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# Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court

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SUMMARY

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**Andrew Nolan, Coordinator**
Section Research Manager

**Caitlain Devereaux Lewis, Coordinator**
Legislative Attorney

# Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court

On July 9, 2018, President Donald J. Trump announced the nomination of Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to fill retiring Justice Anthony M. Kennedy's seat on the Supreme Court of the United States. Nominated to the D.C. Circuit by President George W. Bush, Judge Kavanaugh has served on that court for more than twelve years. In his role as a Circuit Judge, the nominee has authored roughly three hundred opinions (including majority opinions, concurrences, and dissents) and adjudicated numerous high-profile cases concerning, among other things, the status of wartime detainees held by the United States at Guantanamo Bay, Cuba; the constitutionality of the current structure of the Consumer Financial Protection Bureau; the validity of rules issued by the Environmental Protection Agency under the Clean Air Act; and the legality of the Federal Communications Commission's net neutrality rule. Since joining the D.C. Circuit, Judge Kavanaugh has also taught courses on the separation of powers, national security law, and constitutional interpretation at Harvard Law School, Yale Law School, and the Georgetown University Law Center.

Prior to his appointment to the federal bench in 2006, Judge Kavanaugh served in the George W. Bush White House, first as associate and then senior associate counsel, before becoming assistant and staff secretary to the President. Before his service in the Bush Administration, the nominee worked in private practice at the law firm of Kirkland & Ellis, LLP for three years and served in the Office of the Independent Counsel and the Office of the Solicitor General. Judge Kavanaugh began his legal career with three federal clerkships—two for judges on the federal courts of appeals and one for the jurist he is nominated to succeed, Justice Kennedy. Judge Kavanaugh is a graduate of Yale College and Yale Law School.

Judge Kavanaugh's nomination to the High Court is particularly significant as he would be replacing Justice Kennedy, who was widely recognized as the Roberts Court's median vote. Justice Kennedy was often at the center of legal debates on the Supreme Court, casting decisive votes on issues ranging from the powers of the federal government vis-à-vis the states, to separation-of-powers disputes, to key civil liberties issues. Accordingly, a critical question now before the Senate as it considers providing its advice and consent to the President's nomination to the High Court is how Judge Kavanaugh may view the many legal issues in which Justice Kennedy's vote was often determinative.

In this vein, understanding Judge Kavanaugh's views on the law is one method to gauge how the Supreme Court might be affected by his appointment. In attempting to ascertain how Judge Kavanaugh could influence the High Court, however, it is important to note at the onset that, for various reasons, it often is difficult to predict accurately a nominee's likely contributions to the Court based on his or her prior experience. That said, the nominee is a well-known jurist with a robust record, composed of both judicial opinions and non-judicial writings, in which he has made his views on the law and the role of the judge fairly clear. Central to the nominee's judicial philosophy is the concept of judicial formalism and a belief that the "rule of law" must be governed by a "law of rules." In addition, Judge Kavanaugh has endorsed the concept of the judge as a neutral "umpire." In order to achieve this vision of neutrality, the nominee's legal writings have emphasized (1) the primacy of the text of the law being interpreted, (2) an awareness of history and tradition, and (3) adherence to precedent. Applying these principles, Judge Kavanaugh's views on several discrete legal issues are readily apparent, including administrative law, environmental law, freedom of speech, national security, the Second Amendment, and separation of powers. At the same time, perhaps because of the nature of the D.C. Circuit's docket, less is known about the nominee's views on other legal issues, including business law, civil rights, substantive due process, and takings law.

This report provides an overview of Judge Kavanaugh's jurisprudence and discusses his potential impact on the Court if he were to be confirmed to succeed Justice Kennedy. In particular, the report focuses upon those areas of law where Justice Kennedy can be seen to have influenced the High Court's approach to certain issues or served as a fifth and deciding vote on the Court, with a view toward how Judge Kavanaugh might approach these same issues if he were to be elevated to the High Court. Of particular note, the report includes an **Appendix** with several tables that summarize the nominee's rate of authoring concurring and dissenting opinions relative to his colleagues on the D.C. Circuit, and how Judge Kavanaugh's opinions as an appellate judge have fared upon review by the Supreme Court.

