), Judge Kavanaugh concurred in the denial of rehearing en banc, noting that “the inquiry that Omar asks this Court to undertake in this habeas case reviewing the conditions Omar might face in Iraqi custody is the precise inquiry that the Supreme Court in *Munaf* already rejected. As a lower court, even apart from possible res judicata problems with Omar’s habeas corpus submission, we have no authority to toss *Munaf* aside in this manner.” He then reiterated that “[v]ertical stare decisis both in letter and in spirit is a critical aspect of our hierarchical Judiciary.”” *Id.*
- **Judge Kavanaugh has warned that, because of the force of precedent, future Executive Branches cannot “readily undo” “binding judicial precedent protected by stare decisis.”** *Al-Bihani v. Obama*, 619 F.3d 1, 47 (D.C. Cir. 2010) (concurring in the denial of rehearing en banc).
- **Judge Kavanaugh has invoked the *Marks* rule—guidance about the stare decisis value of splintered decisions—in at least 11 opinions he has authored, showing he pays careful attention to prior precedent and follows the law governing the interpretation of precedent.<sup>2</sup>**

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<sup>2</sup> *United States v. Duvall*, 705 F.3d 479 (2013); *United States v. Duvall*, 740 F.3d 604 (2013) (concurring in the denial of rehearing en banc); *United States Telecom Association v. FCC*, 855 F.3d 381, 432 n.10 (2017) (dissenting from the denial of rehearing en banc); *Stephens v. U.S. Airways Group, Inc.*, 644 F.3d 437, 442 n.1 (2011) (concurring in the judgment); *Priests for Life v. U.S. Dept. of Health and Human Services*, 808 F.3d 1, 22 (2015) (dissenting from the denial of rehearing en banc); *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 993 n.5 (2013) (concurring); *EMILY’s List v. Federal Election Com’n*, 581 F.3d 1, 9 n.8 (2009); *In re Navy Chaplaincy*, 534 F.3d 756, 759 n.2 (2008); *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337 (2015); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1061 n.8 (2008) (dissenting); *United States v. Askew*, 529 F.3d 1119, 1150 (2008) (en banc) (dissenting).

- **Judge Kavanaugh has never once included an *Irons* footnote**—essentially a substitute for *en banc* review by which a D.C. Circuit panel can, in consultation with every member of the court, overrule prior precedent in any opinion for which he served on the panel. He has consented to “*Irons* footnotes” in other panels’ opinions only four times and in each case, the vote to overrule past precedent was unanimous.
- **Judge Kavanaugh has maintained consistency in the law by looking to the precedents of other jurisdictions, even though they are non-binding:**
  - *Vann v. U.S. Dep’t of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012) (evaluating the application of *Ex Parte Young* against relevant Ninth and Tenth Circuit precedents)
  - *Mills v. Giant of Maryland, LLC*, 508 F.3d 11, 14 (D.C. Cir. 2007) (considering precedents from, *inter alia*, Iowa, New York, and Texas in deciding a failure-to-warn case)
  - *Winslow v. FERC*, 587 F.3d 1133, 1135-36 (D.C. Cir. 2009) (citing to precedents from the First, Fourth, Sixth, Ninth, and Tenth Circuits in deciding pre-judgment interest case)

**Judge Kavanaugh has issued numerous narrow holdings favoring incremental remedies that minimize disruption:**

- Judge Kavanaugh explained that the PCAOB’s invalid structure could be cured by “giving the SEC express authority to direct and supervise all Board actions and to fire Board members at will.” *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 715 (D.C. Cir. 2008) (dissent). The Supreme Court embraced that **incremental remedy** when it held “the unconstitutional tenure provisions are severable from the remainder of the statute.” *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 508 (2010).
- Judge Kavanaugh proposed curing the invalid structure of the CFPB “by severing the for-cause removal provision from the statute” and thus allowing the CFPB to “**continue to operate.**” *PHH Corp. v. CFPB*, 881 F.3d 75, 200 (D.C. Cir. 2018) (en banc) (dissent).
- When Judge Kavanaugh held that several EPA emissions budgets were invalid, he left the EPA’s rule in place to **allow the EPA an opportunity “to reconsider” it.** *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015).

**Judge Kavanaugh co-wrote *the book on precedent*, co-authored by leading judges appointed by Presidents of both parties, which makes clear that:**

- a change in a court’s personnel should “should *not* throw former decisions open to reconsideration or justify their reversal except on grounds that would have warranted such a course if the makeup of the court had remained the same” (p. 415);
- “judges are traditionally exhorted to keep the law stable” (p. 411);
- “a court on which certain judges have come to determine that a prior case was wrongly decided . . . cannot properly overrule the prior case without considering both the doctrine of stare decisis and the factors that it requires” (p. 416).



**Fragoso, Michael (OLP)**

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**From:** Fragoso, Michael (OLP)  
**Sent:** Wednesday, August 29, 2018 11:23 AM  
**To:** Abegg, John (McConnell)  
**Cc:** Lacy, Megan M. EOP/WHO  
**Subject:** FW: BMK TPs  
**Attachments:** Heller II and Second Amendment - BMK.docx; 9-11 - BMK.docx; LGBT Rights - BMK -.docx; Rice v. Cayetano - BMK.docx; SC Voter ID - BMK.docx; BMK - Independent and Impartial Judge.docx; Judge Brett Kavanaugh by the Numbers - .docx

More

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**From:** Bumatay, Patrick J. (OLP)  
**Sent:** Wednesday, August 29, 2018 11:11 AM  
**To:** Davis, Mike (Judiciary-Rep) (b) (6); Mehler, Lauren (Judiciary-Rep) (b) (6) >  
**Cc:** Lichter, Jennifer (OLP) <jlichter@jmd.usdoj.gov>; (b)(6) per CRM (b)(6) per CRM; Kenny, Steve (Judiciary-Rep) (b) (6)  
(b)(6) per CRM; Fragoso, Michael (OLP) <mfragoso@jmd.usdoj.gov>  
**Subject:** RE: BMK TPs

All – here's the second batch of TPs.

Regards,  
Patrick

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**From:** Davis, Mike (Judiciary-Rep) (b) (6)  
**Sent:** Tuesday, August 28, 2018 7:25 PM  
**To:** Bumatay, Patrick J. (OLP) <pajbumatay@jmd.usdoj.gov>; Mehler, Lauren (Judiciary-Rep) (b) (6) >  
**Cc:** Lichter, Jennifer (OLP) <jlichter@jmd.usdoj.gov>; (b)(6) per CRM (b)(6) per CRM; Kenny, Steve (Judiciary-Rep) (b) (6)  
(b)(6) per CRM  
**Subject:** RE: BMK TPs

Roger.

+ Steve Kenny

Thank you,  
Mike Davis

Mike Davis, Chief Counsel for Nominations  
United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
(b) (6)

202-224-(b) (6) direct

(b) (6) cell

202-224-9102 fax

(b) (6)

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**From:** Bumatay, Patrick J. (OLP) [<mailto:Patrick.J.Bumatay@usdoj.gov>]

**Sent:** Tuesday, August 28, 2018 7:18 PM

**To:** Mehler, Lauren (Judiciary-Rep) (b) (6); Davis, Mike (Judiciary-Rep)

(b) (6) >

**Cc:** Lichter, Jennifer (OLP) <[Jennifer.Lichter@usdoj.gov](mailto:Jennifer.Lichter@usdoj.gov)>; (b)(6) per CRM (b)(6) per CRM >

**Subject:** BMK TP's

Lauren – here is the first round of Administration talking points for the Kavanaugh hearing.

Regards,

Patrick

## **Judge Brett Kavanaugh's Service During and After 9/11**

Judge Brett Kavanaugh has been in public service for virtually his entire adult life and was serving in the White House when terrorists attacked America on September 11, 2001. Judge Kavanaugh's service after 9/11 should be commended.

### **Facts:**

- As Judge Kavanaugh noted in his remarks when his nomination was announced, he met his wife Ashley in 2001, when they both worked in the White House.
  - “Our first date was on September 10, 2001. The next morning, I was a few steps behind her as the Secret Service shouted at all of us to sprint out the front gates of the White House because there was an inbound plane. In the difficult weeks that followed, Ashley was a source of strength for President Bush and for everyone in th[e] building.”
  - Judge Kavanaugh and Ashley married in 2004.
- In the wake of the devastating terrorist attacks, Judge Kavanaugh continued to serve as a steady hand and aide to President Bush for nearly 5 more years.
- After more than two years in the White House Counsel's Office, Judge Kavanaugh served in the Office of the Staff Secretary. As Staff Secretary, Judge Kavanaugh worked from at least 6:30am-10:00pm almost every day for three years.
- Judge Kavanaugh has devoted his life to public service. Since graduating from law school in 1990, he has spent approximately 25 of the last 28 years serving in the Government. That is a testament to his love of country and his commitment to the motto of his Jesuit high school: “men for others.”

## JUDGE BRETT KAVANAUGH: AN INDEPENDENT AND IMPARTIAL JUDGE

**Judge Kavanaugh is an independent judge who applies the law impartially without regard to political views, policy preferences, or the identity of litigants.**

- “We cannot be buffaloeed, influenced, or pressured into worrying too much about transient popularity when we are trying to decide a case . . . . One of the most important duties of a judge as umpire is to stand up for the unpopular party who has the correct position on an issue of law in a particular case.” Brett M. Kavanaugh, *The Judge As Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 688 (2016).

### **Three notable illustrations of Judge Kavanaugh’s independence**

- **Ruling for an al Qaeda terrorist:** In *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), Judge Kavanaugh wrote a majority opinion vacating the military-commission conviction of Salim Hamdan, Osama bin Laden’s driver, for providing material support for terrorism. Judge Kavanaugh held that material support for terrorism was not a war crime that could be prosecuted by military commission under U.S. law at the time of Hamdan’s conduct. (Hamdan had been released from Guantanamo before the decision.)
- **Ruling against the RNC:** In *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), Judge Kavanaugh authored a unanimous majority opinion for a three-judge district court panel rejecting a lawsuit brought by the RNC challenging limits on political-party fundraising. His opinion relied on binding Supreme Court precedent and was subsequently affirmed by the Supreme Court.
- **Ruling for Emily’s List:** In *Emily’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), Judge Kavanaugh authored a unanimous majority opinion vacating FEC regulations that limited fundraising and spending by a non-profit group that “promotes abortion rights and supports pro-choice Democratic women candidates.” The full D.C. Circuit (including three Clinton appointees) later adopted his reasoning.

**As described in the attached summaries, Judge Kavanaugh has shown his independence and impartiality in numerous other ways:**

<b>Ruling for the “Little Guy” Against Corporations or Government Entities .....</b>	<b>2</b>
<b>Ruling for Criminal Defendants and Other Unpopular Litigants .....</b>	<b>4</b>
<b>Ruling for Environmental Interests .....</b>	<b>6</b>
<b>Ruling for Labor or Workers .....</b>	<b>7</b>
<b>Ruling Against the Bush Administration.....</b>	<b>8</b>
<b>Siding with Democratic Appointees over Republican Appointees .....</b>	<b>12</b>

### Rulings for the “Little Guy” Against Corporations or Government Entities

1. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013): Allowing the discrimination claims of an **African-American employee** who had been called a racial epithet to proceed; writing separately to argue that even a single use of the n-word by a supervisor suffices to create a racially hostile work environment.
2. *Essex Insurance Company v. Doe*, 511 F.3d 198 (D.C. Cir. 2008): Ruling for a **child sexual abuse victim** (a 7-year-old boy) against an insurance company that was trying to limit his payout to a total of \$100,000; the court ruled that he was entitled to \$100,000 for each of several assaults.
3. *Stephens v. U.S. Airways Group, Inc.*, 644 F.3d 437 (D.C. Cir. 2011): Concluding that **retired airline employees** were entitled to interest on unreasonably delayed pension plan payments.
4. *Casey v. McDonald’s Corp.*, 880 F.3d 564 (D.C. Cir. 2018): Allowing the **parents of a man killed** in a fight to sue the bars that allegedly negligently served alcohol to the person who killed their son.
5. *Ortiz-Diaz v. U.S. Department of Housing & Urban Development*, 867 F.3d 70 (D.C. Cir. 2017): **Permitting discrimination claim** to proceed and writing separately to explain that all race-based decisions to transfer an employee between jobs or offices “plainly constitute[] discrimination” cognizable under Title VII of the Civil Rights Act.
6. *Rossello ex rel. Rossello v. Astrue*, 529 F.3d 1181 (D.C. Cir. 2008): Reversing the Social Security Administration’s denial of benefits to a **woman with a serious history of mental illness**, ruling that the agency had failed to take into account that her brief stint of employment had been subsidized.
7. *Artis v. Bernanke*, 630 F.3d 1031 (D.C. Cir. 2011): Joining an opinion reversing the dismissal of a Title VII race discrimination complaint filed by **African-American secretaries**.
8. *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008): Joining an opinion siding with a candidate for the Foreign Service who was disqualified because she had had breast cancer in the past even though the cancer had been treated and returning her employment-discrimination case to the lower court to determine whether the State Department’s actions constituted discrimination against **disabled individuals**.
9. *Pasternack v. National Transportation Safety Board*, 596 F.3d 836 (D.C. Cir. 2010): Vacating NTSB’s revocation of an airman’s certificate for failure to take a drug test because NTSB had not adequately supported its decision to treat the **airman’s** inability to provide a specimen as the refusal to take a drug test.
10. *Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017): Holding that the FAA lacked authority to require **owners of small hobby drones** used for recreational purposes to register their model aircraft.

11. *Vann v. U.S. Department of Interior*, 701 F.3d 927 (D.C. Cir. 2012): Concluding that **descendants of Cherokee Nation slaves** could bring suit against the tribal Chief for violating their tribal membership and voting rights.
12. *Citizens for Responsibility & Ethics in Washington v. Federal Election Commission*, 711 F.3d 180 (D.C. Cir. 2013): Allowing **public interest group** to sue for information from the FEC under the Freedom of Information Act because the FEC had failed to adequately respond to the FOIA request in the allotted time.
13. *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014): Rejecting IRS rule imposing heavy regulatory burdens on tax-return preparers (many of whom were **small businesses or solo practitioners**), where the statute did not provide the IRS with such regulatory authority.
14. *Laccetti v. SEC*, 885 F.3d 724 (D.C. Cir. 2018): Ruling that the Public Company Accounting Oversight Board had acted arbitrarily and capriciously in refusing to allow **the subject of an audit** to be accompanied by an accounting expert during his interview.
15. *Park v. Commissioner of Internal Revenue*, 722 F.3d 384 (D.C. Cir. 2013): Holding that the IRS had misinterpreted the law when it required a **nonresident alien** to pay taxes on every winning bet instead of on his net gains from a session of gambling.
16. *Lorenzo v. SEC*, 872 F.3d 578 (D.C. Cir. 2017): Dissenting to argue that an **employee** who distributed his boss's prewritten message at his boss's request without reviewing the message's accuracy could not have willfully committed fraud when the message was revealed to be false.
17. *Navajo Nation v. U.S. Department of Interior*, 852 F.3d 1124 (D.C. Cir. 2017): Joining opinion holding that the Bureau of Indian Affairs had accepted a proposal to fund the **Navajo Nation's** judicial operations.

### Rulings for Criminal Defendants or Unpopular Litigants

1. *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016): Holding that a **criminal defendant** had received ineffective assistance of counsel when her lawyer failed to introduce evidence that she suffered from battered woman's syndrome.
2. *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010): Suggesting that use of a GPS tracker against a major D.C. **drug dealer** violated his Fourth Amendment rights.
3. *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011): Holding that a convicted **fraud defendant** could not be ordered to pay restitution for the costs of a private, internal investigation.
4. *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012): Vacating the military-commission conviction of **Osama bin Laden's driver**, who had been convicted of providing material support for terrorism, on the ground that material support for terrorism was not a war crime that could be prosecuted by military commission under U.S. law at the time of his conduct.
5. *Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014): Contending in a separate opinion that the military-commission convictions of **Osama bin Laden's press aide** for material support for terrorism and solicitation must be vacated as violations of the *Ex Post Facto* Clause.
6. *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012): Dissenting to argue that a **convicted bank robber** could not face a mandatory 30-year sentence for carrying a machine gun during a crime unless the government proved that he had *mens rea* i.e., that he knew the weapon was a machine gun.
7. *United States v. Williams*, 836 F.3d 1 (D.C. Cir. 2016): Concurring in an opinion reversing the murder conviction of a **gang member** involved in a gang hazing ritual on the ground that the defendant may have lacked the mental state to commit the crime.
8. *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011): Finding a Confrontation Clause violation where **criminal defendants** convicted of a violent drug conspiracy were convicted based in part on DEA reports without having an opportunity to confront the reports' author.
9. *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015): Concurring in the denial of rehearing en banc to note an "overarching concern about the use of acquitted conduct at sentencing" in a case where the defendant was convicted on three counts of **crack cocaine distribution** but sentenced based in part on a much larger drug trafficking conspiracy.
10. *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007): Concurring in an *en banc* opinion reversing the convictions of a **former police detective** convicted of multiple counts of receiving illegal gratuities, reasoning that the government had failed to show a nexus between the gift and an "official act."

11. *Fourstar v. Garden City Group, Inc.*, 875 F.3d 1147 (D.C. Cir. 2017): Interpreting the Prison Litigation Reform Act to allow a **prisoner** to bring a lawsuit alleging a violation of constitutional rights.
12. *United States v. Burnett*, 827 F.3d 1108 (D.C. Cir. 2016): Ordering resentencing of a **criminal defendant** because the district court had based the sentence on conduct that had occurred before he joined the conspiracy.
13. *United States v. Bostick*, 791 F.3d 127 (D.C. Cir. 2015): Remanding **criminal defendants'** cases for resentencing under the advisory sentencing guidelines.
14. *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011): Vacating a criminal defendant's conviction for being a **felon in possession** of a firearm because the only evidence on that count violated the Confrontation Clause.
15. *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008): Affirming the **defendant's** sentence of probation despite the government's argument on appeal that the district court abused its discretion in not imposing a term of imprisonment.



### Rulings for Environmental Interests

1. *National Association of Manufacturers v. EPA*, 750 F.3d 921 (D.C. Cir. 2014): Upholding EPA’s decision to impose **stricter air quality standards** for particulate matter, stating that “the Clean Air Act gives EPA substantial discretion in setting” emissions standards.
2. *American Trucking Association v. EPA*, 600 F.3d 624 (D.C. Cir. 2010): Upholding EPA **emissions limits for non-road engines**, such a refrigeration units, in rejecting a challenge brought by trucking associations.
3. *Utility Air Regulatory Group v. EPA*, 744 F.3d 741 (D.C. Cir. 2014): Joining Chief Judge Garland in rejecting an industry challenge to EPA rules for **particulate matter for fossil-fuel-fired** steam generating units.
4. *National Mining Association v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014): Rejecting a challenge by states and industry groups to EPA’s Clean Water Act permit process applicable to **surface coal mining**.
5. *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015): Rejecting a challenge brought by a coal company to EPA’s anticipated rule **restricting carbon dioxide emissions** from existing power plants (the Clean Power Plan) on the ground that it was premature.
6. *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013): Ruling for **environmentalists** in a greenhouse gas case challenging regulation of “biogenic emissions.”
7. *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014): Ruling for **environmental groups, including the NRDC and Sierra Club**, who challenged EPA’s decision to create an affirmative defense in private civil suits seeking penalties for violations of emission standards.
8. *National Environmental Development Association’s Clean Air Project v. EPA*, 686 F.3d 803 (D.C. Cir. 2012): Joining opinion upholding EPA rule **setting the level of sulfur dioxide emissions** against challenge by states, state regulatory agencies, corporations, and industrial associations.
9. *ATK Launch Systems, Inc. v. EPA*, 669 F.3d 330 (D.C. Cir. 2012): Joining opinion upholding EPA’s rule designating certain portions of Utah counties as within a nonattainment area under national **ambient air quality standards**.
10. *American Road & Transp. Builders Association v. EPA*, 705 F.3d 453 (D.C. Cir. 2013): Rejecting as untimely an industry challenge to an EPA **regulation governing non-road engines**.