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On July 9, 2018, President Donald J. Trump announced the nomination of Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit)[1] to fill the vacancy on the Supreme Court of the United States caused by Justice Anthony M. Kennedy's retirement on July 31, 2018.[2] Nominated by President George W. Bush to the D.C. Circuit, a court once described by President Franklin Roosevelt as "the second most important court in the country,"[3] Judge Kavanaugh has served on the bench for more than twelve years.[4] In his role as a Circuit Judge, the nominee has authored roughly three hundred opinions (including majority opinions, concurrences, and dissents)[5] and adjudicated numerous high-profile cases concerning, among other things, the status of wartime detainees held by the United States at Guantanamo Bay, Cuba;[6] the constitutionality of the current structure of the Consumer Financial Protection Bureau (CFPB);[7] the validity of rules issued by the Environmental Protection Agency (EPA) under the Clean Air Act;[8] and the legality of the Federal Communications Commission's (FCC's) net neutrality rule.[9] Since joining the D.C. Circuit,[10] Judge Kavanaugh has also taught courses on the separation of powers, national security law, and constitutional interpretation at Harvard Law School, Yale Law School, and the Georgetown University Law Center.[11]

Prior to his appointment to the federal bench in 2006, Judge Kavanaugh served in the George W. Bush White House, first as an associate and then senior associate counsel, before becoming an assistant and staff secretary to the President.[12] Before his service in the Bush Administration, the nominee worked in private practice at the law firm of Kirkland & Ellis, LLP for three years and

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[1] *See* Press Release, President Donald J. Trump Announces Intent to Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States (July 9, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/. *See generally* CRS Legal Sidebar LSB10168, *President Trump Nominates Judge Brett Kavanaugh: Initial Observations*, by Andrew Nolan.

[2] Letter from Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, to Donald J. Trump, President, United States of America (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/Letter_to_the_President_June27.pdf.

[3] SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 26 (1997).

[4] *Brett M. Kavanaugh: Professional Biography*, U.S. COURT OF APPEALS FOR THE D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK (last visited July 20, 2018) [hereinafter *Kavanaugh Biography*]; *Kavanaugh, Brett M.*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/kavanaugh-brett-m (last visited July 20, 2018) [hereinafter *FJC Biography*].

[5] *See* CRS Report R45269, *Judicial Opinions of Judge Brett M. Kavanaugh*, coordinated by Michael John Garcia [hereinafter *CRS Kavanaugh Opinions Report*]; *see also Judge Brett Kavanaugh's 188 Majority Opinions, 52 Concurrences, and 57 Dissents*, CIR. BREAKER, https://dccircuitbreaker.org/kavanaugh-opinions/ (last visited July 20, 2018).

[6] *See* Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

[7] *See* PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); PHH Corp. v. CFPB, 839 F.3d 1, 5 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017).

[8] *See* EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 11 (D.C. Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1584 (2014).

[9] *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[10] For purposes of brevity, references to a particular circuit in the body of this report (e.g., the D.C. Circuit, the Second Circuit, etc.) refer to the U.S. Court of Appeals for that particular circuit. Collectively, the federal appellate courts are termed "federal courts of appeals."

[11] *See Kavanaugh Biography*, *supra* note 4.

[12] *Id.*

served in the Office of the Independent Counsel and the Office of the Solicitor General.[13] Judge Kavanaugh began his legal career with three federal clerkships—two for judges on the federal courts of appeals and one for the jurist he is nominated to succeed, Justice Kennedy.[14] Judge Kavanaugh is a graduate of Yale College and Yale Law School.[15]

This report provides an overview of Judge Kavanaugh's jurisprudence and discusses how the Supreme Court might be affected if he were to succeed Justice Kennedy. In attempting to ascertain how Judge Kavanaugh could influence the High Court, however, it is important to note that, for various reasons, it is difficult to predict accurately a nominee's likely contributions to the Court based on his or her prior experience. A section of this report titled *Predicting Nominees' Future Decisions on the Court* provides a broad context and framework for evaluating how determinative a judge's prior record may be in predicting future votes on the Supreme Court.[16]

Because Judge Kavanaugh would succeed Justice Kennedy on the High Court, the report then focuses on those areas of law where Justice Kennedy can be seen to have influenced the Court's approach, or provided a fifth and deciding vote,[17] with a view toward how the nominee might approach those same issues.[18] Justice Kennedy's retirement is likely to have significant implications for the Court, Congress, and the nation as a whole.[19] Justice Kennedy, often described as the Roberts Court's median vote,[20] was frequently at the center of legal debates on

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[13] *Id.*

[14] *Id.* One of Judge Kavanaugh's co-clerks with Justice Kennedy was future-Justice Neil M. Gorsuch. As has been widely reported, Judge Kavanaugh and Justice Gorsuch also attended the same high school—Georgetown Preparatory School in Washington, D.C.—where they were two years apart. *See, e.g.*, Michelle Hackman, *The All-Boys High School Producing GOP Bigwigs*, WALL ST. J. (July 11, 2018), https://www.wsj.com/articles/the-all-boys-high-school-producing-gop-bigwigs-1531310401; Moriah Balingit, *With Brett Kavanaugh, Georgetown Prep Can Count Two Supreme Court Nominees Among its Alumni*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/education/wp/2018/07/10/with-brett-kavanaugh-georgetown-prep-can-count-two-supreme-court-nominees-among-its-alumni/?utm_term=.62191f877a56; Sarah Mervosh, *Kavanaugh and Gorsuch Both Went to the Same Elite Prep School*, N.Y. TIMES (July 10, 2018), https://www.nytimes.com/2018/07/10/us/kavanaugh-gorsuch-georgetown-prep.html; Brittany Shepherd, *Trump's Two SCOTUS Picks Also Went to High School Together*, WASHINGTONIAN (July 9, 2018), https://www.washingtonian.com/2018/07/09/brett-kavanaugh-neil-gorsuch-georgetown-prep/. Of Justice Gorsuch, Judge Kavanaugh has said:

> [Justice Gorsuch] and I actually went to high school together at Georgetown Prep. I was two years ahead of him. And then we clerked together the same year for Justice Kennedy and got to know each other very well. We worked together in the Bush Administration, and we both became judges in 2006. We serve together now on the Appellate Rules Committee of the Judicial Conference, and were coauthors along with Bryan Garner and several other judges of a book on precedent. . . . So I know [Justice] Gorsuch well and have known him seemingly forever. He is a good friend. He is kind, funny, hard working, and brilliant. He's a great writer and independent. With his smarts, his character, and his understanding of life and law, I firmly believe he will be one of the great Justices in Supreme Court history, like a Jackson or a Scalia.

Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions (Feb. 3, 2017), *in* 92 NOTRE DAME L. REV. 1907 (May 2017) [hereinafter Kavanaugh, *Two Challenges*].

[15] *Kavanaugh Biography*, *supra* note 4.

[16] *See* discussion *infra* in *Predicting Nominees' Future Decisions on the Court*.

[17] These areas are noted in CRS Report R45256, *Justice Anthony Kennedy: His Jurisprudence and the Future of the Court*, by Andrew Nolan, Kevin M. Lewis, and Valerie C. Brannon [hereinafter *CRS Kennedy Report*].

[18] *See id.* at 31–67 (noting every case in which Justice Kennedy cast a decisive vote on the Roberts Court).

[19] *See id.*

[20] Alicia Parlapiano & Jugal K. Patel, *With Kennedy's Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html.

the High Court, casting decisive votes on issues ranging from the powers of the federal government vis-à-vis the states, to separation-of-powers disputes, to key civil liberties issues. Accordingly, a critical question now before the Senate as it considers providing its advice and consent[21] to the President's nomination to the High Court is how Judge Kavanaugh may view the many legal issues in which Justice Kennedy's vote was often determinative.[22]

As a result, the report begins by discussing two cross-cutting issues—the nominee's general judicial philosophy and his approach to statutory interpretation. It then addresses thirteen separate areas of law, arranged in alphabetical order, from "administrative law" to "takings." Within each section, the report reviews whether and how Judge Kavanaugh has addressed particular issues in the opinions he authored.[23] In some instances, the report also identifies other votes in which he participated (e.g., votes to join majority opinions authored by other D.C. Circuit judges, votes on whether the D.C. Circuit should grant en banc review to a decision of a three-judge panel, etc.). The report also analyzes, where relevant, Judge Kavanaugh's non-judicial work, including a

[21] U.S. CONST. art. II, § 2, cl. 2.

[22] Judge Kavanaugh has himself commented on the judicial confirmation process, opining that it "has become badly flawed in recent decades." *See* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1465–66 (2009) [hereinafter Kavanaugh, *Separation of Powers*]. The nominee has also offered a number of suggestions to improve the process. *See id.* at 1468 ("The Senate should consider a rule ensuring that every judicial nominee receives a vote by the Senate within 180 days of being nominated by the President. Six months is sufficient time for senators to hold hearings, interest groups to register their preferences, and citizens to weigh in on the qualifications of a judicial nominee for lifetime office. At the end of that time, it seems that senators should stand and be counted. If a home-state senator or a group of ideologically-committed senators wishes to block a judicial nomination, they can do so. But they can do so by persuading their colleagues and voting, not through procedural maneuvers. In this way, voters can properly hold their senators accountable, nominees can receive prompt and respectful treatment, and key judicial vacancies can be filled without unnecessary delay."); *see also* Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., The Courts and the Administrative State (Oct. 1, 2013), *in* 64 CASE W. RES. L. REV. 711, 715 (2014) [hereinafter Kavanaugh, *Administrative State*] ("My personal view is that the Senate should require a vote on all judicial nominees within six months of nomination. That would provide a set ground rule for how the Senate would consider the nominees. Now, it is not my place to say whether that should be a majority vote or what the Senate calls—in Washington speak—a cloture vote that requires sixty votes for something to happen. But either way, the Senate in my view should establish a strict time limit so that the process will come to a final determination within a set amount of time.").