### Rulings for Labor or Workers

1. *United Food & Commercial Workers v. NLRB*, 519 F.3d 490 (D.C. Cir. 2008): Upholding an NLRB decision finding that Wal-Mart had engaged in **unfair labor practices** by failing to bargain with a union.
2. *Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183 (D.C. Cir. 2008): Granting enforcement of an NLRB order **against an employer** that had withdrawn recognition of a union following a merger, and rejecting the employer's argument that the union lacked majority support.
3. *Veritas Health Services, Inc. v. NLRB*, 671 F.3d 1267 (D.C. Cir. 2012): Rejecting employer's argument that a **union election of nurses** was tainted by coercion, and granting enforcement of an NLRB order finding that the employer had committed an unfair labor practice by refusing to bargain with the union.
4. *E.I. du Pont de Nemours v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007): Granting enforcement of an NLRB order **against a company** for wrongfully declaring an impasse on negotiations concerning the subcontracting of certain positions.
5. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016): Joining opinion upholding the NLRB's finding that an employer violated the NLRA and acted with **anti-union animus** by threatening an employee during collective bargaining negotiations and then suspending and firing the employee.
6. *Cannon v. District of Columbia*, 717 F.3d 200 (D.C. Cir. 2013): Joining an opinion siding with three D.C. **government workers** in their contention that D.C. violated the Fair Labor Standards Act in reducing their salaries and paying them less than the federal minimum wage.
7. *New York-New York, LLC v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012): Affirming the NLRB's holding that New York-New York had engaged in **unfair labor practices** when it restricted its onsite contractor's employees from handbilling.

### **Rulings Against the Bush Administration**

- Between his confirmation to the D.C. Circuit in May 2006 and the end of the Bush Administration in January 2009, **Judge Kavanaugh ruled against the Bush Administration's executive agencies at least 8 times.**
  - Specifically, he authored an opinion ruling against the Bush Administration's Commerce Department, and he joined opinions ruling against the Bush Administration's Defense Department (twice), State Department, Interior Department, Food and Drug Administration, Internal Revenue Service, and Postal Service.
- Between his confirmation to the D.C. Circuit in May 2006 and the end of the Bush Administration in January 2009, **Judge Kavanaugh ruled against the Bush Administration's independent agencies at least 15 times.**
- After the Bush Administration, **Judge Kavanaugh ruled against multiple policies or initiatives developed during the Bush Administration.**
  - Most notably, he voted to overturn military-commission convictions of al Qaeda terrorists captured by the Bush Administration and prosecuted for war crimes.

### **Decisions Against Bush Administration Executive Agencies**

- *Baker & Hostetler LLP v. Department of Commerce*, 473 F.3d 312 (D.C. Cir. 2006): Reversing a district court decision in favor of the Department of Commerce both because the decision incorrectly denied a FOIA request and a request for attorney's fees.
- *Ranbaxy Laboratories Ltd. v. Leavitt*, 469 F.3d 120 (D.C. Cir. 2006): Joining an opinion holding that one of the FDA's patent delisting requirements was inconsistent with the text of the Food, Drug, and Cosmetic Act.
- *Felter v. Kempthorne*, 473 F.3d 1255 (D.C. Cir. 2007): Joining a decision remanding a suit by former members of the Ute Indian Tribe and their descendants against the Department of Interior so that the District Court could consider whether plaintiffs' claims had been saved from dismissal by recently enacted legislation.
- *Kramer v. Gates*, 481 F.3d 788 (D.C. Cir. 2007): Joining an opinion affirming a district court order granting relief to a technician who had sued the Department of Defense for failing to provide him with a statutorily mandated employment position.
- *Tax Analysts v. IRS*, 495 F.3d 676 (D.C. Cir. 2007): Joining an opinion requiring the IRS to disclose certain e-mails containing legal advice.
- *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008): Joining an opinion reversing dismissal of an action against the Secretary of the Army by residents who lived near a military base.

- *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008): Joining an opinion reversing the grant of summary judgment to the State Department in a disability discrimination case.
- *American Postal Workers Union v. U.S. Postal Service*, 550 F.3d 27 (D.C. Cir. 2008): Joining an opinion reversing the grant of summary judgment to the U.S. Postal Service in a dispute over an arbitral award.

### **Decisions Against Bush Administration Independent Agencies**

- *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006): Vacating a FERC order because it was arbitrary and capricious.
- *Clark County v. FAA*, 522 F.3d 437 (D.C. Cir. 2008): Vacating FAA determinations because they failed to provide a reasoned explanation for purposes of the APA.
- *Rossello ex rel. Rossello v. Astrue*, 529 F.3d 1181 (D.C. Cir. 2008): Concluding that the Social Security Administration's denial of benefits was not supported by substantial evidence.
- *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008): Dissenting from a panel opinion upholding an NLRB order; reasoning that the order was inconsistent with statutory authority.
- *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008): Dissenting from a panel opinion upholding the structure of the Public Company Accounting Oversight Board.
- *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008): Dissenting from a panel opinion granting the FTC's motion to enjoin the merger of two companies.
- *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945 (D.C. Cir. 2007) (per curiam): Joining an opinion holding that FERC acted contrary to law when it decided that the *Arizona Grocery* doctrine precluded the Commission from awarding reparations to certain shippers for rates paid after a certain date.
- *BellSouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006): Joining an opinion vacating an FCC order because it lacked a sufficient explanation.
- *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007): Joining an opinion vacating an NLRB decision because it departed from precedent and was not supported by substantial evidence.
- *Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007): Joining an opinion vacating an SEC rule because the Commission had exceeded its authority in promulgating it.
- *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007): Joining an opinion upholding an employee's attempt to invoke the psychotherapist-privilege against an SEC subpoena.

- *PAZ Securities, Inc. v. SEC*, 494 F.3d 1059 (D.C. Cir. 2007): Joining an opinion granting a petition for review of an SEC order because the Commission had abused its discretion in issuing the order.
- *Safe Extensions, Inc. v. FAA*, 509 F.3d 593 (D.C. Cir. 2007): Joining an opinion holding an FAA circular arbitrary and capricious because it was unsupported by any actual evidence.
- *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008): Joining an opinion holding an FCC determination arbitrary and capricious because of the FCC's failure to enforce its filing deadline.
- *Albany Engineering Corp. v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008): Joining an opinion rejecting FERC's interpretation of a statutory provision because it was unreasonable.

### Rulings Across Ideological Lines

- **Judges on the D.C. Circuit have agreed with Judge Kavanaugh's rulings in the overwhelming majority of matters across the board.**
  - 94% of the matters Judge Kavanaugh heard were decided unanimously.<sup>1</sup>
  - In 97% of the matters Judge Kavanaugh heard, he voted with the majority.
  - Judge Kavanaugh issued a dissenting opinion in only about 2.7% of the matters he heard.
- **Judges on the D.C. Circuit have overwhelmingly agreed with Judge Kavanaugh's published majority opinions.**
  - Of Judge Kavanaugh's 193 published majority opinions, *his Democrat-appointed colleagues were as likely to join his opinions in full* as his Republican-appointed colleagues.
    - Democrat-appointed judges joined Judge Kavanaugh's published majority opinions 88.67% of the time, while Republican-appointed judges joined Judge Kavanaugh's published majority opinions 88.94% of the time.
- **Judge Kavanaugh broadly agreed with colleagues across the spectrum.**
  - Judge Kavanaugh was *as likely to join his Democrat-appointed colleagues' published majority opinions in full* as he was to join his Republican-appointed colleagues on panels.
    - He joined published majority opinions authored by Democrat-appointed colleagues 86.78% of the time, while joining published majority opinions authored by Republican-appointed colleagues 88.98% of the time.
- **Judge Kavanaugh and Chief Judge Merrick Garland have agreed with one another in the overwhelming majority of cases.**
  - Chief Judge Garland joined 96.43% (27 of 28) of the published majority opinions authored by Judge Kavanaugh when the two sat together.
  - Judge Kavanaugh joined 93.55% (29 of 31) of the published majority opinions authored by Chief Judge Garland when the two sat together.
  - Judge Kavanaugh and Chief Judge Garland have voted the same way in approximately 93% of the matters that they have heard together.

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<sup>1</sup> "Matters" refer to published and unpublished decisions and orders, as drawn from Appendix 13(c) of Judge Kavanaugh's Senate Judiciary Questionnaire.

**In at least 10 cases, Judge Kavanaugh has joined with a judge appointed by a Democratic President over the dissent of a judge appointed by a Republican President.**

1. *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016): Holding that a criminal defendant had received ineffective assistance of counsel when her lawyer failed to introduce evidence that she suffered from battered woman’s syndrome.
  - **Judge Kavanaugh** authored the majority opinion, which **Judge Edwards** (appointed by President Carter) joined; **Judge Sentelle** (appointed by President Reagan) dissented.
2. *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016): Holding that retired D.C. correctional officers had stated a claim to carry a concealed weapon under a federal statute.
  - **Judge Rogers** (appointed by President Clinton) authored the majority opinion, which **Judge Kavanaugh** joined; Judge Henderson (appointed by President George H.W. Bush) dissented.
3. *Ryskamp v. Commissioner of Internal Revenue*, 797 F.3d 1142 (D.C. Cir. 2015): Finding jurisdiction to review IRS denials of taxpayer hearing requests and upholding IRS’s resolution of a taxpayer dispute.
  - **Judge Pillard** (appointed by President Obama) authored the majority opinion, which **Judge Kavanaugh** joined; **Judge Brown** (appointed by President George W. Bush) dissented.
4. *American Civil Liberties Union v. DOJ*, 750 F.3d 927 (D.C. Cir. 2014): Concluding that docket information in cases where the defendant was acquitted or had the charges dismissed was exempt from disclosure under FOIA.
  - **Judge Tatel** (appointed by President Clinton) authored the majority opinion, which **Judge Kavanaugh** joined; **Judge Brown** (appointed by President George W. Bush) dissented.
5. *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013): Upholding environmental group’s challenge to EPA rule regulating “biogenic emissions.”
  - **Judge Tatel** (appointed by President Clinton) authored the majority opinion, which **Judge Kavanaugh** joined; **Judge Henderson** (appointed by President George H.W. Bush) dissented.
6. *Honeywell International, Inc. v. EPA*, 705 F.3d 470 (D.C. Cir. 2013): Rejecting challenge to EPA’s administration of cap-and-trade program regulating hydrochlorofluorocarbons.
  - **Judge Kavanaugh** authored the majority opinion, which **Judge Rogers** (appointed by President Clinton) joined; **Judge Brown** appointed by President George W. Bush) dissented.
7. *Empresa Cubana v. Department of Treasury*, 638 F.3d 794 (D.C. Cir. 2011): Upholding statute barring renewal of certain Cuban trademarks.
  - **Judge Kavanaugh** authored the majority opinion, which **Judge Edwards** (appointed by President Carter) joined; **Judge Silberman** (appointed by President Reagan) dissented.

8. *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008): Reversing the grant of summary judgment to the State Department in a disability discrimination case.
  - **Judge Tatel** (appointed by President Clinton) authored the majority opinion, which **Judge Kavanaugh** joined; **Judge Henderson** (appointed by President George H.W. Bush) dissented.
9. *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916 (D.C. Cir. 2008): Upholding FERC order allocating costs of pipeline expansion.
  - **Judge Tatel** (appointed by President Clinton) authored the majority opinion, which **Judge Kavanaugh** joined; **Judge Brown** (appointed by President George W. Bush) dissented in part.
10. *Baker & Hostetler LLP v. Department of Commerce*, 473 F.3d 312 (D.C. Cir. 2006): Upholding challenge to agency's denial of FOIA request and fees request.
  - **Judge Kavanaugh** authored the majority opinion, which **Judge Garland** (appointed by President Clinton) joined; **Judge Henderson** (appointed by President George H.W. Bush) dissented in part.



### **Judge Brett Kavanaugh: *Heller v. District of Columbia* (“*Heller II*”)**

Judge Brett Kavanaugh wrote a thoughtful and thorough dissent faithfully applying **binding Supreme Court precedent** to Washington, D.C.’s expansive gun-control regime (part of which the Supreme Court had found to be unconstitutional in its earlier *Heller* decision). While the D.C. Circuit majority upheld gun-control regulations banning semi-automatic rifles and requiring registration of all guns, Judge Kavanaugh found that those regulations were impermissible under the Supreme Court’s *Heller* decision. In doing so, Judge Kavanaugh recognized that **“traditional and common gun laws in the United States remain constitutionally permissible.”**

#### **Facts:**

- After the Supreme Court’s decision in *D.C. v. Heller* striking down D.C.’s ban on handguns as unconstitutional, the question before the D.C. Circuit was whether D.C.’s amended gun laws were lawful.
  - Judge Kavanaugh was bound by *stare decisis* to apply binding precedent.
    - “As a lower court . . . it is not our role to re-litigate *Heller* or to bend it in any particular direction. Our sole job is to faithfully apply *Heller* and the approach it set forth.”
  - Accordingly, he exhaustively analyzed the reasoning in the Supreme Court’s Second Amendment cases, concluding that *Heller* and *McDonald* (which made the Second Amendment applicable to the States) applied a “text, history, and tradition” test, not strict- or intermediate-scrutiny tests.
  - Applying the Supreme Court’s binding test, Judge Kavanaugh concluded that both the ban on semi-automatic rifles and the registration requirement were unconstitutional.
    - He explained that D.C.’s ban on semi-automatic rifles was an outlier. Moreover, semi-automatic rifles have not traditionally been banned and are in common use by law-abiding citizens today for self-defense, hunting, and other lawful uses.
      - “[M]ost of the country does not ban some categories of semi-automatic rifles, and even the bans that exist are significantly narrower than D.C.’s.”

- He explained that D.C.’s registration requirement for all lawful guns was an outlier—“the strictest in the Nation, by D.C.’s own admission”—and not rooted in history or tradition. The “vast majority of states” have not traditionally required registration.
  - Judge Kavanaugh reasoned that there was “no meaningful or persuasive constitutional distinction” between semi-automatic handguns (which the Supreme Court had found to be constitutionally protected in *Heller*) and semi-automatic rifles. They fire at the same rate, and semi-automatic handguns are actually more dangerous than semi-automatic rifles.
- Judge Kavanaugh’s explained that “traditional and common gun laws in the United States remain constitutionally permissible”:
  - He acknowledged that many gun-control laws are legal, including:
    - “machine gun bans, concealed-carry laws, and felon-in-possession laws,” “prohibitions on the possession of firearms by ... the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” and “laws imposing conditions and qualifications on the commercial sale of arms.”
  - He emphasized that he was not holding that the laws “are necessarily a bad idea as a matter of policy”; that was not his role as a judge.
- As a lifelong resident of D.C., Judge Kavanaugh was troubled by the “longstanding problem of gun violence in the District of Columbia”
  - He acknowledged that “D.C.’s public safety motivation in enacting these laws is worthy of great respect.”
  - “As a citizen, I certainly share the goal ... to reduce and hopefully eliminate the senseless violence that has persisted for too long and harmed so many.”
- Judge Kavanaugh’s record as a whole shows that he applies the law fairly and impartially. On numerous occasions, he has upheld convictions and lengthy sentences for individuals convicted of illegal possession of firearms:

- *United States v. Settles*, 530 F.3d 920, 922 (D.C. Cir. 2008): Writing for the panel, Judge Kavanaugh upheld a Defendant's 57-month post-trial sentence for unlawful possession of a firearm and ammunition as a convicted felon under 18 U.S.C. § 922(g)(1).
- *United States v. Haight*, 892 F.3d 1271, 1274 (D.C. Cir. 2018): Writing for the panel, Judge Kavanaugh upheld Defendant's conviction on drug-related and felon-in-possession-of-a-firearm charges, but vacated his sentence because it was below the applicable 15-year mandatory-minimum sentence.
- *United States v. Lathern*, 488 F.3d 1043, 1044 (D.C. Cir. 2007): Writing for the panel, Judge Kavanaugh upheld Defendant's conviction as a felon in possession of a firearm and rejected Defendant's appeal of his conviction on the ground that the District Court improperly excluded so-called expert testimony at trial.

### Judge Brett Kavanaugh by the Numbers

- **12**: The number of years Judge Brett M. Kavanaugh has served as a judge on the U.S. Court of Appeals for the D.C. Circuit. Also the number of years he has taught law at Yale, Harvard, and Georgetown.
- **307**: The number of opinions that Judge Kavanaugh has authored.
- **450,000**: The number of pages of documents the Senate Judiciary Committee has received more than twice the number the Committee has received for any previous Supreme Court nominee.
- **65**: The number of Senators Judge Kavanaugh has met with since his nomination.
- **97**: The percentage of cases in which Judge Kavanaugh voted with the majority on the D.C. Circuit. Judge Kavanaugh's Democratic-appointed colleagues were as likely to join Judge Kavanaugh's published majority opinions in full (**88.67%**) as his Republican-appointed colleagues (**88.94%**).
- **96.43**: The percentage of times Chief Judge Garland joined majority opinions authored by Judge Kavanaugh when the two sat together. (27 of 28)
- **13**: The number of times the Supreme Court has adopted positions advanced in Judge Kavanaugh's opinions, citing him in **at least 5** of those cases.
- **10**: The number of books and law review articles (**1** book and **9** law review articles) written by Judge Kavanaugh.
- **25**: The years Judge Kavanaugh has spent in public service.
- **39**: The number of Judge Kavanaugh's law clerks (out of 48) who have gone on to clerk for 12 Supreme Court Justices (including Justices Stevens, O'Connor, Souter, Breyer, Sotomayor, and Kagan).
- **19**: The number of cases that Judge Kavanaugh's law clerks have collectively argued before the Supreme Court.
- **52**: The percentage of Judge Kavanaugh's law clerks who are female (**25** of **48**).
- **27**: The percentage of Judge Kavanaugh's law clerks who are members of racial minorities (**13** of **48**: **6** Asian-American clerks, **5** African-American clerks, and **2** Latino clerks).

## **Judge Brett Kavanaugh: LGBT Rights**

In his 12 years on the D.C. Circuit, Judge Kavanaugh has not heard any LGBT rights cases, nor has he written or spoken about any of the Supreme Court's LGBT rights decisions. Strained attempts to paint Judge Kavanaugh as hostile to the LGBT community are without basis. Judge Kavanaugh rules fairly and impartially based on the law, not the identity of the parties before him, and he has a record of faithfully applying legal protections for racial minorities, women, and other protected groups.