[23] Judge Kavanaugh has also sat by designation on panels for the Eighth Circuit, the Ninth Circuit, and the U.S. District Court for the District of Columbia. While he did not author an opinion while sitting by designation on either of the circuit courts, he did author three opinions and joined a memorandum opinion and order of the U.S. District Court for the District of Columbia. *See* Beaumont Indep. Sch. Dist. v. United States, 944 F. Supp. 2d 23, 24 (D.D.C. 2013) (Kavanaugh, J., joining memorandum opinion and order); South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012) (Kavanaugh, J.); Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), *aff'd*, 565 U.S. 1104 (2012); Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150 (D.D.C. 2010) (Kavanaugh, J.), *aff'd*, 561 U.S. 1040 (2010).

number of speeches[24] and academic articles,[25] many of which address the role of the judiciary, separation of powers, and constitutional and statutory interpretation.

While this report discusses many of Judge Kavanaugh's non-judicial writings, it does not address two types of written work. First, the report does not discuss anything written by the nominee in a representative capacity for another party, such as a brief submitted on behalf of a client to a court, as such materials may provide limited insight into the advocate's personal views on the law.[26] For purposes of this report, this limitation also extends to writings related to Judge Kavanaugh's former government service, such as his work for the George W. Bush Administration, the Office of the Independent Counsel, and the Office of the Solicitor General.[27] Second, the report does not

[24] *See, e.g.*, Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., The Role of the Judiciary in Maintaining the Separation of Powers (Oct. 25, 2017), *in* HERITAGE FOUND., LECTURE (Feb. 1., 2018), https://www.heritage.org/sites/default/files/2018-02/HL1284.pdf [hereinafter Kavanaugh, *Role of the Judiciary*]; Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist (Sept. 18, 2017), *in* AM. ENTER. INST., 2017 WALTER BERNS CONSTITUTION DAY LECTURE, at 6, 18 (2017), https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf [hereinafter Kavanaugh, *From the Bench*]; Kavanaugh, *Two Challenges*, *supra* note 14; Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., The Judge As Umpire: Ten Principles (Mar. 30, 2015), *in* 65 CATH. U. L. REV. 683 (2016) [hereinafter Kavanaugh, *Judge As Umpire*]; Kavanaugh, *Administrative State*, *supra* note 22; Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution, *in* 89 NOTRE DAME L. REV. 1907 (2014) [hereinafter Kavanaugh, *Our Anchor*].

[25] *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) [hereinafter Kavanaugh, *Fixing Statutory Interpretation*]; Kavanaugh, *Separation of Powers*, *supra* note 22.

[26] *See Confirmation Hearing on Federal Appointments: Hearing Before the S. Comm. on the Judiciary Part 1*, 108th Cong. 419 (2003) (statement of John G. Roberts, Jr.) [hereinafter *Roberts Confirmation Hearing*] ("I do not believe that it is proper to infer a lawyer's personal views from the positions that lawyer may advocate on behalf of a client."); *but see* William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 161 (2001) (suggesting that, although "it is unlikely that judges would permit positions that they advocated as attorneys to directly bias their judicial decisions," and "most lawyers advocate positions about which they hold indifferent or conflicting opinions," it "often may" be possible to "discern a nominee's political predilections from the types of clients and cases that a nominee has had as an attorney").

[27] It should be noted, however, that the nominee has previously remarked that he believes his experiences in these various roles were valuable to his career as a federal judge. *See, e.g.*, *Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit Before the S. Comm. on the Judiciary*, S. Hrg. 109-435, at 33, 109th Congress (2006) (statement of Brett M. Kavanaugh) [hereinafter Kavanaugh, *2006 Confirmation Hearing*] ("I believe very much that it's good to have judges who've participated in Government."); *see also* Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 2 ("I think the White House experience made me a far better judge than I otherwise would have been, in terms of understanding of government, of the legislative process, of the regulatory process, of national security decision making, the pressure, the ups and downs and the ins and outs of how our government operates at the very highest level. I believe my White House experience made me a more knowledgeable judge, certainly, and also, a more independent judge. Independent because working at the White House, at least in my view, helps give you the backbone and fortitude to say 'no' to the government—even when the stakes are high. I think Chief Justice John Roberts and Justice Elena Kagan, both of whom had substantial White House experience, would probably say that their White House experiences likewise have made them better jurists."); Kavanaugh, *Administrative State*, *supra* note 22, at 713–14 ("White House service, it turns out, is very useful for a job on the D.C. Circuit. It gives you great respect, first of all, for the presidency, the demands of the executive branch, and the burdens of the presidency. But at the same time, it gives you perspectives that might be unexpected to some. Such experience helps refine your ability to determine whether the executive branch might be exaggerating or overstating how things actually work and the problems that would supposedly arise under certain legal interpretations. White House experience also helps—and history shows that executive branch experience helps—when judges need to show some fortitude and backbone in those cases where the independent judiciary has to stand up to the mystique of the presidency and the executive branch.").

discuss the nominee's writings that predate his graduation from law school, as such writings may be of limited import to gauging his educated views on the law.

While the report discusses numerous cases and votes involving Judge Kavanaugh, it focuses particularly on cases in which the sitting panel was divided, as these cases arguably best showcase how he might approach a legal controversy whose resolution is a matter of dispute and is not necessarily clearly addressed by prior case law.[28] In addition, the report highlights areas where the nominee has expressed views on the law that may contrast with those of some of his colleagues. To the extent that the nominee's votes in particular cases arguably reflect broader trends and tendencies in his decisionmaking that he might bring to the High Court, the report highlights such trends. Nonetheless, this report does not attempt to catalog every matter in which Judge Kavanaugh has participated during his service on the D.C. Circuit. A separate report, CRS Report R45269, *Judicial Opinions of Judge Brett M. Kavanaugh*, coordinated by Michael John Garcia, lists and briefly describes each opinion authored by the nominee during his tenure on the federal bench.[29] Other CRS products discuss various issues related to the vacancy on the Court. For an overview of available products, see CRS Legal Sidebar LSB10160, *Supreme Court Nomination: CRS Products*, by Andrew Nolan.

[28] *See* Jonathan H. Adler, *What Happened When Merrick Garland Wrote for Himself*, VOLOKH CONSPIRACY (Mar. 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/21/what-happened-when-merrick-garland-wrote-for-himself/ ("The best way to get a handle on a circuit judge's judicial philosophy is to look at the judge's concurrences and dissents."); *see also* Aaron Nielson, *D.C. Circuit Review—Reviewed: Brooding Spirits*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 30, 2016), http://yalejreg.com/nc/d-c-circuit-review-reviewed-brooding-spirits-by-aaron-nielson/ ("[I]f you really want to understand an appellate judge, look to his or her separate writings. Of course, most separate opinions don't say much about the judge's philosophy or personality; sometimes a judge thinks the panel just got it wrong. Even so, despite the fact that not all separate writings are windows to the soul, it is still true that reading opinions that judges don't have to write can be telling.").

[29] *CRS Kavanaugh Opinions Report*, *supra* note 5.

# Predicting Nominees' Future Decisions on the Court

At least as a historical matter, attempting to predict how Supreme Court nominees may approach their work on the High Court is a task fraught with uncertainty.[30] For example, Justice Felix Frankfurter, who had a reputation as a "progressive" legal scholar prior to his appointment to the Court in 1939,[31] disappointed[32] some early supporters by subsequently becoming a voice for judicial restraint and caution when the Court reviewed laws that restricted civil liberties during World War II[33] and the early Cold War era.[34] Similarly, Justice Harry Blackmun, who served on the Eighth Circuit for a little over a decade prior to his appointment to the Court in 1970,[35] was originally considered by President Richard Nixon to be a "strict constructionist" in the sense that he viewed the judge's role as interpreting the law, rather than making new law.[36] In the years that followed, however, Justice Blackmun authored the majority opinion in *Roe v. Wade*, which recognized a constitutional right to terminate a pregnancy.[37] He was generally considered one of the more liberal voices on the Court when he retired in 1994.[38]

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[30] Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838–2009*, 76 MO. L. REV. 999, 1040 (2011) ("[U]ncertainty is empirically well-founded. It is borne out by Justices' overall voting records since at least 1838. The president's odds of appointing a Justice who sides with appointees of his party have been no better than a coin flip."); *id.* at 1021 (listing Justices William J. Brennan Jr., Tom C. Clark, Felix Frankfurter, Oliver Wendell Holmes Jr., John McLean, James Clark McReynolds, Stanley Forman Reed, David Souter, John Paul Stevens, Earl Warren, and James Moore Wayne as examples of jurists who "disappointed" the expectations of the President who appointed them to the Court); *see also The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight & the Courts, S. Comm. on the Judiciary*, 107th Cong. 195 (2001) (statement of Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, The Catholic University of America) (similar).

[31] *See* Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 220 (1990) ("When Frankfurter took his seat on the Supreme Court in January 1939, almost everyone assumed that he would become the dominant spirit and intellectual leader of the new liberal Court. After all, he had been, in the words of Brandeis, 'the most useful lawyer in the United States': defender of Tom Mooney, the alien victims of the Palmer Red Raids, the striking miners of Bisbee, Arizona, Sacco and Vanzetti, and too many others to mention."); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 13–16, 46–47 (1989) (noting fears in some political circles that Justice Frankfurter was a Communist or Communist sympathizer, "inspir[ing] American conservatives to label Frankfurter a dangerous radical"); *see generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 14, 21–27 (2010).