### **Facts:**

- Judge Kavanaugh has no opinions, writings, or speeches on gay rights cases. “In his dozen years as a federal appeals court judge... Kavanaugh has not heard any significant cases addressing LGBT issues and has said hardly anything about LGBT people.” *Buzzfeed*, Aug. 7, 2018.
- Even Human Rights Campaign was forced to acknowledge that “[d]uring his 12 years on the D.C. Circuit, he did not substantively address any of the Supreme Court’s seminal LGBTQ decisions in *Lawrence v. Texas*, *Romer v. Evans*, *United States v. Windsor*, or *Obergefell v. Hodges*, nor ... *Bowers v. Hardwick*.”
- Gregory Angelo, Executive Director of the Log Cabin Republicans: “What is astonishing is that in the dozen pages issued by the HRC painting Kavanaugh as an enemy of the LGBT community, there is not a single mention of anything he has done, said, or written that could be even remotely construed as anti-LGBT... [T]he findings of this ‘analysis’ were fait accompli before a single file from the Kavanaugh archives was cracked.” *It’s Wrong to Call Kavanaugh Anti-LGBT*, *Fox News*, Aug. 7, 2018.
  - As Angelo noted, “In 2003, while on the staff of President George W. Bush, Kavanaugh met with a group of over 200 gay men as part of a Log Cabin Republicans event at the Eisenhower Executive Office Building hardly the mark of a raging homophobic jurist.”
- Chad Felix Greene: “As a gay man, am I worried that confirming Kavanaugh will bring about an end to my marriage and reinstitute the criminality of my private sex life? No. The reason is simple. Despite the fear, exaggeration and emotional manipulation presented by the LGBT media, I see Kavanaugh as a neutral and principled judge willing to set his personal views aside and defend the Constitution

and the purpose of the court.” *Why It’s Preposterous to Call Brett Kavanaugh a ‘Threat’ to LGBT Americans*, The Federalist, Aug. 16, 2018.

- Timothy Patrick Gaudatte, Former Chair of the Denver Gay & Lesbian Chamber of Commerce (signatory to letter from Georgetown Prep alumni to the Judiciary Committee): “Brett M. Kavanaugh is a good man, a brilliant jurist, and is eminently qualified to serve as an Associate Justice on the U.S. Supreme Court. ... He has consistently demonstrated his dedication to the premise that the pursuit of helping people, and not a political objective, fulfills the promise of human potential and governmental purpose.”
- Critics have selectively fixated on speeches Judge Kavanaugh has given honoring the late Chief Justice Rehnquist and the late Justice Scalia, while at the same time ignoring Judge Kavanaugh’s words of praise for Justice Kennedy, the Justice for whom he clerked and the author of the Supreme Court’s leading precedents recognizing LGBT rights. At bottom, all attempts to define Judge Kavanaugh based on his association with others are baseless. Judge Kavanaugh is an independent judge.
- Judge Kavanaugh has a record of faithfully applying legal protections for racial minorities, the elderly, and others in discrimination cases.
  - Even the ACLU has stated that “Judge Kavanaugh’s legal writings have expressed sympathy for the needs of people with disabilities,” that he has an “expansive view of liability for racial discrimination under Title VII,” and that he “has expressed an understanding of the psychology surrounding domestic abuse” of women. ACLU Report, Aug. 15, 2018.
  - In *Ayissi-Etoh v. Fannie Mae*, he voted to permit a hostile-work-environment claim to proceed in a case where an employee alleged that his supervisor had called him the n-word.
  - In *Ortiz-Diaz v. HUD*, he joined an opinion reversing a lower-court ruling that a federal employee claiming that he was denied a transfer on the basis of race and national origin had not stated an actionable claim.

- In *Wilson v. Cox*, he joined an opinion reversing the dismissal of an age-discrimination claim brought by a 71-year-old military retiree who worked as a security guard at a military home.

### **Judge Brett Kavanaugh: *Rice v. Cayetano***

While in private practice, Judge Brett Kavanaugh filed a Supreme Court amicus brief in *Rice v. Cayetano* (2000), arguing *against* Hawaii's racial restrictions on the right to vote. The brief challenged Hawaii's limits on the eligibility to vote in elections—limits that excluded African Americans, Caucasians, and others from the voting booth—as a violation of the Fifteenth Amendment. The Supreme Court agreed 7-2 with Judge Kavanaugh's clients.

#### **Facts:**

- While in private practice, Judge Kavanaugh was Counsel of Record for an *amicus* brief representing the Center for Equal Opportunity and the New York Civil Rights Coalition, among others, before the Supreme Court in *Rice v. Cayetano*. Robert Bork also signed the brief.
  - Under the state law challenged in *Rice*, Hawaii allowed only those people who were descended from native Hawaiians present on the islands in 1778 to vote in elections for board members of a government agency that disbursed public funds.
    - As Judge Kavanaugh argued in his brief, “Hawaii excludes not just Caucasians from voting in elections for the Office of Hawaiian Affairs, it turns away citizens who are African-Americans, Japanese-Americans, Chinese-Americans, and indeed members of all racial and ethnic groups except the preferred Hawaiians.”
  - A Hawaii resident sued, claiming that the state law violated his rights because his family had lived in Hawaii for nearly 150 years but was of European descent.
- On behalf of his clients, Judge Kavanaugh's brief argued that Hawaii's law and its brazen racial restrictions on the right to vote violated the 15<sup>th</sup> Amendment, which provides: “The right of citizens of the United State to vote *shall not be denied or abridged by the United States or by any State on account of race....*”



- As Judge Kavanaugh’s brief argued, “Hawaii restricts the right to vote in a state election based on a citizen’s race, and the clear and unequivocal language of the Fifteenth Amendment flatly prohibits such state action.”
- By a vote of 7-2, in an opinion authored by Justice Kennedy (and joined in result by Justices Breyer and Souter), the Supreme Court agreed with Judge Kavanaugh’s position.
  - The Court concluded that “Hawaii’s denial of petitioner’s right to vote [is] a *clear violation* of the Fifteenth Amendment.” The Supreme Court threw out the Hawaiian law as “an explicit, race-based voting qualification.” The Court’s opinion emphasized the “fundamental principle” that states “may not deny or abridge the right to vote on account of race.”

### **Judge Brett Kavanaugh: South Carolina Voter ID - *South Carolina v. U.S.***

Judge Brett Kavanaugh’s unanimous opinion upholding South Carolina’s new voter law under the Voting Rights Act but delaying implementation of the new law for another election cycle united an ideologically diverse panel (including a Clinton appointee). His measured approach was designed to ensure that African American voters would not face discriminatory effects, and led to a successful resolution that the Obama Justice Department did not appeal.

#### **Facts:**

- The question before the court was whether South Carolina’s new law had discriminatory effects **compared to the benchmark of the preexisting law**.
  - Judge Kavanaugh explained that **neither the previous law nor the new law required photo IDs to vote**. The previous law had required voters to have certain photo IDs *or a non-photo voter registration card*. Under the new law, those with non-photo voter registration cards could still vote, but were required to sign an affidavit at their polling place listing the reason why they did not obtain a photo ID (a “reasonable impediment”).
    - Judge Kavanaugh’s opinion relied on representations by South Carolina’s Attorney General and Election Commission that they would construe the “reasonable impediment” provision extremely broadly: other than falsehoods, every reason why a voter had not obtained a photo ID should be accepted, and notaries would not be permitted to require photo IDs or payment to notarize affidavits.
    - “[T]he sweeping reasonable impediment provision ... eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused.”
  - Judge Kavanaugh explained that the new law also *expanded* the photo IDs that qualified, and made it easier to obtain a qualifying photo ID.

- He found that based on the extensive trial record, there was no basis to impute a discriminatory purpose to the South Carolina Legislature or to the Governor in enacting the new law.
- Thus, as interpreted by SC officials, the new law satisfied Section 5 of the VRA. Judge Kavanaugh surveyed “several other contemporary state laws that have passed legal muster” and observed that South Carolina’s law was “significantly more friendly to voters without qualifying photo IDs.”
- Despite upholding the law, Judge Kavanaugh’s opinion *denied* South Carolina’s request that it go into effect for the 2012 elections. Instead, he delayed implementation of the new law until the 2013 elections.
  - More time was needed for poll workers to be trained and for voters to consider getting one of the new free photo IDs: “Because the voters who currently lack qualifying photo ID are disproportionately African-American, proper and smooth functioning of the reasonable impediment provision would be vital to avoid unlawful racially discriminatory effects on African-American voters in South Carolina in the 2012 elections.... [T]here is too much of a risk to African-American voters for us to roll the dice in such a fashion.”
  - This measured, even-handed approach led to a successful resolution of the litigation: the Obama Justice Department chose not to appeal.
  - Commenting on the delayed-implementation holding, the ACLU remarked on Judge Kavanaugh’s “pragmatic rather than ideological approach to voting rights issues.”
- Throughout the opinion, Judge Kavanaugh emphasized the importance of the VRA and the scourge of racism:
  - He specifically noted “something we know and do not forget: Racial insensitivity, racial bias, and indeed outright racism are still problems throughout the United States as of 2012. We see that reality on an all-too-frequent basis.”
  - He called the VRA “among the most significant and effective pieces of legislation in American history,” noting that “[i]ts simple and direct legal prohibition of racial discrimination in voting laws and practices has

dramatically improved the Nation, and brought America closer to fulfilling the promise of equality espoused in the Declaration of Independence and the Fourteenth and Fifteenth Amendments.”

- Judge Bates “concurred fully” in Judge Kavanaugh’s “excellent” opinion. Judge Kollar-Kotelly, a Democratic appointee, also joined the opinion.

**Judge Kavanaugh’s record shows that he has long been committed to equal opportunity for others.**

- He has faithfully enforced civil rights protections for minorities and others.
  - In *Ayissi-Etoh v. Fannie Mae*, he voted to permit a hostile-work environment claim to proceed in a case where an employee alleged that his supervisor had called him the n-word.
  - In *Ortiz-Diaz v. HUD*, he wrote separately to emphasize that “[a]ll discriminatory transfers (and discriminatory denials of requested transfers)” based on race should be actionable under Title VII.
- Judge Kavanaugh’s mother was a history teacher at two largely African-American public high schools in D.C., and taught him about the struggle for civil rights at an early age. He wrote his law school note on procedures for ferreting out implicit race discrimination in jury selection. He has long volunteered in underserved minority communities. He has also been lauded for the diversity of his law clerks and his efforts to encourage more diverse law students to clerk: 13 of his 48 clerks are minorities.

**Fragoso, Michael (OLP)**

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**From:** Fragoso, Michael (OLP)  
**Sent:** Thursday, August 30, 2018 12:51 PM  
**To:** Abegg, John (McConnell)  
**Cc:** Lacy, Megan M. EOP/WHO  
**Subject:** FW: BMK TPs  
**Attachments:** Bipartisan Support for SCT Nominees.docx; Garland Rates of Agreement.docx; Kozinski and Equal Treatment of Women - BMK.docx; Rattigan v. Holder - BMK.docx; SeaWorld v. Perez - BMK.docx; ACA Healthcare - BMK.docx; Priests for Life - BMK.docx; Executive Power - BMK.docx; BMK Bipartisan Support 8-29-2018.docx

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**From:** Bumatay, Patrick J. (OLP)  
**Sent:** Thursday, August 30, 2018 12:49 PM  
**To:** Kenny, Steve (Judiciary-Rep) (b) (6); Davis, Mike (Judiciary-Rep) (b) (6); Mehler, Lauren (Judiciary-Rep) (b) (6)  
**Cc:** Lichter, Jennifer (OLP) <jlichter@jmd.usdoj.gov>; (b)(6) per CRM (b)(6) per CRM >; Fragoso, Michael (OLP) <mfragoso@jmd.usdoj.gov>  
**Subject:** RE: BMK TPs

All – here is another batch of TPs.

---

**From:** Kenny, Steve (Judiciary-Rep) (b) (6) >  
**Sent:** Wednesday, August 29, 2018 5:40 PM  
**To:** Bumatay, Patrick J. (OLP) <pajbumatay@jmd.usdoj.gov>; Davis, Mike (Judiciary-Rep) (b) (6) >; Mehler, Lauren (Judiciary-Rep) (b) (6)  
**Cc:** Lichter, Jennifer (OLP) <jlichter@jmd.usdoj.gov>; (b)(6) per CRM (b)(6) per CRM >; Fragoso, Michael (OLP) <mfragoso@jmd.usdoj.gov>  
**Subject:** RE: BMK TPs

Thanks

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**From:** Bumatay, Patrick J. (OLP) [mailto:Patrick.J.Bumatay@usdoj.gov]  
**Sent:** Wednesday, August 29, 2018 5:06 PM  
**To:** Davis, Mike (Judiciary-Rep) (b) (6) >; Mehler, Lauren (Judiciary-Rep) (b) (6)  
**Cc:** Lichter, Jennifer (OLP) <Jennifer.Lichter@usdoj.gov>; (b)(6) per CRM (b)(6) per CRM >; Kenny, Steve (Judiciary-Rep) (b) (6) >; Fragoso, Michael (OLP) <Michael.Fragoso@usdoj.gov>  
**Subject:** RE: BMK TPs

Steve – per your request, here are the memos that were previously sent to the SJC. These are not for use in the hearings, but for your information.

**From:** Davis, Mike (Judiciary-Rep) (b) (6)  
**Sent:** Wednesday, August 29, 2018 11:15 AM  
**To:** Bumatay, Patrick J. (OLP) <[pajbumatay@jmd.usdoj.gov](mailto:pajbumatay@jmd.usdoj.gov)>; Mehler, Lauren (Judiciary-Rep) (b) (6) >  
**Cc:** Lichter, Jennifer (OLP) <[jlichter@jmd.usdoj.gov](mailto:jlichter@jmd.usdoj.gov)>; (b)(6) per CRM (b)(6) per CRM >; Kenny, Steve (Judiciary-Rep) (b) (6) >; Fragoso, Michael (OLP) <[mfragoso@jmd.usdoj.gov](mailto:mfragoso@jmd.usdoj.gov)>  
**Subject:** RE: BMK TPs

Roger.

Thank you,  
Mike Davis

Mike Davis, Chief Counsel for Nominations  
United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
202-224-(b) (6) (direct)  
(b) (6) (cell)  
202-224-9102 (fax)  
(b) (6)

**From:** Bumatay, Patrick J. (OLP) [<mailto:Patrick.J.Bumatay@usdoj.gov>]  
**Sent:** Wednesday, August 29, 2018 11:11 AM  
**To:** Davis, Mike (Judiciary-Rep) (b) (6) >; Mehler, Lauren (Judiciary-Rep) (b) (6) >  
**Cc:** Lichter, Jennifer (OLP) <[Jennifer.Lichter@usdoj.gov](mailto:Jennifer.Lichter@usdoj.gov)>; (b)(6) per CRM (b)(6) per CRM >; Kenny, Steve (Judiciary-Rep) (b) (6) >; Fragoso, Michael (OLP) <[Michael.Fragoso@usdoj.gov](mailto:Michael.Fragoso@usdoj.gov)>  
**Subject:** RE: BMK TPs

Duplicative Material

## Judge Brett Kavanaugh: Healthcare

Judge Brett Kavanaugh's decisions relating to the Affordable Care Act (ACA) show fidelity to the rule of law, an understanding of the importance of the issue to millions of Americans, and the constitutional limitations on the power of the federal government. In his two opinions in constitutional challenges to the ACA, he issued thoughtful opinions analyzing the specific issues and ruled against the challengers. Even the *New York Times's* fact checker, citing a liberal law professor, has acknowledged that critics have "exaggerated" and "overstated" Judge Kavanaugh's writings in ACA cases. Democrats Overstate Kavanaugh's Writings on the Affordable Care Act, *New York Times*, July 12, 2018.

### **Facts:**

- Judge Kavanaugh has written two opinions in constitutional challenges to the ACA. In both cases, he carefully considered the arguments of the challengers. At the same time, he did not rush to strike down the ACA, as some political commentators wanted the courts to do. As in all cases, Judge Kavanaugh evaluated the merits based on text and precedent and in these two particular cases, rejected the challengers' claims.
- **In *Seven-Sky v. Holder*—the challenge to the individual mandate—a D.C. Circuit panel majority upheld the mandate's constitutionality. Judge Kavanaugh dissented for jurisdictional reasons.** In his dissent, he explained that the lawsuit was premature. The Anti-Injunction Act a statute governing when challenges to certain federal laws can be brought deprived the court of the authority to consider the suit until the IRS imposed penalties on people who failed to comply with the individual mandate.
  - The Fourth Circuit had endorsed this approach.
  - Judge Kavanaugh did not resolve whether the ACA was constitutional under the Commerce or Taxing Clauses. His approach was one of judicial restraint: courts should avoid "premature or unnecessary constitutional decisions."
- While exercising judicial modesty in refusing to rule on a case that was not yet ripe, Judge Kavanaugh also expressed his concerns that the ACA's individual mandate was "unprecedented on the federal level in American history" and could "usher in a significant expansion of congressional authority with no obvious principled limit."

- Unlike Chief Justice Roberts, Judge Kavanaugh did not accept the argument that the individual mandate was a tax. He wrote: “The Taxing Clause has not traditionally authorized a legal prohibition or mandate, as opposed to just a financial disincentive or incentive.”
- Judge Kavanaugh also acknowledged the importance of ensuring that all Americans have affordable healthcare. He wrote, “The elected Branches designed this law to help provide all Americans with access to affordable health insurance and quality healthcare, vital policy objectives. This legislation was enacted, moreover, after a high-profile and vigorous national debate. Courts must afford great respect to that legislative effort and should be wary of upending it.”
- Finally, Judge Kavanaugh highlighted the role of the political branches in addressing the controversies surrounding the ACA, noting that a president might decide not to enforce unconstitutional provisions of the law or Congress might make changes to the statute to eliminate constitutional objections.
  - Such steps would ensure that the people’s elected representatives rather than unelected judges were addressing concerns, and would eliminate any need for courts to step in.
- **In *Sissel v. HHS*—the Origination Clause challenge to the ACA—the D.C. Circuit rejected the challenge, and Judge Kavanaugh dissented from the denial of rehearing *en banc* because “the panel opinion reached the right bottom line ... but relied on what I see as a faulty rationale.”**
  - The challengers argued that the ACA was a revenue-raising bill that did not originate in the House of Representatives, as required by the Constitution. Judge Kavanaugh came to the common-sense conclusion that, just as the challengers argued, the ACA was a revenue-raising bill. As he said, “It is difficult to say with a straight face that a bill raising \$473 billion in revenue is not a ‘Bill for raising Revenue.’”
  - But the challenge ultimately failed, he concluded, because the ACA did “in fact originate in the house, as required by the Clause,” thus complying with constitutional requirements.
- The *New York Times* has described as “exaggerated” Democrats’ characterizations of Judge Kavanaugh’s ACA opinions based on these two cases. Democrats



Overstate Kavanaugh's Writings on the Affordable Care Act, *New York Times*, July 12, 2018.

- As liberal law professor Nicholas Bagley noted in that article, Judge Kavanaugh's opinions in these cases focus on specific and discrete legal issues such that he believes Judge Kavanaugh "doesn't think of these cases as Affordable Care Act cases."

**SUMMARY:**  
**SENATE TRADITION OF BIPARTISAN SUPPORT FOR SUPREME COURT NOMINEES**

**Democratic support for highly regarded Judge Brett Kavanaugh would continue the tradition of bipartisan support for Supreme Court nominees.**

- **Every sitting member of the Supreme Court received some measure of bipartisan support** in her or his confirmation vote.
  - 33 Republicans crossed party lines to confirm Justice Breyer 87-9.
  - 41 Republicans voted to confirm Justice Ginsburg 96-3.
  - Both Justice Kagan and Justice Sotomayor were confirmed with over 60 votes in the Senate:
    - Nine Republicans voted for Justice Sotomayor; and
    - Five Republicans voted for Justice Kagan.
  - Chief Justice Roberts received 22 votes from Democrats on his way to a 78-22 confirmation.
  - Justice Alito was confirmed 58-42 with four votes from Democrats.
  - 11 Democrats voted to confirm Justice Clarence Thomas (52-48).
  - Last year, Justice Neil Gorsuch earned three votes from Democrats on his way to confirmation (54-45).
- **Justice Ruth Bader Ginsburg recently called for a return to bipartisanship** in judicial confirmations.<sup>1</sup>
  - On a recent trip to Israel after Justice Anthony Kennedy's retirement, **Justice Ginsburg recalled her 96-3 confirmation, noting that Republican Senator Orrin Hatch of Utah was her "biggest supporter."**

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<sup>1</sup> <https://www.haaretz.com/israel-news/.premium-ruth-bader-ginsburg-in-israel-i-pity-your-supreme-court-justices-1.6245868>

- Justice Ginsburg noted that although she “was considered a controversial person” because of her “affiliation with the ACLU,” she was still confirmed with overwhelming bipartisan support.
- She stated **her hope that “someday we will get back to the bipartisan spirit that once prevailed when it came to the confirmation of judges.”**
- **Judge Kavanaugh himself received bipartisan support in his 2006 confirmation** to the D.C. Circuit Court of Appeals.
- **Many current Senators have crossed party lines to support a Supreme Court nominee.**
  - Justice Gorsuch (2017): Senators Joe Donnelly (IN), Heidi Heitkamp (ND), and Joe Manchin (WV) voted to confirm.
  - Justice Kagan (2010): Senators Susan Collins (ME) and Lindsey Graham (SC) voted to confirm.
  - Justice Sotomayor (2009): Senators Lamar Alexander (TN), Susan Collins (ME), and Lindsey Graham (SC) voted to confirm.
  - Chief Justice Roberts (2005): Senators Tom Carper (DE), Patrick Leahy (VT), Patty Murray (WA), Bill Nelson (FL), and Ron Wyden (OR) voted to confirm.
  - Justice Breyer (1994): Majority Leader Mitch McConnell (KY), Judiciary Committee Chairman Chuck Grassley (IA), Orrin Hatch (UT), and John McCain (AZ) voted to confirm.
  - Justice Ginsburg (1993): Majority Leader Mitch McConnell (KY), Judiciary Committee Chairman Chuck Grassley (IA), Orrin Hatch (UT), and John McCain (AZ) voted to confirm.

- **Supreme Court nominees routinely receive bipartisan support in midterm election years.**
  - Justice Breyer’s 87-9 confirmation occurred in July of 1994, garnering 33 Republican votes ahead of a midterm election that flipped control of the Senate from the Democrats to the Republicans.
  - Justice Kagan’s 63-37 confirmation occurred in August of 2010; Justice Kagan earned five Republican votes just months before a midterm election favorable to the Republicans.
- **On average, Republicans have been more open to supporting the Supreme Court nominee of a President from the opposing party.**
  - Of the current members of the Supreme Court, Democrat-appointed Justices received an average of 22 Republican “crossover” votes in their confirmations.
  - By contrast, the current Republican-appointed Justices received an average of 10 “crossover” confirmation votes from Democrats.
  - **Every Democrat-appointed Justice received at least one Republican vote out of the Senate Judiciary Committee. Justices Breyer and Ginsburg were supported unanimously in their Committee votes.**

## **JUDGE KAVANAUGH: WIDESPREAD AND BIPARTISAN PRAISE**

Judge Brett Kavanaugh has attracted widespread praise from litigators, judges, scholars, students, politicians, and members of civil society all across the political spectrum.

- **Donald Verrilli, Obama Administration Solicitor General**

- “Judge Kavanaugh is a brilliant jurist and he’s a very gracious person, both on the bench and off.” *Oyez! A Former SG Dishes on Kavanaugh, Kennedy and a Changing Court*, [LegalSpeak Podcast on July 13, 2018](#)
- “[H]e carries out all phases of his responsibilities as a judge in the way you’d want: an exemplary way.” *Ibid.*
- “[H]e’s a distinguished jurist by any measure.” *Ibid.*

- **Lisa Blatt, Arnold & Porter Partner and Head of Appellate & Supreme Court Practice**

- “Sometimes a superstar is just a superstar. That is the case with Judge Brett Kavanaugh, who had long been considered the most qualified nominee for the Supreme Court if Republicans secured the White House. The Senate should confirm him.” *I’m a Liberal Feminist Lawyer. Here’s Why Democrats Should Support Judge Kavanaugh*, [Politico](#)
- “[U]nless the Democrats want to stand on the principle of an eye-for-an-eye and I don’t think they should folks should stop pretending that Kavanaugh or his record is the issue. He is supremely qualified.” *Ibid.*
- “I do not have a single litmus test for a nominee. My standard is whether the nominee is unquestionably well-qualified, brilliant, has integrity and is within the mainstream of legal thought. Kavanaugh easily meets those criteria.” *Ibid.*
- “Democrats should quit attacking Kavanaugh full stop. It is unbecoming to block him simply because they want to, and they risk alienating intelligent people who see the obvious: He is the most qualified conservative for the job.” *Ibid.*

- **David Gregory, CNN Political Analyst**

- “Good for Lisa [Blatt] for writing this. This a highly qualified lawyer standing up for the integrity and qualifications of a colleague.” [Twitter](#)

- **Robert Bennett, Schertler & Onorato and Former Lawyer for President Clinton**

- “I first crossed paths with Brett in the mid-1990s, when we found ourselves lined up on opposite sides of the decade’s biggest legal battle. At the time, I was serving as President Clinton’s personal lawyer in the Paula Jones case.” *Clinton Lawyer During Starr Investigation Endorses Kavanaugh*, [The Hill](#)

- “‘Brett had just joined the Office of Independent Counsel under Ken Starr, then investigating the President,’ he added. ‘Despite being on opposite sides of the Starr investigation, however, Brett and I managed to avoid falling prey’ to more divisive political instincts.” *Ibid*
- “Brett’s integrity quickly won me over, and we became close friends despite our differences (and the differences between the Presidents we served).” *Ibid*.

- **Amy Chua, Yale Law School Professor**

- “Many judges use ideological tests in hiring clerks. Judge Kavanaugh could not be more different. While his top consideration when hiring is excellence top-of-the-class grades, intellectual rigor he actively seeks out clerks from across the ideological spectrum who will question and disagree with him. He wants to hear other perspectives before deciding a case. Above all, he believes in the law and wants to figure out, without prejudging, what it requires.” *Kavanaugh Is a Mentor to Women*, [The Wall Street Journal](#)

- **Akhil Amar, Yale Law School Professor**

- “The nomination of Judge Brett Kavanaugh to be the next Supreme Court justice is President Trump’s finest hour, his classiest move. Last week the president promised to select ‘someone with impeccable credentials, great intellect, unbiased judgment, and deep reverence for the laws and Constitution of the United States.’ In picking Judge Kavanaugh, he has done just that.” *“A Liberal’s Case for Brett Kavanaugh,”* [The New York Times](#)
- “In 2016, I strongly supported Hillary Clinton for president as well as President Barack Obama’s nominee for the Supreme Court, Judge Merrick Garland. But today, with the exception of the current justices and Judge Garland, it is hard to name anyone with judicial credentials as strong as those of Judge Kavanaugh. He sits on the United States Court of Appeals for the District of Columbia Circuit (the most influential circuit court) and commands wide and deep respect among scholars, lawyers and jurists.” *Ibid*.
- Judge Kavanaugh’s “combination of smarts, constitutional knowledge and openness make him clearly superior.” *Supreme Court Nominee Brett Kavanaugh Votes One Way But Sees Both Sides*, [USA Today](#)
- “He goes out of his way to make sure he’s hearing both sides.” *Ibid*.
- “Judge Kavanaugh commands wide and deep respect among scholars, lawyers, judges, and justices.” *Brett Kavanaugh ‘90 Nominated to U.S. Supreme Court*, [YLS Today](#)

- “Good appellate judges faithfully follow the Supreme Court; great ones influence and help steer the Court. Several of Kavanaugh’s biggest ideas have found their way into Supreme Court opinions. Thanks to decades of high-level experience and close observation, Kavanaugh also understands the intricacies of the executive and legislative branches.” *Ibid.*
- Judge Kavanaugh has always shown “willingness . . . to respectfully engage thoughtful moderates and liberals. Kavanaugh, a stalwart Republican, has often hired Democrats and independents to assist him as law clerks. This is exactly the sort of jurist who free-thinking Mainers from [Senator] Collins on down should applied.” [\*As Maine Goes, So May Go the Nation on Kavanaugh Confirmation, Portland Press Herald\*](#)

- **Letter from Bipartisan Group of 23 Classmates from Yale Law School**

- “Although we doubt we will agree with every decision Judge Kavanaugh may make as a justice, we firmly believe that Judge Kavanaugh would make decisions thoughtfully, honestly and impartially, and after careful, thorough and respectful consideration of precedent, the case records and the arguments of the litigants.” *A Letter to Senate Judiciary Committee Members Chuck Grassley and Dianne Feinstein Stands in Contrast to a Similar Letter from Yale Law Students, [The Weekly Standard](#)*
- “Based on our years of knowing Judge Kavanaugh, we are firmly convinced that his allegiance as a Supreme Court justice would be only to the Constitution and laws of the United States and not to any partisan interests.” *Ibid.*

- **David Levi, Current President of the American Law Institute; Former U.S. District Judge for E.D. Cal.; Former Dean of Duke Law School**

- “[During our moot court competition, Judge Kavanaugh] did a wonderful job in taking the students through a series of questions while maintaining an encouraging and gracious demeanor. One could see what a fine judge he is and what a fair courtroom he would run, one in which every advocate and every party would feel heard and respected.” *Letter to Sens. Grassley and Feinstein* (Aug. 7, 2018).
- “I find it quite extraordinary that Judge Kavanaugh has such a broad base of support among academics, who highly respect him for his inspiration of their students and for the brilliance of his judicial opinions, and among his former law clerks, who have found him such a wonderful mentor and example. I can assure you that this kind of deep, broad, and enthusiastic support is unusual and telling of the character and ability of Judge Kavanaugh.” *Ibid.*
- “There can be no serious doubt that Judge Kavanaugh is eminently qualified by his ability, training, education, character, judicial demeanor, and record on the bench.” *Ibid.*

- **41 Renowned Veteran Appellate Lawyers of Varied Political Ideologies**

- “We write to express our strong support for the nomination of Judge Brett M. Kavanaugh to be an Associate Justice of the United States Supreme Court. Each of us is a member of the Supreme Court Bar and has had an active practice in appellate matters before that Court and throughout the country. We hold a broad range of political, policy, and jurisprudential views, but we speak as one in supporting Judge Kavanaugh’s nomination.” *Veteran Supreme Court Advocates Voice Support for Nominee Brett Kavanaugh*, [The National Law Journal](#).
- “Judge Kavanaugh has a well-deserved reputation as an outstanding jurist. His opinions are clear, rigorous, and thoughtful. Those of us who have appeared before him appreciate his impressive ability to distill complex legal issues to their essence, the incisiveness of his questions, and the unfailing courtesy he extends to his colleagues and to counsel who appear before him.” *Ibid*.

- **Robert Loeb, Orrick Partner**

- “Having argued before Kavanaugh many times and having seen him preside over dozens of cases, I can say he always gets to the heart of the case, appears very interested in the dialogue with counsel and is never trying to play gotcha or embarrass anyone.” [Twitter](#)
- “On numerous occasions, I have seen him throw a lifeline to struggling counsel giving them a needed case or record cite, even if they are arguing a so-called liberal side.” *Ibid*.

- **Heather Gerken, Yale Law School Dean**

- “I have known Brett Kavanaugh for many years. . . . Ever since I joined the faculty, I have admired him for serving as a teacher and mentor to our students and for hiring a diverse set of clerks, in all respects, during his time on the court.” *Brett Kavanaugh ’90 Nominated to U.S. Supreme Court*, [YLS Today](#)

- **Abbe Gluck, Yale Law School Professor**

- “Brett Kavanaugh is a true intellectual – a leading thinker and writer on the subjects of statutory interpretation and federal courts; an incomparable mentor – someone who picks law clerks of all backgrounds and viewpoints; and a fair-minded jurist who believes in the rule of law. He is humble, collegial and cares deeply about the federal courts.” *Brett Kavanaugh ’90 Nominated to U.S. Supreme Court*, [YLS Today](#)

- **William N. Eskridge, Yale Law School Professor and Leading Academic Proponent of Marriage Equality**

- “Brett Kavanaugh has been one of the most learned judges in America on a variety of issues, ranging from theories of statutory interpretation to separation of powers. . . . We



are proud that he is our graduate...” *Brett Kavanaugh ’90 Nominated to U.S. Supreme Court*, [YLS Today](#)

- **Richard Lazarus, Harvard Law School Professor**

- “Judge Kavanaugh has been an outstanding member of our teaching faculty. Our students have benefited enormously from his generous devotion of his time, his skills as a jurist, and his legal acumen.” *Judge Brett Kavanaugh, HLS Williston Lecturer on Law, Nominated to Supreme Court*, [Harvard Law Today](#)
- “He’s not like a Scalia or, to some extent, an Alito where you read their opinions and find there’s an antipathy, a hostility, to environmental law. Scalia is sometimes even sarcastic in his tone. You never see this in Brett Kavanaugh. He is a really decent person, with enormous integrity, and there’s just not that kind of bent with him.” *Brett Kavanaugh: ‘The Earth Is Warming,’* [The Atlantic](#)

- **John Manning, Harvard Law School Dean**

- “I congratulate Judge Kavanaugh on his nomination to the Supreme Court and thank him for his superb teaching at Harvard Law School over the past decade . . . As the Williston Lecturer on Law, he has brought rigor and openness to his ever-popular courses on Separation of Powers and the Supreme Court.” *Harvard Law Colleagues Applaud Judge Kavanaugh’s Nomination to Supreme Court*, [The Boston Globe](#)

- **Noah Feldman, Harvard Law School Professor**

- Judge Kavanaugh is an “orderly, precise thinker . . . It helps explain why everyone in the legal establishment has seen him for a decade as a likely future justice.” *Kavanaugh’s Papers Don’t Help Trump Avoid Indictment*, [Bloomberg Opinion](#)

- **Jack Goldsmith, Harvard Law School Professor**

- “[Brett Kavanaugh] will . . . be an influential figure within the Supreme Court building. He is a brilliant analyst with a deep scholarly and practical knowledge of the law. His legal opinions are unusually accessible. He is a magnanimous soul. And perhaps most important, he engages beliefs he does not share and is amenable to a better argument. Such open-mindedness is a mark of a great judge, and a prerequisite for persuading others.” *Brett Kavanaugh Will Right the Course of the Supreme Court*, [Time](#)

- **Jonathan Adler, Case Western Reserve University School of Law Professor**

- “Judge Kavanaugh’s opinions in [administrative law] cases show someone who takes administrative law principles to heart. . . . Judge Kavanaugh is quite evenhanded, applying the same approach whether evaluating agency actions that could be characterized as liberal or conservative.” *Will Kavanaugh Curb Sloppy White House Deregulation?*, [The New York Times](#)

- **Will Baude, University of Chicago Law School Professor**
  - “He is an incredibly conscientious person who I think has the right way of thinking about the law, and it would be a travesty if he were not confirmed.” *First Mondays Podcast* (Aug. 27, 2018).
- **Daniel Epps, Washington University in St. Louis Law School Professor**
  - Judge Kavanaugh has built “a very good reputation for working with people across ideological lines.” *Kavanaugh’s Collegial Nature Could Change Supreme Court’s Tenor*, [The Wall Street Journal](#)
- **Lester Munson, Visiting Fellow at Scalia Law School and Former Staff Director for the Senate Foreign Relations Committee**
  - “Judge Brett Kavanaugh is one of the most qualified individuals ever to be nominated to the Supreme Court. He has demonstrated integrity, influence, and experience in his twelve years as a judge on the second most powerful court in the land.” *Brett Kavanaugh Has All the Right Qualifications for Supreme Court*, [The Hill](#) (Aug. 6, 2018).
- **Jed Shugerman, Fordham Law School Professor**
  - “I’ve never met [Judge Kavanaugh], but I’ve thought of him as a respectable, independent-minded, highly qualified mainstream conservative judge for a while.” *Four Thoughts on Judge Kavanaugh*, [Shugerblog](#)
- **Joshua D. Wright, Professor at George Mason’s Scalia Law School and former FTC Commissioner**
  - “Judge Kavanaugh is one of the most qualified individuals to ever be nominated to the Supreme Court. He has demonstrated integrity and influence as a judge on the D.C. Circuit. Kavanaugh understands that the judge’s role is to apply the law as it is written, not to impose his own policy preferences. He is a textualist when interpreting statutes and frequently resorts to history and tradition when interpreting the Constitution.” *Dems Should Drop Delay Tactics and Evaluate Kavanaugh on the Merits*, [Real Clear Politics](#) (Aug. 13, 2018).
- **Former Harvard Law Students**
  - “We . . . represent a broad spectrum of political and ideological beliefs, as well as perspectives on judicial philosophy. We may have differing views on political issues surrounding the confirmation process, but we all agree on one thing: Judge Kavanaugh is a rigorous thinker, a devoted teacher, and a gracious person.” *Former Harvard Law Students Praise Kavanaugh in Letter*, [The Boston Globe](#)

- **Six Harvard Law Graduates and Former Members of Harvard BLSA and One Current HLS student and BLSA member**

- “Judge Kavanaugh reached out to the Harvard Law School chapter of the Black Law Students Association (BLSA) in 2017 to express interest in planning a clerkship event for our members . . . . On March 27, the Judge participated in a panel jointly with Judge Paul Watford of the Ninth Circuit Court of Appeals to provide information to BLSA students about the clerkship hiring process.” *Kavanaugh Garner's Support Among Several Black Harvard Law School Graduates*, [The Washington Free Beacon](#)
- “The graduates and law student went on to talk about how Kavanaugh told them one of his major priorities was encouraging more students of color to apply for judicial clerkships in response to multiple recent reports about minority law students being ‘underrepresented in clerkship positions in the Federal Judiciary.’” *Ibid.*

- **Former Students**

- “Over the last decade, about 350 law students at Harvard, Yale and Georgetown expressed views on classes offered by Judge Brett M. Kavanaugh, President Trump’s Supreme Court nominee. With rare exceptions, they praised his mastery of legal materials, intellectual rigor, fair-mindedness and accessibility. ‘I honestly believe I took a class that was instructed by a future Supreme Court justice,’ a Georgetown student wrote in 2007.” *‘Best Professor.’ ‘Very Evenhanded.’ ‘Great Hair!’: Brett Kavanaugh, as Seen by His Law Students*, [The New York Times](#)

- **Kathryn Cherry, Former Law Clerk**

- “I’m Kathryn Cherry, I’m a registered Democrat, I clerked for Judge Kavanaugh for a year. Judge Kavanaugh is a brilliant jurist. You can rely on Judge Kavanaugh to follow precedent. You can rely on Judge Kavanaugh to follow the U.S. Constitution and the laws as they’re written.” *Kathryn Cherry*, [Statement](#)
- “He treats everyone equal under the law.” *Ibid.*
- “As a woman and a minority I am confident that Judge Kavanaugh will be a great justice.” *Ibid.*

- **Zac Hudson, Law Clerk to Judge Kavanaugh from 2009 to 2010**

- “Judge Kavanaugh is not merely a fair and independent jurist, but a generous mentor and devoted friend, father, and husband. America would be lucky to have him on the Supreme Court.” [Take It From a Local Guy Kavanaugh Well-Suited](#), *The Intelligencer* (Aug. 5, 2018).