[32] *See, e.g.*, Rauh, *supra* note 31, at 220 ("But . . . a deep belief in judicial restraint in all matters overtook even [Justice Frankfurter's] lifelong dedication to civil liberties.").

[33] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring) (contending that the propriety of the Japanese-American civilian exclusion order was the "business" of Congress and the Executive, not the Court); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (arguing for the constitutionality of a World War II-era law requiring students to salute the flag).

[34] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring) (upholding the conviction of three defendants under the Smith Act for conspiracy to organize the Communist Party as a group advocating the overthrow of the U.S. government by force).

[35] *See Blackmun, Harry Andrew*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/blackmun-harry-andrew (last visited Aug. 13, 2018).

[36] *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 97 (1979) ("Nixon found Blackmun's moderate conservatism perfect. . . . [Blackmun] had a . . . predictable, solid body of opinions that demonstrated a levelheaded, strict-constructionist philosophy. . . . Blackmun was a decent man, consistent, wedded to routine, unlikely to venture far.").

[37] 410 U.S. 113 (1973).

[38] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 235 (2005) (declaring that, by 1994, "Harry Blackmun was, by wide consensus, the most liberal member of the Supreme Court").

The difficulty in attempting to predict how a nominee will approach the job of being a Justice remains even when the nominee has had a lengthy federal judicial career prior to nomination.[39] Federal judges on the courts of appeals are bound by Supreme Court and circuit precedent[40] and, therefore, are not normally in a position to espouse freely their views on particular legal issues in the context of their judicial opinions.[41] Moreover, unlike the Supreme Court, which enjoys "almost complete discretion" in selecting its cases, the federal courts of appeals are required to hear many cases as a matter of law.[42] As a result, the courts of appeals consider "many routine cases in which the legal rules are uncontroverted."[43] Because lower court judges are often bound by Supreme Court and circuit precedent, moreover, the vast majority[44] of federal appellate opinions are unanimous. Perhaps indicative of the nature of federal appellate work, the vast majority of cases decided by three-judge panels of federal courts of appeals are decided without dissent.[45]

While the D.C. Circuit, where Judge Kavanaugh serves, witnesses more dissents on average than its sister circuits,[46] the overwhelming majority of opinions issued by the nominee's court are unanimous.[47] Accordingly, while Judge Kavanaugh's work on the D.C. Circuit may provide some

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[39] Judge Kavanaugh has served for twelve years on the D.C. Circuit. *See Kavanaugh Biography*, *supra* note 4. If confirmed, he would have the third-longest tenure on a federal appellate bench of the current members of the Court after Justice Alito (sixteen years) and Justice Breyer (twelve years). *See Alito, Samuel A., Jr.*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/alito-samuel-jr (last visited Aug. 13, 2018); *Breyer, Stephen Gerald*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/breyer-stephen-gerald (last visited Aug. 13, 2018).

[40] *See* Brewster v. Comm'r of Internal Revenue, 607 F.2d 1369, 1373–74 (D.C. Cir. 1979) (explaining that future panels are bound to follow precedent set by previous panels until the en banc court or Supreme Court overrules that precedent); *see generally* Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 816 n.160 (2006) ("Vertical stare decisis binds hierarchically inferior federal appellate judges to follow the Supreme Court's on-point precedent. The relationship is vertical, or between inferior and superior.").

[41] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (2009) ("Supreme Court decisions bind the courts of appeals in a way in which they do not bind the Court itself, and therefore narrow considerably the scope for those courts to exercise choice."); *see also* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 171 (1999) (claiming that the nature of a judge's work on a federal court of appeals allows "most circuit judges [to] chart a course of moderation" and "more often than not, a circuit judge's opinions tend to betray outsiders' perceptions of that judge as a sharp ideological extremist").

[42] Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1052 n.8 (1991); *see generally* POSNER, *supra* note 41, at 367 ("[M]ore of the work of [the federal appellate] courts really is technical. . . . Most of the appeals they get can be decided uncontroversially by the application of settled principles").

[43] *See* Sirico & Drew, *supra* note 42, at 1052 n.8.

[44] *See* Harry T. Edwards, *Collegial Decision Making in the U.S. Courts of Appeals* (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 17-47, Nov. 2017).

[45] *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 160 (2007) (noting the "relative paucity of circuit court panel dissents"); Neil M. Gorsuch, *Law's Irony*, 37 HARV. J.L. & PUB. POL'Y 743, 753 (2014) ("Over ninety percent of the decisions issued by [the Tenth Circuit] are unanimous; that's pretty typical of the federal appellate courts.").