- **Kenneth Christmas, Law School Friend**

- “He was sort of the guy that would argue both sides. I don’t think he sees himself as an ideologue in any way. I think he sees himself as someone who has intellectual rigor in how he looks at the law.” *A Sports Junkie Who Ate Pasta with Ketchup: Law School Friends Reflect on Kavanaugh’s Time at YLS*, [Yale Daily News](#)
- **Colleen Roh Sinzdek, Former Kavanaugh Student at Harvard and Former Clerk to Chief Judge Merrick Garland (D.C. Cir.)**
  - “He wanted people to disagree. He wanted to hear the different sides. I think he liked nothing more than having two people really engaged in the reading and disagreeing and debating about it. I’m not a Republican. But I did genuinely get the impression that he listened and wanted to go where the best arguments led him.” *At Harvard Law School, He’s Professor Kavanaugh*, [Boston Globe](#)
- **Judge Robert A. Katzmann (2d Cir.)**
  - “With much respect, I read Judge Kavanaugh’s review of *Judging Statutes*. I could not have hoped for a more thoughtful examination of the subject. Judge Kavanaugh, a rightfully highly regarded jurist and colleague, offers a measured critique that furthers discussion of how to approach the interpretive enterprise. And his fresh ideas about the use of canons open up new lines of thinking.” *Response to Judge Kavanaugh’s Review of Judging Statutes*, [Harvard Law Review Forum](#)
- **Senator Joe Manchin (D-WV)**
  - “I think he seems to be a very fine person of high moral standards. A family person who’s very involved in his community. Has all the right qualities. He’s well-educated.” *Joe Manchin: Brett Kavanaugh ‘Has All the Right Qualities,’* [Axios](#)
- **Senator Susan Collins (R-ME)**
  - “It will be very difficult for anyone to argue that [Judge Kavanaugh]’s not qualified for the job. He clearly is qualified for the job.” *Collins, Murkowski Signal Comfort with Kavanaugh*, [Politico](#)
- **Senator Thom Tillis (R-NC)**
  - “I was incredibly impressed with Judge Brett Kavanaugh’s extensive resume and impeccable qualifications when he was nominated to the Supreme Court, and I’m even more impressed after meeting with him. . . . I am confident Judge Kavanaugh is a mainstream jurist who understands his job is to interpret laws based on the text of the Constitution, and not to serve as an activist and extension of the legislative branch.” [Twitter](#)
- **Senator Mike Lee (R-UT)**

- Judge Kavanaugh’s “insight into the current state of the law and the Constitution shows he is just the kind of originalist jurist we need on the Court.” [Twitter](#)
- **Senator Orrin Hatch (R-UT)**
  - “Judge Kavanaugh is an eminently qualified, widely respected court of appeals judge well within the judicial mainstream.” *Democrats Have Already Jumped the Shark on Judge Kavanaugh*, [The Daily Beast](#)
- **Senator Lindsey Graham (R-SC)**
  - “I’d like [Kavanaugh] to move into my neighborhood.” [Twitter](#) (via Seung Min Kim)
- **Senator Dean Heller (R-NV)**
  - “[Judge Kavanaugh’s] legal career combined with his educational credentials make him an exceptionally qualified nominee to fill the upcoming vacancy on the U.S. Supreme Court. At this point, I have no reservations in confidently supporting Judge Kavanaugh’s confirmation.” *Heller Meets with U.S. Supreme Court Justice Nominee Judge Brett Kavanaugh*, [Press Release](#)
- **Senator Heidi Heitkamp (D-ND)**
  - “He seems to be a fairly standard conservative judge, and obviously highly qualified.” *A Supreme Court Vote Is Just One of Heidi Heitkamp’s Headaches*, [The New York Times](#)
- **Senator David Perdue (R-GA)**
  - “Judge Kavanaugh is an independent judge, and the kind of judge we need to fill this critical open seat on the United States Supreme Court.” *Sen. David Perdue: Confirm Judge Kavanaugh*, [Marietta Daily Journal](#)
- **Senator Pat Toomey (R-PA)**
  - “It is abundantly clear to me that Judge Kavanaugh has the character, the intellect, the experience, and the judicial philosophy to be a great Supreme Court justice. He understands that the proper role of a judge is to apply the law, and apply it neutrally.” *After Meeting with SCOTUS Nominee, Pat Toomey Say[s] He’ll Vote for Brett Kavanaugh*, [The Morning Call](#)
- **Senator Tim Scott (R-SC)**
  - “After reviewing his record & meeting with Judge Kavanaugh today, I am certain that he is devoted to these principles and will serve as a fantastic addition to the Supreme

Court. He is truly what a 21st century conservative looks like & I look forward to voting for him this fall.” [Twitter](#)

- **Senator Rob Portman (R-OH)**

- “I have known Brett Kavanaugh for more than 15 years, since I worked with him and his wife in the George W. Bush White House. He is compassionate and humble and someone who has a big heart and the humility to be able to listen. I saw this on display when Judge Kavanaugh came to my office in Washington, D.C. to discuss his qualifications and his record, something he will continue doing with senators throughout his nomination process.” *Portman Column: Brett Kavanaugh Is the Right Pick for the Supreme Court*, [Press Release](#)
- “I have known Judge #Kavanaugh for 15+ years. Not only is he a great legal scholar, but he is also a terrific person. I can’t think of anyone better qualified to be on #SCOTUS and I look forward to supporting his confirmation.” [Twitter](#)

- **Senator Todd Young (R-ID)**

- “Judge Kavanaugh is a good and decent person, a family man, and a well-respected jurist. If confirmed, I have confidence that he will be faithful to the Constitution and preserve the integrity of the Supreme Court. Our discussion today will be very helpful as I continue to review Judge Kavanaugh’s record.” *Young Meets with Supreme Court Nominee Brett Kavanaugh*, [Press Release](#)

- **Representative Mike Johnson (R-LA)**

- “Brett Kavanaugh checks every one of the founder’s boxes and meets the highest qualifications that any American should demand of a judge who faithfully administers equal justice under the law.” *Judge Kavanaugh Confounds the Left*, [The Hill](#)

- **GOP Governors**

- “Nearly all the nation’s Republican governors have signed a letter backing Senate confirmation for President Donald Trump’s Supreme Court nominee, Brett Kavanaugh.” *Most GOP Governors Back Trump’s Supreme Court Pick*, [AP News](#)

- **Adam Laxalt, Attorney General of Nevada**

- “Ultimately, our senators shouldn’t be supporting or opposing judicial nominees based on whether they agree with the nominee on this or that issue. Our senators should be supporting nominees based on whether they will faithfully apply the law. Kavanaugh has repeatedly demonstrated his commitment to do just that, which is why I wholeheartedly support his nomination. I encourage the Senate to fairly and quickly confirm Judge Kavanaugh as our next Supreme Court justice.” *Judge Brett Kavanaugh Faithfully Applies the Law Instead of Making It Up*, [The Washington Examiner](#)

- **Ken Paxton, Attorney General of Texas**

- “The millions of Americans who believe that great questions are best decided in statehouses, rather than courthouses, by voters rather than judges, could not have hoped for better than Judge Brett Kavanaugh.” *Kavanaugh Will Defend the Constitution, Uphold Rule of Law*, [RealClearPolitics](#)

- **Tim Griffin, Lieutenant Governor of Arkansas**

- “Judge Kavanaugh and I served in President George W. Bush’s White House simultaneously, and I have followed his career with great interest. His intellect, experience, and commitment to the Constitution make him the ideal addition to the Supreme Court.” *Brett Kavanaugh: The Ideal Choice*, [Arkansas Democrat-Gazette](#)

- **West Virginia State Senator Mitch Carmichael**

- “President Trump promised a transparent, principled, and consistent process for choosing his Supreme Court nominees. He pledged to choose a judge with top-notch credentials, unbiased judgment, and a great intellect. He delivered on this promise with Justice Gorsuch, and it is clear he intends to deliver on this promise once more with Judge Kavanaugh.” *Kavanaugh’s Nomination Is Part of Trump’s Dedication to America’s Comeback*, [West Virginia Record](#)

- **Pete Kelly and Cathy Giessel, Alaska State Senators**

- “The United States Senate would serve our country by confirming Brett Kavanaugh to the Supreme Court. Judge Kavanaugh’s immense qualifications and exemplary record alone should carry him to the bench.” *Voices of Alaska: Judge Brett Kavanaugh Deserves Better*, [Peninsula Clarion](#)
- “President Trump committed to appoint good judges who analyze the law, uphold the Constitution and don’t legislate from the bench. . . . The president upheld his campaign promise; that’s why we have Justice Neil Gorsuch, and why Judge Kavanaugh stands ready to join him. We ask our United States senators to keep their commitments to the voters and confirm Judge Brett Kavanaugh to the Supreme Court.” *Ibid.*

- **Twenty-Nine Members of the Iowa Senate Republican Caucus**

- “Judge Kavanaugh has spent many years working to improve the lives of others and working to protect the rights of private citizens, while strictly interpreting the laws and our Constitution as they were written. He will be an advocate for freedom for the people of the United States and an outstanding addition to the Supreme Court.” Letter to Senator Grassley (Aug. 17, 2018).

- **Fifty-Five Members of the Iowa House of Representatives**



- “Americans deserve a Supreme Court Justice who is fair and has a deep respect for the rule of law. Most importantly, they deserve someone who interprets our Constitution the way it is written, rather than performing mental gymnastics to reach a pre-determined outcome based on personal preference. Judge Kavanaugh exhibits these important qualities which makes him clearly qualified to serve.” Letter to Senators Grassley and Feinstein (Aug. 20, 2018).

- **Kent Leonhardt, West Virginia Commissioner of Agriculture**

- “Clearly, Judge Kavanaugh possesses the experience, moral fortitude and reliability required to fulfill a lifetime appointment to our nation’s highest court.” *Manchin Should Vote ‘Yes’ to Confirming Kavanaugh to U.S. Supreme Court*, [West Virginia Record](#)

- **Ray LaHood, Former Secretary of Transportation in the Obama Administration**

- “Brett is a very solid judge with strong public service experience. America and #SCOTUS would be well served by his appointment.” [Twitter](#)

- **Kay Coles James, Heritage Foundation President**

- “We need more judges like Brett Kavanaugh with a demonstrated ability to apply the Constitution faithfully and uphold the traditions of our democracy.” [Twitter](#)
- “As a judge, Brett Kavanaugh has sent former clerks to work under 8 of the 9 Supreme Court justices. It’s just one more example of why he’ll be a great justice!” *Ibid.*
- “His mother worked hard to become a prosecutor when women in the law were rare. His father worked hard to put himself through law school. And now he’s been nominated to the Supreme Court. Brett Kavanaugh is truly a product of the American Dream!” *Ibid.*
- “Judge Kavanaugh has been a steadfast supporter of civil rights, because he has been consistently faithful to the Constitution.” [Black Press USA](#)

- **Representative Vicky Hartzler (R-MO)**

- “During his more than ten years serving on the D.C. Circuit Court, Brett Kavanaugh has shown his ability to respect, uphold, and interpret the Constitution fairly. . . . He has resisted the pressure of the majority in complicated cases and maintained his strong judicial values. Brett Kavanaugh is well qualified for the U.S. Supreme Court, and I hope Senator McCaskill will decide to support his nomination after their meeting tomorrow.” *Vicky Hartzler*, [Press Release](#)

- **Thomas J. Donahue, President and CEO, U.S. Chamber of Commerce**



- “[T]he president hit a home run by nominating Circuit Judge Brett Kavanaugh.” *The Right Judge for the Job, Chamber of Commerce*.
- “Legal professionals of all political persuasions who have worked with Judge Kavanaugh over the years have described him as an accomplished, fair, and thoughtful jurist who will make an excellent addition to our nation’s highest court. In the Chamber’s view, he takes seriously the interests and legal arguments on all sides of a case. Judge Kavanaugh has repeatedly demonstrated that he treats all who come before him seeking justice with the utmost dignity and respect that every party in our legal system deserves. This is why the Chamber fully supports Judge Kavanaugh and has deemed his confirmation a ‘key vote’ that will be factored into our grading of lawmakers this year.” *Ibid*.

- **National Rifle Association of America, Institute for Legislative Action**

- “NRA members can feel confident throwing their enthusiastic support behind President Donald Trump’s nomination of Judge Brett Kavanaugh to the U.S. Supreme Court. Throughout his time on the bench, Judge Kavanaugh has demonstrated deep respect for the Second Amendment as construed in Justice Antonin Scalia’s landmark decision in *District of Columbia v. Heller*. Moreover, his record on the Second Amendment is well established.” *Judge Brett Kavanaugh Has Earned NRA Members’ Support*, [NRA-ILA Press Release](#)

- **Adam White**

- “Adam White, a research fellow at the Hoover Institution who studies administrative law and regulatory policy, describes Kavanaugh as one of the judiciary’s top intellectual luminaries.” *Hoover Scholars Analyze Supreme Court Nominee Brett Kavanaugh*, [Hoover Institution](#)

- **Chris Dudley, Former NBA Player and Teammate of Judge Kavanaugh at Yale**

- “People who are hard workers on the court are usually hard workers off the court as well . . . .That’s the case with Brett.” [He Can Hold Court as Judge, But in Basketball? He Tries His Best](#), *Wall Street Journal*

- **The Editors of the Weekly Standard**

- “Neither Judge Kavanaugh’s words nor his achievements nor his character will give any fair-minded lawmaker, Democrat or Republican, reason to conclude that he is anything but a first-rate legal mind and a conspicuously qualified nominee.” *Judging Kavanaugh*, [The Weekly Standard](#)

- **Shannen Coffin, Washington Attorney and Judge Kavanaugh’s Friend**

- “‘I’ve known Brett Judge Kavanaugh for 20 years,’ Shannen Coffin, an attorney in Washington, D.C., told CNA. ‘He’s a very smart person, but he’s a regular guy, too. He’s a devoted father, and spouse.’ Judge Kavanaugh has spent the last 12 years on the D.C. Circuit Court of Appeals but despite that formidable judicial record, Coffin says that there are ‘no airs about’ him and he has a ‘humility in his approach to judging.’ ‘He’s also the guy who after a day of long meetings with senators, you know, and without fanfare, was serving food to the homeless.’ Coffin said that Kavanaugh ‘views the role of a judge in the constitutional system not as a political job, but as a job of interpreting statutes and interpreting the Constitution.’” *See Christine Rousselle, Kavanaugh’s Friends Describe Man of Humility, Service, Faith*, [Catholic News Agency](#)

- **Ruben Navarette Jr., Syndicated Columnist**

- “So, when assessing Supreme Court nominees, I have my own test. And it is based on just one thing: character. That’s what I look for, and in this process, as in life it’s the only thing that matters. Judging from his remarks at the White House when his nomination was announced, federal appeals court Judge Brett Kavanaugh has buckets of character. He radiates it.” *Kavanaugh Demonstrates the Quality that Matters in Supreme Court Pick*, [San Francisco Chronicle](#)

- **Charlie Gerow, CEO of Quantum Communications (PA)**

- “He is a man with impeccable legal credentials, a distinguished record as a federal judge, a reputation as an incredibly hard worker, and a record of service to others through his church and in his community. He serves meals to the less fortunate and tutors elementary school kids. He’s even a CYO girls basketball coach and a car pooler. Most important, he has a judicial philosophy that he summed up succinctly: ‘The judge’s job is to interpret the law, not make the law or make policy.’ That’s what the American people said they want.” *Give Brett Kavanaugh a Fair Hearing*, Sen. Casey, [Penn Live](#)

- **John R. Lott, Economist and Political Commentator**

- “Kavanaugh is dedicated to judging cases based on the evidence and dedicated to following the Constitution as it is written. He is a firm opponent of legislating from the bench to support his ideological views.” *Here’s the Real Reason Democrats Are So Scared About Kavanaugh Joining the Supreme Court*, [Fox News](#)

- **William Kristol**

- “Kavanaugh is a serious and respected federal judge with a well-thought-through constitutionalist orientation. Based on what we know now, he deserves enthusiastic support from all who believe in a constitutionalist Supreme Court, and he should be confirmed by the United States Senate. President Trump deserves credit for the selection.” *A Case of the Mondays*, [The Weekly Standard](#)

- **Hans A. von Spakovsky and Elizabeth Slattery**

- “There is no question that Brett Kavanaugh is extremely qualified to be the newest member of the Supreme Court. His long record on the bench shows him to be fair, impartial and faithful to the Constitution. No amount of character assassination, record distortion, or inappropriate questioning will change that. The top priority of the Senate should be getting Kavanaugh confirmed by Oct. 1.” *The Left Slings Mud at Kavanaugh but Will It Stick? Three Things Fair-Minded Senators Need to Consider*, [Fox News](#)

- **Eugene Scalia, Gibson Dunn Partner**

- “Kavanaugh’s interest in administrative law tells us that he is intensely engaged with questions that arise constantly in his current court and at the Supreme Court. His interest tells us that he is thinking about the roles of Congress, the executive branch, and the courts in regulating our daily lives. He’s asking questions that concern our liberty and our ability to participate as citizens in the development of the law. Hopefully, these are concerns close to the hearts of Democrats and Republicans alike.” *Why Supreme Court Nominee Brett Kavanaugh Should Appeal to Both Democrats and Republicans*, [USA Today](#)

- **Amy Swearer**

- “The main takeaway from Kavanaugh’s *Heller II* dissent is not that he is an extremist or that he personally dislikes the idea of regulating semi-automatic rifles. It is, rather, that he faithfully applied binding precedent during his time on the D.C. Circuit, in spite of whatever his personal policy preferences might have been.” *Brett Kavanaugh’s Defense of Second Amendment Is Hardly ‘Extremist,’* [The Daily Signal](#)

- **The Economist**

- “Mr Kavanaugh is highly qualified, an unremarkable choice for a Republican president. Jeb Bush or Marco Rubio might have picked him.” *Brett Kavanaugh Could Shape the Law for the Next 40 Years*, [The Economist](#)

- **The New York Times**

- “Yet by many accounts, the conservative combatant of the Bill Clinton investigation, the 2000 Florida recount who has spent a dozen years as an appellate judge is also a generous friend, including to many Democrats; an authentic sports fanatic who keeps a beat-up basketball in his chambers; and a warmhearted family man.” *Influential Judge, Loyal Friend, Conservative Warrior and D.C. Insider*, [The New York Times](#)

- **Small Business & Entrepreneurship Council**

- His “job is to interpret the law as written, and not make law or policy. His legal opinions and decisions back up those words. Judge Kavanaugh’s judicial philosophy is

especially critical for a Supreme Court justice as the U.S. Constitution guarantees and protects rights and freedoms that have kept our nation free and have made America the most entrepreneurial and innovative in the world. Sometimes, unfortunately, the executive and legislative branches overreach when it comes to policy or legislative actions.” *Main Street Largely Cheers Trump’s Pro-Business Supreme Court Nominee Brett Kavanaugh*, [CNBC](#)