[46] *See* Edwards, *supra* note 44, at 70–71 (providing data indicating that, over a five-year period beginning on September 30, 2011, roughly 4.5% of cases decided on the merits by the D.C. Circuit drew at least one dissenting opinion, compared to the nationwide average of 1.3% for the geographic circuit courts of appeals).

[47] *See id.*; *see also* Douglas H. Ginsburg, Circuit Judge, U.S. Court of Appeals for the D.C. Circuit, Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter, Georgetown University Law Center (Apr. 26, 2011), *in* 10 GEO. J.L. & PUB. POL'Y 1, 7 (2012) (noting that in 2010, panels of the D.C. Circuit "disposed of 873 cases, 191 of them with published opinions, but our nine active and four senior judges . . . issued a total of only nineteen dissenting opinions"); Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–*

insight into his general approach to particular legal issues,[48] the bulk of the opinions that the nominee has authored or joined may not be particularly insightful with regard to his views on specific areas of law, or how he would approach these issues if he were a Supreme Court Justice. When a federal appellate judge takes the step to write separately, however, such an opinion need not accommodate the views of other colleagues, and can therefore provide unique insight into a circuit judge's judicial approach.[49]

Even in closely contested cases where concurring or dissenting opinions are filed, however, it still may be difficult to determine the preferences of the nominated judge if the nominee did not actually write an opinion in the case.[50] The act of joining an opinion authored by another judge does not necessarily reflect full agreement with the underlying opinion.[51] For example, in an effort to promote consensus on a court, some judges will decline to dissent unless the underlying issue is particularly contentious.[52] As one commentator notes, "the fact that a judge joins in a majority opinion may not be taken as indicating complete agreement. Rather, silent acquiescence may be understood to mean something more like 'I accept the outcome in this case, and I accept that the reasoning in the majority opinion reflects what a majority of my colleagues has agreed on.'"[53]

Using caution when interpreting a judge's vote isolated from a written opinion may be particularly important with votes on procedural matters. For example, a judge's vote to grant an extension of time for a party to submit a filing generally does not signal agreement with the substantive legal position proffered by that party. And while some observers have highlighted votes by Judge Kavanaugh in favor of having certain three-judge panel decisions reconsidered by the D.C. Circuit sitting en banc, these votes should be viewed with a degree of caution. A vote to

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*2002*, 70 GEO. WASH. L. REV. 259, 265 (2002) (noting that, from FY1995 through FY2001, a dissent was filed in only 9% of published decisions of the D.C. Circuit).

[48] *See* YALOF, *supra* note 41, at 170 ("Although hardly dispositive, federal appellate opinions offer perhaps the best gauge available for predicting an individual's future voting behavior on the Supreme Court.").

[49] *See, e.g.*, M. Todd Henderson, *Citing Fiction*, 11 GREEN BAG 2D 171, 181 (2008) ("[N]on-majority opinions are quite different in tone and purpose. When a judge dissents or concurs, the shackles are removed . . . .").

[50] *See* Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1754–55 (2015) (suggesting that the "presence of a concurrence or dissent serves as a signal" that the case before the court is a "hard case"); *see generally* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (noting the motivations that prompt judges to write concurring or dissenting opinions); Diane P. Wood, *When to Hold, When to Fold, When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445, 1451–57 (2012) (describing the considerations that prompt judges to author separate opinions).

[51] *See* Irin Carmon, *Opinion, Justice Ginsburg's Cautious Radicalism*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/opinion/sunday/justice-ginsburgs-cautious-radicalism.html (quoting Justice Ruth Bader Ginsburg as remarking that "an opinion of the court very often reflects views that are not 100 percent what the opinion author would do, were she writing for herself").

[52] *See* Sanford Levinson, *Trash Talk at the Supreme Court: Reflections on David Pozen's Constitutional Good Faith*, 129 HARV. L. REV. F. 166, 174 (2016) (declaring the assumption that "all adjudicators are splendidly isolated" is "foolish," and arguing that it may be "incumbent" upon judges to engage in "intellectual compromise[s]" "to serve the public weal"). There is an academic debate as to whether the decision to join a concurrence or dissent signals complete agreement with that opinion. *Compare* Robert H. Smith, *Uncoupling the "Centrist Bloc"—An Empirical Analysis of the Thesis of A Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 10 n.36 (1994) (arguing that "decisions to join or not join others' opinions may in fact be influenced by a number of factors" outside of a judge's agreement with that decision), *with* Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 143 (2007) ("[A] decision to join a special opinion is a more finely tuned tool, one that almost certainly indicates agreement not just with the outcome but also with the reasoning.").