- **Reverend Eve Nunez, President of the National Latina/Latino Commission**

- “We’re thrilled with President Trump’s nomination. Judge Kavanaugh is a Christian who’s devoted his life of faith to public service, gives his time to advance religious liberty, and to serve God and his neighbor. As we read in Proverbs 31:8-9, we must speak up for those who don’t have a voice and judge fairly. Judge Kavanaugh is one of the brightest legal minds in our country, the best of the best, who builds consensus and decides cases based on the law, not personal policy preferences.” *Why Latina Pastoral Leaders Believe Judge Kavanaugh’s Appointment Will Protect Religious Freedoms*, [The Standard Newswire](#)

- **Black Farmers and Agriculturalists Association**

- “The Black Farmers and Agriculturalists Association represents seventeen thousand African American farmers across America. . . . Judge Brett Kavanaugh would make an excellent Associate Justice of the Supreme Court of the United States.” Letter to Sen. Chuck Grassley and Sen. Diane Feinstein (Aug. 15, 2018).
- “During Judge Kavanaugh’s tenure he was prepared, attentive and had command of the facts. If confirmed, these are the traits that Judge Kavanaugh would bring to the bench as an Associate Justice.” *Ibid.*

- **The Richmond Times-Dispatch**

- “Brett Kavanaugh is a good and decent man who promises to uphold the rule of law rather than attempting to legislate from the bench. We applaud the president’s choice.” *Editorial: A Good and Decent Choice for Supreme Court Justice*, [Richmond Times-Dispatch](#)

- **Editorial Board of the Chicago Tribune**

- “Predicting how a judge will rule on any particular question is a fool’s errand. . . . More important is weighing whether Kavanaugh will do the job in a careful, conscientious way, with a deep respect for the text of the Constitution, the language of statutes and the different responsibilities of the three branches of government. A justice who acts mainly to advance some political agenda will be wrong even if he or she votes in the way we would prefer. . . . Kavanaugh’s record suggests that by these standards, he’s highly qualified.” *Judging Judge Kavanaugh*, [The Chicago Tribune](#)

- **The Guardian**

- “The 53-year-old has impeccable academic credentials.” *Brett Kavanaugh: Trump’s Supreme Court Pick Is Conservative Rising Star*, [The Guardian](#)

- **Jan Crawford, CBS News Legal Correspondent**

- Judge Kavanaugh is “highly regarded” on “both sides of the aisle.” *Face the Nation*, [CBS News](#)

- **David Lat, Editor in Chief of Above the Law**

- “Judge Kavanaugh is well known to legal elites, especially conservative legal elites, and to readers of Above the Law. He has dominated our pages for years as the #1 SCOTUS feeder judge, i.e., the lower-court judge who sends the highest number of clerks into coveted Supreme Court clerkships — a sign of the deep respect that his possible future colleagues have for him. And it’s bipartisan; Judge Kavanaugh is the rare feeder who has sent clerks to justices on both sides of the aisle (to every justice except Justice Ginsburg).” *America’s Next Top Justice: Judge Brett Kavanaugh, Or Judge Raymond Kethledge?*, [Above the Law](#)
- “The fact that Judge Kavanaugh has managed to send 39 out of these 48 clerks to SCOTUS is a testament to the fact that there’s no tradeoff between diversity and excellence. You just need to work harder at it — as Judge Kavanaugh does, traveling to law schools on his own dime to mentor diverse students, meet with minority law student groups, and give them advice on applying for clerkships.” *The Supreme Court Sweepstakes: The Case for Judge Kavanaugh*, [Above the Law](#)

- **Monsignor John Enzler, CEO of Catholic Charities in Washington**

- “He’s a man for others. It’s all about service.” [National Review](#)

- **Ken Blackwell, Former Ohio State Treasurer, Ohio Secretary of State, and Mayor of Cincinnati**

- “Just like Neil Gorsuch before him, it’s clear that Judge Kavanaugh will make another great justice, one who will protect the constitutional rights of all Americans.” [The Hill](#)

- **Russ Fagg, Former State District Court Judge and Montana legislator**

- “Judge Kavanaugh is a proven commodity. With over 300 published opinions we know he is a judge who will follow the law, not make it. His opinions are often cited by the Supreme Court and other courts. 39 of his 48 law clerks have gone to clerk at the Supreme Court. Importantly, he is known as a mentor who really takes time to know his law clerks and help them in their career.” [Montana Standard](#)

- **Lester Munson, Visiting Fellow at Scalia Law School and Former Staff Director for the Senate Foreign Relations Committee**
  - “Judge Brett Kavanaugh is one of the most qualified individuals ever to be nominated to the Supreme Court. He has demonstrated integrity, influence, and experience in his twelve years as a judge on the second most powerful court in the land.” [The Hill](#)
- **A Majority of State Attorneys General**
  - “As the chief legal officers of our States, we write to urge the United States Senate to promptly hold a hearing on and confirm the nomination of Judge Brett M. Kavanaugh to the Supreme Court of the United States. Judge Kavanaugh is an outstanding jurist with a proven commitment to upholding the Constitution and the rule of law. We have no doubt that he possesses the qualifications, temperament, and judicial philosophy to be an excellent Associate Justice.” [Letter from Attorneys General](#)
  - “Throughout his career, Judge Kavanaugh has demonstrated an abiding commitment to the principles and freedoms on which our country was founded, and an unshakable respect for the proper role of the courts within our constitutional structure. The Senate should confirm Judge Kavanaugh without delay.” *Ibid.*
- **Jason Nemes, Kentucky State Legislator**
  - “To me, Kavanaugh not only meets, but exceeds the standard I would use to measure the potential of a Supreme Court Justice. I strongly encourage the Senate to confirm him. I look forward to his time on the highest bench in the land and feel confident our Constitution will be in safe hands.” [Lexington Herald Leader](#)
- **Kansas City Star Editorial Board**
  - “Kavanaugh is an accomplished jurist with an impeccable reputation of fairmindedness. . . . [He] is an honorable man who is liked and respected by people on both sides of the aisle.” [Editorial](#)
- **William P. Barr On Behalf Of Griffin B. Bell, Edwin Meese, III, Dick Thornburgh, and John Ashcroft, Bipartisan Group Of Former U.S. Attorneys General**
  - “Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. . . . We believe that Mr. Kavanaugh possesses each characteristic of an outstanding nominee to the U.S. Court of Appeals for the D.C. Circuit, including academic and professional credentials and integrity.” *Letter to Sen. Arlen Specter* (May 5, 2006)

- **Bipartisan Group Of Kavanaugh’s Classmates from the Yale Law School Class of 1990**
  - “We have known Brett Kavanaugh for almost two decades and we are convinced that he would be fair and impartial on the bench. He has the integrity, honesty, good sense, and temperament to apply the law fairly and with intellectual honesty as a judge on the United States Court of Appeals for the District of Columbia Circuit.” *Letter to Sen. Arlen Specter and Sen. Pat Leahy* (May 3, 2006)
- **Professor Robert Chesney, Associate Dean for Academic Affairs at the University of Texas School of Law**
  - “I have had occasion to consider the qualities that make for a good judge. Brett Kavanaugh has such qualities in abundance. . . . [H]e is an immensely bright lawyer who combines intellect and experience with a tremendous work ethic. Equally significant, moreover, through all of my conversations with him on a wide variety of subjects I have found him to be a very reasonable and open-minded thinker. He is not an ideologue; on the contrary, he is intellectually open and moderate. It may be a cliché, but it is fair to say that he has a judicial temperament. Because he combines these essential judicial qualities — intelligence, experience, diligence, and open-mindedness — I whole-heartedly support his nomination.” *Letter to Sen. Orrin Hatch* (April 26, 2004)
- **James Hamilton, Morgan Lewis Partner and Opposing Counsel in *Swidler & Berlin v. United States***
  - “Brett is obviously a very talented lawyer. Although he lost the *Swidler* case . . . he did well with a most difficult position.” *Will D.C. Circuit Nominee’s Conservative Credentials Be His Undoing?*, [Legal Times](#)
- **Roberta Cooper Ramo, Former American Law Institute President and Former American Bar Association President**
  - “[W]hat people said about him that I thought was so interesting . . . was that Judge Kavanaugh was a person of extraordinary intellect and extraordinary personal qualities....” *Remarks by Judge Brett Kavanaugh at the Opening Session of the ALI’s 2013 Annual Meeting* [American Law Institute](#)
- **John McAuliffe, Former Associate Judge of the Court of Appeals of Maryland**
  - “I am a life-long Democrat. Over the years I have formed definite impressions about the qualities that most often produce an excellent judge, and I strongly believe that Brett Kavanaugh possesses those qualities in abundance.” *Letter to Sen. Arlen Specter* (May 31, 2005)



- “Brett is, without a doubt, one of the finest and brightest persons with whom I have worked or associated. He has a genuine and deep love of the law, an absolutely tireless capacity for work, and a friendly and sincere personality. Brett is totally without pretense and to put it quite simply, he is one of the warmest and nicest people you will ever wish to meet.” *Ibid.*
- “Brett Kavanaugh is blessed with a tremendous amount of common sense and a fine sense of humor — two attributes I consider important for judges at any level. Although it has been my experience that judicial demeanor is one of the most difficult traits to predict, I am absolutely certain that Brett will represent the epitome of good judicial demeanor, and will be courteous, attentive and fair to all who appear before the Court.” *Ibid.*
- “It is my honest belief that if confirmed, Brett will serve every litigant and decide every issue fairly, without bias, prejudice, or partisanship. As a lover of Constitutional Law he will savor every difficult issue presented, but he will judge fairly and according to the law.” *Ibid.*
- “Additionally, his intimate knowledge of the operation of government will be an added value in this Court. Brett has packed more intellectual, valuable, and practical knowledge and experience into his adult years than anyone I have ever known, yet he remains unassuming and very much with the common touch.” *Ibid.*
- “[W]e have a wonderful opportunity to move onto a critically important Court a man of highest moral character, excellent legal and practical knowledge, demonstrated fairness and pleasant demeanor, who will likely prove to be one of our finest jurists.”
- **Judge Pamela Harris (4th Cir.) – Obama Appointee, Former Justice Stevens Clerk, and YLS Classmate**
  - “I am a liberal Democrat, and during the time we have been friends, Brett and I have disagreed on most political questions we have discussed. . . . But not once in that time has Brett been anything less than fully respectful of my views or unwilling to hear and take seriously what I have to say. . . . He never belittles or condescends to those with whom he disagrees. . . . Brett stands out as someone who refuses to personalize policy disagreements. . . . His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries.” *Letter to Sen. Orrin Hatch* (April 27, 2004)
- **Neal Katyal, Former Obama Administration Acting Solicitor General**
  - “Mr. Kavanaugh would be a welcome, terrific addition to the United States Court of Appeals. Six years ago, I invited him to speak in a two-hour class I was teaching about the Clinton impeachment. I, and the 75-person class, found him open-minded, smart, and principled. In fact, after the class, I wound up sending one of my best students, who happened to be quite liberal, to work with him for a time. I recall her telling me that he



was principled in his fealty to the law to a fault, and never let ideology get in the way of judgment.” *Letter to Sen. Arlen Specter* (May 9, 2006)

- “It is undoubtedly true that Mr. Kavanaugh has been in the center of many legal disputes over the past fifteen years. That strikes me as an unqualified good — he has an enormous breadth of experience that will serve him well. I have watched his career for many years, and it strikes me as one of almost unmatched distinction.” *Ibid.*
- “I would strongly caution any who might read into his service for the Administration a lack of judicial independence. That is not what I have seen in Mr. Kavanaugh and not what one should expect. As you reminded people in today’s hearing, Justice Jackson handily showed his independence from the President despite his service as Attorney General.” *Ibid.*

## **Judge Brett Kavanaugh: Executive Power**

Judge Brett Kavanaugh's record and writings on executive power express mainstream views that are widely held within the legal community. His writings also demonstrate the high priority he places on the independence of the judiciary. Judge Kavanaugh's academic writings reflect his experiences in both the Independent Counsel's office and the White House. It is no surprise that he has thought deeply and written about these issues in an academic setting.

### **Facts:**

- Judge Kavanaugh has never decided a case involving the legality of the now-defunct Independent Counsel statute, the regulations relating to Special Counsels, or any other significant issue relating to potential criminal indictment or prosecution of a President.
  - Suppositions regarding Judge Kavanaugh's judicial views on the Special Counsel (or other current events) based on inferences from academic articles he has written or speeches he has given are purely speculative.
- Judge Kavanaugh's academic criticism of the majority opinion and praise for Justice Scalia's dissent in *Morrison v. Olson* (the 1988 case that upheld the then-operative, but now-expired, Independent Counsel statute) reflects a widely held, bipartisan view.
  - Justice Kagan has called Justice Scalia's dissent in *Morrison* "one of the greatest dissents ever written and every year it gets better." Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench," *Stanford Lawyer*, May 30, 2015.
  - Senator Richard Durbin described the Independent Counsel at issue in *Morrison* as "unchecked, unbridled, unrestrained, and unaccountable," and has said that such "unchecked power is tyranny." Senate Committee on Governmental Affairs, Hearing on the Future of the Independent Counsel Act, Feb. 24, 1999.
  - Because of these problems, Congress declined to reauthorize the Independent Counsel statute at issue in *Morrison*. (The Special

Counsel regulations that are currently in effect were not at issue in *Morrison*.)

- In any event, *Morrison* was a one-off case that dealt with a now-repealed statute. Little can be gleaned about a judge's views on any current issue from criticism of *Morrison*.
- Judge Kavanaugh's comments regarding *United States v. Nixon* (the 1974 decision that required President Nixon to comply with a subpoena to turn over the Watergate tapes) show that he understands the importance of judicial independence from the executive branch.
  - In 1998, Judge Kavanaugh wrote that there was "no reason to revisit" *Nixon* and that the decision "reflects the proper balance of the President's need for confidentiality and the government's interest in obtaining all relevant evidence for criminal proceedings." *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2162, 2173 (1998).
  - In 2014, Judge Kavanaugh wrote that *Nixon* was one of "the two most significant cases in which the Judiciary stood up to the President." *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1922 (2014).
  - And in a 2015 article in the *Catholic University Law Review*, Judge Kavanaugh wrote, "As a judge, you must, when appropriate, stand up to the political branches and say some action is unconstitutional or otherwise unlawful. Whether it was *Marbury*, or *Youngstown*, or *Brown*, or *Nixon*, some of the greatest moments in American judicial history have been when judges stood up to the other branches, were not cowed, and enforced the law." *The Judge as Umpire: Ten Principles*, 68 CATH. U. L. REV. 683, 688 (2015).
  - When read in their full context, it is clear that Judge Kavanaugh's comments at a roundtable regarding whether *Nixon* was correctly decided were a challenge to President Clinton's legal defense team to reconcile their position on privilege with the Court's holding in *Nixon*. *Lawyers' Roundtable: Attorney-Client Privilege*, Washington Lawyer,

Jan.-Feb. 1999, at 34. In effect, Judge Kavanaugh was telling them that their views were in such tension with *Nixon* that either their views on privilege were wrong or *Nixon* was wrong.

- Judge Kavanaugh's writings both before and after the roundtable demonstrate his respect for the judicial independence exercised in *Nixon*.
- In a speech given two weeks before President Obama was elected, Judge Kavanaugh suggested as a policy matter that Congress consider new legislation to provide future presidents temporary immunity from civil suits and criminal investigations during their time in office. *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1459-62 (2009).
  - In that speech, Judge Kavanaugh was not addressing current law, but rather offering a legislative proposal. (Another legislative proposal in the speech was a single six-year presidential term. No one would conclude from that proposal that Judge Kavanaugh believes the law requires a six-year presidential term. The same is true of his proposal for temporary presidential immunity from suit.)
  - The legislative proposal Judge Kavanaugh offered would not affect whether presidents could be subjected to litigation; it would only affect when that litigation occurs.
  - As he said: "The point is not to put the President above the law or to eliminate checks on the President, but simply to defer litigation and investigations until the President is out of office." *Id.* at 1462.
- As several prominent lawyers across the political spectrum have noted, Judge Kavanaugh's articles and speeches do not say that existing law or the Constitution necessarily provides the President temporary immunity from suit; he has only suggested Congress adopt his proposal as a matter of policy.
  - Walter Dellinger, former Acting Solicitor General for President Clinton, wrote: "[W]hile Judge Kavanaugh has argued for rather sweeping immunity for a president from civil and criminal proceedings,

he was urging that as a matter of legislative policy. He did not state a constitutional position.” Walter Dellinger, Twitter, July 10, 2018.

- These comments are in line with the mainstream legal view. **For the past 45 years, the Department of Justice—across different presidential administrations—has taken the view that a sitting President cannot be indicted while in office.** See OLC Memorandum of Sept. 24, 1973 (Nixon); OLC Memorandum of Oct. 16, 2000 (Clinton).
  - **The most thorough and recent analysis was conducted by President Clinton’s Justice Department** in a 39-page memo by Assistant Attorney General Randolph Moss, whom President Obama later appointed to the U.S. District Court for the District of Columbia.
- In his capacity as a judge, Judge Kavanaugh has never addressed the question of whether a sitting President may be indicted.
  - In a scholarly article, he wrote that “a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office.” *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461 n.31 (2009).
  - During a panel discussion at Georgetown University in 1998 (before he worked in the White House or become a judge), Judge Kavanaugh and 13 other panelists were asked if they believed that a sitting President could not be indicted while in office. He indicated agreement with that statement by raising his hand, joining a majority of the panelists, including President Obama’s future Regulatory Czar, Cass Sunstein. *See Independent Counsel Statute Future* (at 1:00:30).
    - It was unclear from context whether Judge Kavanaugh’s response was based on the Constitution, existing statutes, or opinions of DOJ’s Office of Legal Counsel that bound (and continue to bind) the Executive Branch.
    - However, Judge Kavanaugh contemporaneously acknowledged in a lengthy scholarly publication that this constitutional question is “debatable.” *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2137 (1998).

RATES OF AGREEMENT BETWEEN JUDGE KAVANAUGH AND CHIEF JUDGE GARLAND

**Judge Kavanaugh and Chief Judge Merrick Garland have agreed with one another in the overwhelming majority of cases.**

- Chief Judge Garland joined **96.43%** (27 of 28) of the published majority opinions authored by Judge Kavanaugh when the two sat together, dissenting only in a single case.
- Judge Kavanaugh joined **93.55%** (28 of 30) of the published majority opinions authored by Chief Judge Garland when the two sat together, dissenting only twice.
- Judge Kavanaugh and Chief Judge Garland have voted the same way in approximately **93%** of the matters that they have heard together.<sup>1</sup>

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<sup>1</sup> This figure accounts for published and unpublished decisions and orders, as drawn from Appendix 13C of Judge Kavanaugh's Senate Judiciary Questionnaire.

## **Judge Brett Kavanaugh: Judge Kozinski and Equal Treatment of Women**

Judge Kavanaugh clerked for Alex Kozinski more than 26 years ago. **Until public reports broke in late 2017, Judge Kavanaugh had never heard allegations of sexual misconduct or sexual harassment by Judge Kozinski.** Neither, apparently, **had the other federal judges in Judge Kozinski's own courthouse.** Judge Kozinski's alleged misconduct is reprehensible, but it would be baseless and unfair to hold Judge Kavanaugh responsible. That is simply **guilt by association.**

Indeed, in sharp contrast to Judge Kozinski, **Judge Kavanaugh is “one of the strongest advocates in the federal judiciary for women lawyers” and has received bipartisan praise for his exemplary hiring and mentoring of women in the legal profession.** His judicial record shows that he has repeatedly ruled for female litigants; even the ACLU has acknowledged that his cases have expressed an understanding of women's issues.