[53] *See* Steven D. Smith, *Lessons from Lincoln: A Comment on Levinson*, 38 PEPP. L. REV. 915, 924 (2011).

rehear a case en banc could signal disagreement with the legal reasoning of the panel decision, and may suggest that a judge wants the entire court to have an opportunity to correct a perceived error by the panel.[54] On the other hand, a vote to rehear a case en banc may be prompted by a judge's desire to resolve an intracircuit conflict between panel decisions, or may be indicative of the judge's view that the issue is of such importance as to merit consideration by the full court.[55] Moreover, as one federal appellate judge noted in a dissent from a decision denying a petition for a rehearing en banc:

> Most of us vote against most such petitions . . . even when we think the panel decision is mistaken. We do so because federal courts of appeals decide cases in three judge panels. En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases.[56]

Consequently, a vote for or against rehearing a case en banc or on other procedural matters does not necessarily equate to an endorsement or repudiation of a particular legal position.[57]

Finally, it should be noted that, despite having served on the federal appellate bench for more than a decade, Judge Kavanaugh has said little about some areas of law because of the nature of the D.C. Circuit's docket and, as a consequence, it may be difficult to predict how he might rule on certain issues if he were elevated to the Supreme Court. Due to the D.C. Circuit's location in the nation's capital, and the number of statutes providing it with special or even exclusive jurisdiction to review certain agency actions, legal commentators generally agree that the D.C. Circuit's docket, relative to the dockets of other circuits, contains a greater percentage of nationally significant legal matters.[58] For instance, the D.C. Circuit hears a large number of cases on administrative[59] and environmental law matters.[60] In contrast, cases at the D.C. Circuit rarely, if

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[54] *See* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 784 (1983) (noting that "[s]ome judges vote routinely for rehearings en banc on all cases with which they disagree").

[55] *See* Stephen L. Wasby, *Why Sit En Banc?*, 63 HASTINGS L.J. 747, 763–73 (2012).

[56] *See* United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing en banc); *see also* Bartlett v. Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc) ("By declining to rehear a case, 'we do not sit in judgment on the panel; we do not sanction the result it reached'. . . . We decide merely that . . . review by the full court is not justified.").

[57] *See* Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in denial of rehearing en banc) ("No one thinks a vote against rehearing en banc is an endorsement of a panel decision . . . .").

[58] *See, e.g.*, Aaron Nielson, *D.C. Circuit Review—Reviewed: The Second Most Important Court?*, NOTICE & COMMENT (Sept. 4, 2015), http://yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/ (discussing reasons behind D.C. Circuit's reputation as the "second most important court" after the Supreme Court).

[59] *See* Kavanaugh, *Administrative State*, *supra* note 22, at 715 ("[T]he bread and butter of our docket[ ] is our administrative law docket. What I mean by that is determining in a particular case whether an administrative agency, like the EPA, the NLRB, or the FCC, exceeded statutory limits on their authority or violated a statutory prohibition on what they can do. These are the cases that come up to our court constantly. We see very complicated administrative records, and we adjudicate very complex statutes."); *see also* Harry T. Edwards, *A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL'Y 61, 64 (2004) ("The D.C. Circuit docket largely consists of very dense administrative law cases in appeals that often include huge records and numerous parties with their numerous briefs."); Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 152 (2013) ("The modern D.C. Circuit hears a disproportionate share of administrative petitions and other cases involving the federal government . . . .").

[60] *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 790 (2008) (noting that, in a data set of 347 judicial votes cast in the federal courts of appeals from 2003 to 2005 on environmental law matters, "cases involving environmental statute interpretation tend to occur in the D.C. Circuit"); Patricia M. Wald, *Regulation at Risk: Are*

ever, involve "hot-button" social issues such as abortion, affirmative action, or the death penalty.[61] Moreover, the D.C. Circuit docket has a lower percentage of cases involving criminal matters, prisoner petitions, or civil suits between private parties.[62] As a result, this report focuses primarily on areas of law where Judge Kavanaugh has written extensively, and notes only in passing those areas where little can arguably be gleaned from his judicial record on account of his participation in few, if any, decisions directly addressing those particular areas of law.

*Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 623, 633 (1994) (stating that the D.C. Circuit has decided a number of significant environmental law cases).

[61] *See* David G. Savage, *Supreme Court Nominee Merrick Garland Has a Record of Restraint, Not Activism*, L.A. TIMES (Mar. 18, 2016), http://www.latimes.com/nation/la-na-garland-legal-analysis-20160318-story.html. ("[T]he D.C. Circuit focuses more on dense regulatory questions than hot-button cultural issues.").

[62] *See, e.g.*, Kavanaugh, *Administrative State*, *supra* note 22, at 715; John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 377 (2006) ("[W]hen you look at the docket . . . you really see the differences between the D.C. Circuit and the other courts. One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.").

# Judge