### **Facts**

- **Judge Kavanaugh clerked for Judge Kozinski in Pasadena, California, more than 26 years ago, from 1991-1992.**
- There has been no suggestion that Judge Kozinski engaged in sexual misconduct in the year that Judge Kavanaugh served in his chambers.
  - **A female extern, Leslie Fahrenkopf Foley, worked in the Kozinski chambers at the same times as Judge Kavanaugh.** She has issued a statement: “I worked for Alex Kozinski in the summer of 1992 while Brett Kavanaugh was a law clerk. It was a completely professional environment and I never saw or experienced any harassment, nor did I ever feel uncomfortable. Brett Kavanaugh is, moreover, a consummate gentleman and I cannot imagine he ever knew about or condoned any workplace misconduct by Judge Kozinski or anyone else.”
  - **Judge Kavanaugh's co-clerk, Mark Perry, has likewise issued a statement:** “I was aware of none of that and none of that happened to my knowledge during our year.” *APNews*, August 29, 2018.
- **After his one-year clerkship in California, Judge Kavanaugh moved back across the country to the Washington, D.C. area, where he has lived for the past 26 years.** He has had only limited contact with Judge Kozinski since then.
  - Judge Kavanaugh has seen Judge Kozinski in person only occasionally over the past 26 years. They have not spoken on the phone frequently during that time.

- Their primary interactions in recent years have been over email on two professional projects: (1) working together with 10 other judges (including liberal female judges like Chief Judge Diane Wood of the Seventh Circuit) on a book about precedent, and (2) assisting in screening candidates (on paper) for clerkships with Justice Kennedy. **Neither of those projects involved the kind of contact that would have provided any window into Judge Kozinski's sexual conduct.**
- In late 2017, a number of women, including two of Judge Kozinski's former law clerks, accused him of sexual harassment and sexual assault. **That was the first time that Judge Kavanaugh had heard reports of such misconduct by Kozinski.**
  - Within weeks of the allegations, Judge Kozinski resigned from the bench.
- Judge Kavanaugh was hardly alone in not knowing about Judge Kozinski's alleged misconduct; **apparently, the other federal judges in Judge Kozinski's own courthouse did not know about his alleged sexual misconduct.**
  - If the judges in Kozinski's own courthouse, who worked in close proximity to him and his law clerks, did not know about his alleged misconduct, there is no reason that Judge Kavanaugh—who had lived and worked on the other side of the country for the past 26 years—would have known.
- **Other former law clerks to Judge Kozinski have noted that they were likewise shocked to learn of the allegations against Judge Kozinski. Former Kozinski clerk Susan Engel has issued a statement:** “I clerked for Alex Kozinski from 2000 to 2001 and have known him and Brett Kavanaugh very well ever since. Brett is a devoted father to two daughters, someone who has mentored and supported the careers of many women lawyers, and someone who has always treated women with respect. At no time during my clerkship, or in the years since, did I see or hear Judge Kozinski sexually harass anyone. I was shocked by the allegations that surfaced last year. I would be astonished if Brett Kavanaugh had ever heard anything about this.”
  - **The *Washington Post* “reached out to dozens of Kozinski's former clerks and externs” and “[m]any of those who returned messages said that they experienced no harassment of any kind and that their experience ... was a rewarding one.”** *Washington Post*, Dec. 8, 2017.
- **A 2008 misconduct investigation into the presence of explicit materials on a publicly accessible computer file belonging to Judge Kozinski** was conclusively resolved with a 2009 report by highly respected federal judges on the Third Circuit, and **Kozinski was allowed to continue as Chief Judge of the Ninth Circuit.**



- On June 11, 2008, an *LA Times* article revealed that Kozinski had a publicly available website that contained explicit images. The next day, Kozinski announced that he had asked that an official judicial ethics investigation be initiated. Chief Justice Roberts appointed judges on the Third Circuit to lead the investigation.
- In 2009, the Judicial Council of the Third Circuit—a panel including Carter-appointee Judge Dolores Sloviter and Clinton-appointees Judge Majorie Rendell, Judge Theodore McKee, and Judge Thomas Ambro—unanimously concluded that Kozinski should have administered his server more carefully, but that his apology, the website’s deletion, and the report’s public dissemination with an admonishment would “properly conclude” the matter, with no further action required.
- Given that this incident related only to explicit images on a computer and that the Third Circuit judges unanimously declined to recommend any further sanctions, Judge Kavanaugh had no reason to suspect that Judge Kozinski was engaged in sexual misconduct against his law clerks and other women.
- **Judge Kavanaugh treats all his own employees with dignity and respect. Moreover, he has been universally lauded for being a champion of women in the legal profession.**
  - **Former Kavanaugh clerk Porter Wilkinson issued a statement:** “Prior to the public reports late last year, Judge Kavanaugh had never heard any allegations of sexual misconduct or sexual harassment by Judge Kozinski. Judge Kavanaugh knows firsthand from his mother’s personal experience as a trailblazer in the legal world the discrimination that women can face in the workplace. As a former law clerk to Judge Kavanaugh, I know—as evidenced by the letter signed by his law clerks—that he treats everyone with respect. He does not tolerate sexual harassment in any workplace.”
  - **Judge Kavanaugh has received bipartisan praise for his exemplary hiring and mentorship of female law clerks.** Over half of Judge Kavanaugh’s law clerks—25 of 48—are women. In 2014, all four of Judge Kavanaugh’s law clerks were women, making history on the D.C. Circuit. With his backing, 21 of his 25 female law clerks have gone on to Supreme Court clerkships with Justices across the political spectrum, including Justices Sotomayor and Kagan.
  - **Every female law clerk not precluded by their current employment from signing submitted a letter to the SJC calling the Judge “one of the strongest**

**advocates in the federal judiciary for women lawyers,” and stating that the legal profession is “fairer and more equal” because of him.**

- **Obama’s Acting Solicitor General Neal Katyal** wrote that the letter was “100% right” and that the Judge’s “mentoring and guidance is a model for all of us in the legal profession.” Twitter, 7/13/2018.
- **“Liberal feminist lawyer” Lisa Blatt** wrote that “I know of no other judge who stands out for hiring female law clerks,” that Judge Kavanaugh is “a superstar” who is “unquestionably well-qualified” and “within the mainstream of legal thought,” and that “[t]he Senate should confirm him.” *Politico* 8/2/2018.
- **Yale Law Professor Amy Chua** touted “his role as a mentor for young lawyers, particularly women,” noting that “his role as a fierce champion of their careers ... provide[s] important evidence about the kind of justice he would be.” *Wall Street Journal* 7/12/2018.
- **Judge Kavanaugh has consistently ruled for female litigants when that is what the law requires:**
  - He reversed a district court ruling—over a dissent by Judge Sentelle—on grounds that a female defendant was prejudiced by her lawyer’s failure to introduce expert evidence of her suffering from battered woman syndrome. *United States v. Nwoye* (2016).
    - Even the **ACLU** wrote that Judge Kavanaugh “expressed an understanding of the psychology surrounding domestic abuse.” ACLU Report, Aug. 15, 2018.
    - “Judge Kavanaugh was *empathetic*, able to look at the duress defense both from the perspective of the battered woman’s fear of leaving and the perspective of jurors asking the common-sense question ‘why didn’t she leave?’” Dan McLaughlin, *Judge Kavanaugh on Battered Women*, National Review, 7/12/2018.
  - He sided with Kathy Adams, a Foreign Service candidate who was disqualified from admission to the Foreign Service based on her diagnosis with stage-one breast cancer, even though the cancer was treated. The court reversed and remanded for the lower court to determine whether the State Department’s actions were discriminatory. *Adams v. Rice* (2008).
  - He reversed the Social Security Administration’s denial of childhood disability benefits to a young woman with a serious history of mental illness. He ruled that the agency failed to take into account that her brief stint of employment was

subsidized and chided the agency for taking nearly 15 years to resolve her claims. *Rossello ex rel. Rossello v. Astrue* (2008).

- Judge Kavanaugh was raised by a strong mother, a trailblazer who taught him the importance of gender equality from a young age. His mother served as a D.C. public school teacher, and then—at a time when there were few women in the law—a Maryland state prosecutor and state judge.
- Judge Kavanaugh is a devoted husband—married to Ashley Estes Kavanaugh for 14 years—and father of two girls. He coaches his daughters’ basketball teams and is raising them to be strong women.

### **Judge Brett Kavanaugh: *Priests for Life v. HHS***

In *Priest for Life v. HHS*, the D.C. Circuit upheld the Affordable Care Act's contraceptive mandate's "religious accommodation," which religious organizations argued imposed requirements that violated their religious beliefs. In a measured dissent from denial of rehearing *en banc*, Judge Kavanaugh explained that the panel misapplied the Religious Freedom Restoration Act and contradicted binding Supreme Court precedents. The **Supreme Court subsequently vacated the D.C. Circuit's opinion.**

#### **Facts:**

- Religious organizations challenged the ACA contraceptive mandate's "religious accommodation," which compelled those organizations to file certain forms as part of the process by which the government ensured contraceptive coverage for employees. The organizations argued that the regulations required them to facilitate the provision of contraceptive services that were incompatible with their religious beliefs, thereby burdening their religious exercise and violating the Religious Freedom Restoration Act.
- The D.C. Circuit upheld the regulations. Judge Kavanaugh dissented from the denial of rehearing *en banc* because he believed the decision violated binding Supreme Court precedent and warranted rehearing by the full court.
  - No one disputed that the plaintiffs sincerely believed that submitting the form made them complicit in moral wrongdoing, and that they otherwise faced a "huge" monetary penalty. Under the Supreme Court's precedent in *Hobby Lobby*, which Judge Kavanaugh faithfully applied, that was sufficient to make out a "substantial burden" on the plaintiffs' religious exercise and trigger the application of the Religious Freedom Restoration Act.
  - Judge Kavanaugh's opinion ultimately turned on whether the form represented the "least restrictive means" of furthering the government's "compelling interest." Under the Supreme Court's decisions in *Hobby Lobby*, *Wheaton College*, and *Little Sisters of the Poor*, it was not: in each of those cases, the Court had identified less detailed, less burdensome notices that did not require the organizations to identify or notify their insurers, and thus lessened the burden on the organizations' religious exercise, **but that still permitted the organizations' employees to access cost-free contraception.**

- Judge Kavanaugh emphasized that his view was compelled by Supreme Court precedent: “We are a lower court in a hierarchical judicial system” and “[i]t is not our job to re-litigate or trim or expand Supreme Court decisions.”
- Judge Kavanaugh’s opinion had nothing to do with contraception as a policy matter: his proposed “less restrictive means” of furthering the Government’s compelling interest **would still have permitted employees of religious organizations to access cost-free contraception.**
- Judge Kavanaugh did *not* side with the religious organizations in all respects. His opinion rejected their argument that there was no compelling government interest in facilitating women’s access to contraception, noting (as a matter of precedent) that five Justices in *Hobby Lobby* had “strongly suggested” that there was such a “compelling interest.”
- Judge Kavanaugh’s position was later vindicated by the Supreme Court in *Zubik v. Burwell* (2016) (vacating the Circuit decision and remanding because contraceptive coverage could be provided to the organizations’ employees through the insurance companies without any notice from the religious organizations).

### **Judge Brett Kavanaugh: *Rattigan v. Holder***

Judge Brett Kavanaugh applies the law impartially regardless of party. In *Rattigan v. Holder*, Judge Kavanaugh faithfully applied Supreme Court precedent in a case regarding national security matters. In dissent, he argued that agency security clearance decisions were unreviewable by federal courts. His opinion showed no hostility to workers' rights; it instead reflected his commitment to the limited role of the judiciary and to following binding precedent.

#### **Facts:**

- Rattigan was an FBI employee whose eligibility for a security clearance was investigated. He alleged that the FBI had violated Title VII by launching the investigation in retaliation for his filing of a discrimination complaint. He was awarded \$300,000 in damages by a jury.
  - On appeal, the Government argued that the retaliation claim was non-justiciable under the Supreme Court's decision in *Department of the Navy v. Egan*. At the panel stage and on panel rehearing, the majority disagreed, reading *Egan* narrowly to allow judicial review of the reporting of security risks by certain agency employees.
- In his dissents from both majority opinions, Judge Kavanaugh argued that—under the Supreme Court's binding precedent in *Egan*—*all* agency security clearance decisions are unreviewable by the courts.
  - He explained further that the majority's decision “does not reflect the essential role that the reporting of security risks plays in the maintenance of national security.”
    - A 1995 Executive Order issued by President Clinton requires federal employees holding security clearances to report any reason to believe that another employee's maintenance of a security clearance might harm national security. The majority opinion, Judge Kavanaugh noted, “would allow courts to second-guess the decisions of agency employees who report security risks pursuant to President Clinton's executive order.”

- Acknowledging the limitations on the judicial role, Judge Kavanaugh wrote that “[i]f Congress wishes to re-strike the balance between personnel and employment discrimination laws on the one hand and national security on the other, it is free to do so.” But until that happens, *Egan* applies and would bar the plaintiff’s suit.
- If faced with the question whether the current President’s revocation of security clearances for allegedly political reasons was lawful, Judge Kavanaugh would approach the case as he approaches all others: carefully and with an open mind.
  - Judge Kavanaugh’s vote in such a case would not be inexorably determined by *Rattigan*: a Supreme Court Justice is not bound by the absolute demands of vertical stare decisis the way a lower-court judge is.

**Judge Kavanaugh’s 12-year record in employment and workers’ rights cases shows that he is fair and independent. He decides cases impartially based on text and precedent.**

- **He does not stand for racially hostile work environments.** In *Ayissi-Etoh v. Fannie Mae* (2013), Judge Kavanaugh voted to allow the discrimination claims of a black employee who had been called a racial epithet to proceed.
- **He urged his court to further recognize race-based employment transfers as discrimination.** In *Ortiz-Diaz v. HUD* (2017), Judge Kavanaugh called on the D.C. Circuit to recognize that all race-based decisions to transfer an employee out of his or her office “plainly constitute[] discrimination.”
- **He reversed the dismissal of a Title VII race discrimination complaint filed by a group of African-American secretaries alleging discrimination by the Federal Reserve Board.** *Artis v. Bernanke* (2011).

### **Judge Brett Kavanaugh: *SeaWorld v. Perez***

Judge Brett Kavanaugh's dissent in *SeaWorld v. Perez* was based on longstanding, dispositive precedent about an agency's authority to regulate certain industries. His conclusion that Congress and the States rather than the Department of Labor should make the policy judgment whether to regulate whale shows at SeaWorld does not reflect any lack of concern for workers. It instead demonstrates that he respects well-settled limitations on novel assertions of administrative authority.

#### **Facts:**

- After a whale trainer at SeaWorld was killed while working in close contact with a killer whale during a performance, OSHA fined SeaWorld for exposing the trainers to recognized hazards in violation of the General Duty Clause of the Occupational Safety and Health Act of 1970. The D.C. Circuit upheld the fine, and Judge Kavanaugh dissented.
  - **The fine Judge Kavanaugh would have overturned was money to be paid to OSHA, not to the family of the victim.**
- As Judge Kavanaugh explained in his dissent, the central question in this case was not whether SeaWorld's show was dangerous and should be banned or changed. Rather, the question was whether the *Department of Labor* had the authority under current law to make that decision. He concluded that the Department did not, although Congress could confer such authority in the future and States could also impose regulations of their own.
- Judge Kavanaugh recognized the Department's authority under the Occupational Safety and Health Act of 1970 to "ensure that employers provide a reasonably safe workplace to their employees."
  - However, he noted that the Department, "acting with a fair degree of prudence and wisdom, had not traditionally tried to stretch its general authority under the Act to regulate participants taking part in the normal activities of sports events or entertainment shows."



- He found dispositive longstanding precedent precluding the Department of Labor from entering this new regulatory arena and altering the “normal activities” of participants in intrinsically risky industries. He noted that the Department continued to disclaim its authority over the NFL and NASCAR and sports events generally, so it made no sense that it would have authority over entertainment shows.
- Judge Kavanaugh’s *SeaWorld* dissent showed his sensitivity to the carefully limited role of both administrative agencies and the courts.
  - In his dissent, Judge Kavanaugh wrote, “I take no position here on whether SeaWorld . . . should be subject to more stringent government regulation or liability, or otherwise should voluntarily make its activities safer. That *policy* question is not before [the court].”
  - Judge Kavanaugh’s dissent **did not say** that sports or entertainment activities, like the whale shows at SeaWorld, cannot be regulated at all.
    - In fact, he pointed out that Congress, state legislatures, and state regulators have all regulated certain sports or entertainment activities, citing the Professional Boxing Safety Act of 1996 as an example.
  - But, as he wrote, “the bureaucracy at the U.S. Department of Labor has not traditionally been thought of as the proper body to decide whether to ban fighting in hockey . . . to separate the lions from the tamers at the circus, or the like.”

**Judge Kavanaugh has often voted to protect worker safety and has upheld rules aimed at making workplaces safer.**

- In *National Ass’n of Home Builders v. OSHA*, Judge Kavanaugh joined an opinion upholding rules promulgated by the Department of Labor making clear that failing to properly train workers (on exposure to hazardous materials and other matters) and failing to provide them with respirators constitutes two separate violations as to each employee.

- In *National Mining Ass’n v. Mine Safety and Health Admin.*, he joined an opinion upholding a rule promulgated by the DOL’s MSHA in the wake of two fatal coal-mining accidents in West Virginia aimed at protecting miners’ safety.

**Davis, Mike (Judiciary-Rep)**

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**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Wednesday, September 5, 2018 11:32 PM  
**To:** Megan Lacy (b) (6); Champoux, Mark (OLP); Talley, Brett (OLP); Fragoso, Michael (OLP)(b)(6) - Raj Shah Email Address; Ferrier, Antonia (McConnell)  
**Subject:** SCOTUS -- Day 3 (Thursday) updated schedule

Round 2	Thursday
9:30 - 9:50	CEG
9:50 - 10:10	Feinstein
10:10 - 10:30	Hatch
10:30 - 10:50	Leahy
10:50 - 11:10	Graham
11:10 - 11:25	BREAK
11:25 - 11:45	Durbin
11:45 - 12:05	Cornyn
12:05 - 12:25	Whitehouse
12:25 - 12:45	Lee
12:45 - 1:05	Klobuchar
1:05 - 1:25	Cruz
1:25 - 1:55	LUNCH
1:55 - 2:15	Coons
2:15 - 2:35	Sasse
2:35 - 2:55	Blumenthal
2:55 - 3:15	Flake
3:15 - 3:35	Hirono
3:35 - 3:55	Crapo
3:55 - 4:10	BREAK
4:10 - 4:30	Booker
4:20 - 4:40	<i>Kennedy</i>
4:40 - 5:00	Harris
5:00 - 5:20	<i>Tillis</i>
5:20-?	Round 3 ?s
??	Closed Session

Thank you,  
Mike Davis

Mike Davis, Chief Counsel for Nominations  
United States Senate Committee on the Judiciary  
Senator Chuck Grassley (R-IA), Chairman  
224 Dirksen Senate Office Building  
Washington, DC 20510  
202-224-(b) (6) direct

202-224-9102 (b) (6)  
202-224-9102 (cell)  
202-224-9102 (fax)  
(b) (6)

**Ferrier, Antonia (McConnell)**

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**From:** Ferrier, Antonia (McConnell)  
**Sent:** Saturday, September 8, 2018 10:36 AM  
**To:** Shah, Raj S. EOP/WHO  
**Cc:** Lacy, Megan M. EOP/WHO; Fragoso, Michael (OLP); Kupec, Kerri A. EOP/WHO  
**Subject:** Re: [EXTERNAL] Free Beacon: Kamala Harris Tweets Out Deceptively Edited Video to Smear Brett Kavanaugh

(b) (5)

(b) (5)

Sent from my iPhone

On Sep 8, 2018, at 10:14 AM, Shah, Raj S. EOP/WHO (b) (6) > wrote:

(b) (5)

(b) (5)

Sent from my iPhone

Begin forwarded message:

**From:** Scotus News Alerts <[ScotusNewsAlerts@gop.com](mailto:ScotusNewsAlerts@gop.com)>  
**Date:** September 8, 2018 at 10:03:52 AM EDT  
**To:** undisclosed-recipients;;  
**Subject:** [EXTERNAL] Free Beacon: Kamala Harris Tweets Out Deceptively Edited Video to Smear Brett Kavanaugh

**Kamala Harris Tweets Out Deceptively Edited Video to Smear Brett Kavanaugh**  
Washington Free Beacon  
Alex Griswold  
September 8, 2018 – 9:39 AM  
<https://freebeacon.com/blog/kamala-harris-tweets-deceptively-edited-video-smear-brett-kavanaugh/>

I've seen my share of deception and chicanery from politicians in my thankfully brief time on this earth. And sure, I expected dumb hatchet jobs and pointless grandstanding in reaction to something as big as an open Supreme Court seat. But this tweet from California Senator Kamala Harris really takes the cake.





**Kamala Harris**   
@SenKamalaHarris



Kavanaugh chooses his words very carefully, and this is a dog whistle for going after birth control. He was nominated for the purpose of taking away a woman's constitutionally protected right to make her own health care decisions. Make no mistake - this is about punishing women.

2:45 PM - Sep 7, 2018

 19.5K  13.1K people are talking about this

"Kavanaugh chooses his words very carefully, and this is a dog whistle for going after birth control," the likely 2020 Democratic presidential candidate insisted. Ironically, Harris was the one choosing the words for him. The video in the tweet selectively quotes Brett Kavanaugh in a way that completely changes his meaning.

Here's what you hear Kavanaugh say in the ten-second video:

*"Filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were, as a religious matter, objected to."*

Here's [the longer, fuller quote](#):

*"It was a technical matter of filing out a form in that case. **But they said** filling out*



*the form would make them complicit in the provision of the abortion-inducing drugs that they were, as a religious matter, objected to."*

The "they" Kavanaugh is alluding to is the pro-life Catholic Priests for Life, who sued for a religious exemption to the Affordable Care Act under the Religious Freedom Restoration Act. When the case came before the Tenth Circuit, Kavanaugh dissented from the decision not to take up the case, and Texas Republican Senator Ted Cruz asked during the hearing why he did so.

As the bolded section makes perfectly clear, Kavanaugh was summarizing the Priest for Life's position in that case, which is that the law made them complicit in the provision of birth control to their employees, contrary to Catholic teachings. Sure enough, the priest's brief said they objected to "abortion-inducing products, contraception ... sterilization, or related counseling."

Kavanaugh made no comments during the hearing or in his opinion that suggesting he agreed with the priests' assessment of some forms of birth control. Nor did he need to. In religious liberty cases, it's irrelevant whether or not the judges believe the petitioner's religious beliefs are logical or rational. Surely eight Supreme Court justices didn't endorse the use of mind-altering drugs when they upheld Native Americans' right to use them in religious ceremonies (although some of Ginsburg's dissents make me wonder).

Set all that aside. Harris (or, let's be honest, her staff) took the video of Kavanaugh's comments and cut it off mid-sentence, and only left off the parts that indicated Kavanaugh was alluding to someone else's beliefs. The video even capitalizes "Filling" in the video's subtitles, making it seem like it was the start of a sentence. There's no way they didn't know what they were doing, and they did it with clear malice aforethought.

The best I can say for Harris is that she didn't come up with this lie, she was merely mimicking the hacks on social media who have gone gaga for her and her financial backer, Planned Parenthood. The latter was even almost-sort-of-kind-of called out by CNN in their story on Kavanaugh's comments:

*In a press release, however, Planned Parenthood drew attention to the exchange but left out the words "they said," making it appear as if Kavanaugh was speaking for himself.*

*Beth Lync, a spokeswoman for Planned Parenthood Federation of America, acknowledged the error, but still took issue with the fact that she said Kavanaugh had mischaracterized the case and also used a controversial term used by groups opposed to abortion.*

Ah yes, it was an "error" that led Planned Parenthood to selectively quote the nominee they oppose. That's the sort of leeway that explains why they felt like they could get away with it in the first place. My hope is that they don't, that mainstream fact-checking websites and media outlets take a look at what Planned

Parenthood, Harris, and other are spreading and call it what it is: a desperate, pathetic smear.



**Davis, Mike (Judiciary-Rep)**

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**From:** Davis, Mike (Judiciary-Rep)  
**Sent:** Friday, September 14, 2018 10:27 AM  
**To:** Judiciary Nominations Republican; (b)(6) - Megan Lacy Email Address;  
(b)(6) - Sean Sandomoski Email Address; (b)(6) - Beth Williams Email Address  
Mark.Champoux@usdoj.gov; Michael.Fragoso@usdoj.gov;  
Brett.Talley@usdoj.gov; (b)(6) - Stephen Boyd Email Address Jill.C.Tyson@usdoj.gov;  
David.F.Lasseter@usdoj.gov; Prim.F.Escalona@usdoj.gov  
**Cc:** Steitz, John (Kennedy); Flanz, Ken (Crapo); Ferguson, Andrew (Judiciary-Rep);  
Camacho, Dario (Judiciary-Rep); Hartmann, George (Judiciary-Rep); Gallagher,  
Nick (Judiciary-Rep); Jackson, Katie (Judiciary-Rep); Adkisson, Sam (Judiciary-  
Rep); Kenny, Steve (Judiciary-Rep); Zona, Michael (Grassley); St. Maxens, Colin  
(Crapo); Chestnut, Brendan (Judiciary-Rep); Ventry, Garrett (Judiciary-Rep);  
Abegg, John (McConnell); Hawatmeh, Nick (Kennedy); Lari, Rita (Judiciary-  
Rep); Stone, Judd (Judiciary-Rep); Payne, William (Sasse); Oberan, Elizabeth  
(Judiciary-Rep); Foster, Ethan (Judiciary-Rep); Burwell, Carter (Judiciary-Rep);  
Cooksey, Sean (Judiciary-Rep); Peeples, Camille (Judiciary-Rep); White, Collin  
(Judiciary-Rep); Watts, Brad (Judiciary-Rep); Pugh, Sean (Judiciary-Rep);  
Temple, Courtney (Tillis); Tieman, Nicole (Grassley)  
**Subject:** Canceled: Weekly Nominations Briefing (SCOTUS and non-SCOTUS)  
**Attachments:** Canceled: Weekly Nominations Briefing (SCOTUS and non-SCOTUS)  
**Importance:** High

**Abegg, John (McConnell)**

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**From:** Abegg, John (McConnell)  
**Sent:** Wednesday, October 3, 2018 3:19 PM  
**To:** Boyd, Stephen E. (OLA)  
**Subject:** 'One of the Most Impressive, Stunningly Qualified Nominees in Our Nation's History'  
**Attachments:** McConnell response to Schumer on FBI briefing.pdf

Stephen,

Please see the attached letter from today from Leader McConnell to Leader Schumer.

Please also note that the Leader provided his views on this subject on the Senate floor today as follows:

"Standard practice. Here's what standard practice means: The FBI conducts interviews, prepares a careful report, and makes it available for Senators to review. Standard practice does not mean what the Democratic Leader decided to demand for the first time yesterday, now that the FBI is concluding its review. You get the picture. As they conclude the review, it's not enough. That we have yet another delay so FBI agents are made to appear for in-person briefings and Democrats can cross-examine these agents to see if they're satisfied with how they did their job. Anybody surprised about this? There go those goalposts again.

"Well, guess what. Our Democratic colleagues have made it abundantly clear they will never, ever be satisfied. Not ever. Does anyone really think that the same people who said any nominee of this president would result 'in the destruction of the Constitution' will be satisfied? Does anyone really think that the same people who called Judge Kavanaugh 'evil' long before they heard one word of testimony from anyone will be satisfied? Does anyone really think that the same people who said their goal is to delay this nomination past the election will be satisfied?

"To ask the question is to answer it."

Thanks.

John

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**From:** Majority Leader McConnell Press (McConnell)  
**Sent:** Wednesday, October 3, 2018 10:55 AM  
**Subject:** 'One of the Most Impressive, Stunningly Qualified Nominees in Our Nation's History'

**MITCH McCONNELL**

**SENATE MAJORITY LEADER  
U.S. SENATOR for KENTUCKY**

For Immediate Release, Wednesday, October 3, 2018

Contacts: Don Stewart, David Popp

Robert Steurer, Stephanie Penn

Release: <https://bit.ly/2P7mcqt>

YouTube: <https://bit.ly/2DW6bCu>

**'One of the Most Impressive, Stunningly**



## One of the most impressive, stunningly Qualified Nominees in Our Nation's History'

*'The American people are sick of the display that's been put on here in the United States Senate in the guise of a confirmation process. The FBI is finishing up a supplemental background investigation. It will soon add this information to Judge Kavanaugh's file for Senators' consideration. This is the standard practice. Then, pursuant to last week's agreement of a delay no longer than one week, the Senate will vote on this nomination this week.'... We'll be voting to confirm a new Supreme Court justice who possesses sterling academic credentials, widely-acknowledged legal brilliance, an exemplary judicial temperament, and a proven commitment to complete fairness on the bench.'*

**WASHINGTON, D.C.** – U.S. Senate Majority Leader Mitch McConnell (R-KY) delivered the following remarks today on the Senate floor regarding the president's nominee for the Supreme Court, Judge Brett Kavanaugh:

"I think it's safe to say the national spectacle the professional left has created around Judge Brett Kavanaugh's confirmation process has now reached some kind of fever pitch. It has been 17 days since Dr. Ford's confidential correspondence was leaked to the press. Seventeen days of a feeding frenzy on Judge Kavanaugh and his family unlike anything we have seen in recent memory.

"Since then, a literal mudslide of wild, uncorroborated accusations has poured out -- each more outlandish than the last. And this mudslide has been actively embraced, urged on, and capitalized upon by Democrats inside this chamber and organized far-left special interests outside it. It hasn't been about getting to the truth or giving anyone a fair hearing. It has seemingly been about one thing: The far left's hunger to bring down Judge Kavanaugh's nomination by any means necessary.

"If facts and evidence couldn't get the job done then intimidation tactics and bullying would have to do. Sometimes, this intimidation campaign has been aimed at the nominee. Colleagues including my friend the Democratic Leader have tried to get Judge Kavanaugh to withdraw from this process because of these uncorroborated and sometimes ridiculous allegations. And when that didn't work? Then the far-left tried to bully and intimidate members of this body -- Republican United States Senators.

"One of our colleagues and his family were effectively run out of a restaurant in recent days. Another reported having protestors physically block his car door. And some have seen organized far-left protestors camp out at their homes. I'm not suggesting we're the victims here. But I want to make it clear to these people who are chasing my members around the hall here, or harassing them at the airports, or going to their homes. We will not be intimidated by these people. There is no chance in the world that they're going to scare us out of doing our duty. I don't care how many members they chase, how many people they harass here in the halls. I want to make one thing perfectly clear: we will not be intimidated by these people. This is all part of the organized effort to delay, obstruct, and intimidate those of us who will be voting this week.

"A few days ago, I did something I rarely do: I offered a prediction. I predicted that here, in the last few days before the Senate will vote on Judge Kavanaugh's confirmation, the Democratic conference would continue to make good on their leader's promise and fight this nomination with everything they've got. I predicted that, on a dime, the very supplemental background investigation for which my Democratic friends had clamored would suddenly become insufficient. That no matter what accommodations were made, no matter what agreements were reached, Senate Democrats would find more excuses to continue moving the goalposts one more time.

"Granted, this wasn't exactly a radical prediction. This body and this nation have spent months watching my friends across the aisle grasp at every imaginable excuse to delay this process and damage this nominee. So I felt pretty safe saying the last goalposts would soon be on the move once again. But even I wasn't sure it would happen this quickly.

"Let's start with the Democratic Leader and the Ranking Member of the Judiciary Committee. In a letter released on September 23, they suggested that the FBI had ample time to conduct a supplemental investigation before the hearing that was scheduled for just four days later. They



supplemental investigation before the hearing that was scheduled for just four days later. They insisted that an inquiry would — quote — ‘not take a ‘tremendous amount of time.’ The Democratic Leader brushed aside the notion that this—the seventh background investigation of Judge Kavanaugh—would delay the process, saying ‘it will take only a few days.’ Well, that was before we agreed last Friday to delay proceedings no more than one week to accommodate just such an inquiry.

‘Naturally, we are now hearing a different tune. Yesterday, the Ranking Member stated her view that voting this Friday on Judge Kavanaugh’s nomination — as planned — would be, I quote, ‘too soon.’ There go those goalposts again. Moving right on down. In that same letter, the Democratic Leader and the senior Senator from California called for this supplemental investigation because — quote — ‘conducting background investigations on nominees has long been the FBI’s standard practice.’

‘Standard practice. Here’s what standard practice means: The FBI conducts interviews, prepares a careful report, and makes it available for Senators to review. Standard practice does not mean what the Democratic Leader decided to demand for the first time yesterday, now that the FBI is concluding its review. You get the picture. As they conclude the review, it’s not enough. That we have yet another delay so FBI agents are made to appear for in-person briefings and Democrats can cross-examine these agents to see if they’re satisfied with how they did their job. Anybody surprised about this? There go those goalposts again.

‘Well, guess what. Our Democratic colleagues have made it abundantly clear they will never, ever be satisfied. Not ever. Does anyone really think that the same people who said any nominee of this president would result ‘in the destruction of the Constitution’ will be satisfied? Does anyone really think that the same people who called Judge Kavanaugh ‘evil’ long before they heard one word of testimony from anyone will be satisfied? Does anyone really think that the same people who said their goal is to delay this nomination past the election will be satisfied?

‘To ask the question is to answer it. If my friends across the aisle had their way, the goalposts on Judge Kavanaugh’s nomination would be in another time zone by now. My Democratic colleagues are quickly running out of material. One of their last efforts seems to be the new argument that, notwithstanding whether or not these allegations can be corroborated in any way, the real crime here is that Judge Kavanaugh stood up for his family and took umbrage at this disgraceful spectacle. He’s now expected to witness this disgraceful spectacle and not get upset about it. I would ask any of my colleagues, how would you feel if your entire reputation had been destroyed in this mudslide? For weeks now, a national media feeding frenzy has dragged Judge Kavanaugh and his family through the mud. He has been subjected to the most vile and disgusting accusations. His wife has been threatened. His young daughters traumatized.

‘In many instances my Democratic colleagues have ushered on these absurdly disgusting accusations and tried to give them a veneer of credibility, specifically citing them as a reason why Judge Kavanaugh should not be confirmed. And now, those same Democratic Senators have the temerity to say Judge Kavanaugh disqualified himself for the Supreme Court because he got a little testy at the hearing. Because he told them how much damage these accusations have caused him and his family.

‘Let’s get one thing straight. I don’t want to meet the man or woman who wouldn’t be frustrated and angered by a coordinated strategy to destroy their good name on the altar of partisan politics. The Senate has received an incredible volume of testimony about Judge Kavanaugh’s exemplary judicial temperament.

‘We’ve heard from the faculty of his alma mater, who have called him: ‘a fair-minded jurist who believes in the rule of law’ and ‘commands wide and deep respect’ among his legal peers. And from his former law clerks, who say, quote: ‘He listens carefully to the views of his colleagues and clerks, even — indeed, especially — when they differ from his own.’ Yet some still prioritize partisan point-scoring ahead of Judge Kavanaugh’s actual record. We have heard overwhelming testimony that Judge Kavanaugh’s time on the federal bench has been defined by equanimity, even-handedness, and fair treatment of all parties.

‘It’s time to put this embarrassing spectacle behind us. The American people are sick of the

It's time to put the embarrassing spectacle behind us. The American people are sick of the display that's been put on here in the United States Senate in the guise of a confirmation process. The FBI is finishing up a supplemental background investigation. It will soon add this information to Judge Kavanaugh's file for Senators' consideration. This is the standard practice. Then, pursuant to last week's agreement of a delay no longer than one week, the Senate will vote on this nomination this week.

"When we do, we'll be voting on one of the most impressive, most stunningly qualified Supreme Court nominees in our nation's history. We'll be voting to confirm a new Supreme Court justice who possesses sterling academic credentials, widely-acknowledged legal brilliance, an exemplary judicial temperament, and a proven commitment to complete fairness on the bench. That is exactly what the Senate will do this week."

###



MITCH McCONNELL  
KENTUCKY



**United States Senate**  
MAJORITY LEADER  
WASHINGTON, D.C. 20510

October 3, 2018

The Honorable Charles E. Schumer  
Minority Leader  
United States Senate  
S-221, The Capitol  
Washington, D.C. 20510-0001


Dear Leader Schumer:

I am responding to your request to arrange a briefing by agents from the Federal Bureau of Investigation on the supplemental background investigation (BI) into the nomination of Judge Brett Kavanaugh to be an Associate Justice on the United States Supreme Court.

As I am sure you are aware, the handling of the results of BIs for judicial nominees is governed by a Memorandum of Understanding (MOU) between the Senate Judiciary Committee and the White House. The White House Counsel to former President Barack Obama, former Judiciary Committee Chairman Patrick Leahy, and former Ranking Member Jeff Sessions established the current MOU on this subject. It has governed the handling of BI material for the last three Supreme Court nominees, including Judge Kavanaugh's nomination. It provides that designated and appropriately cleared staff members of the Senate Judiciary Committee are authorized to brief Members of the Senate on the results of BIs.

The briefing you request is not authorized by the MOU. It would be unprecedented and irregular. For example, there was no such briefing on the supplemental BI for the nomination of Clarence Thomas to the Supreme Court. And, in all candor, I believe it would be used to further delay this nomination—a goal about which you and your Democratic colleagues have been abundantly clear and single-minded in pursuing. Despite the gross mishandling of background material by Democrats on the Judiciary Committee, the Chairman of the Committee has promptly and professionally investigated every credible (and incredible), last-minute allegation against Judge Kavanaugh, consistent with standard committee practices. The FBI's supplemental BI will be handled in the same professional and customary manner.

Sincerely,

  
MITCH McCONNELL  
MAJORITY LEADER

**Boyd, Stephen E. (OLA)**

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**From:** Boyd, Stephen E. (OLA)  
**Sent:** Wednesday, October 3, 2018 3:33 PM  
**To:** Abegg, John (McConnell)  
**Subject:** RE: 'One of the Most Impressive, Stunningly Qualified Nominees in Our Nation's History'

Thank you. SB

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**From:** Abegg, John (McConnell) (b) (6)  
**Sent:** Wednesday, October 3, 2018 3:19 PM  
**To:** Boyd, Stephen E. (OLA) (b) (6)  
**Subject:** 'One of the Most Impressive, Stunningly Qualified Nominees in Our Nation's History'

Duplicative Material

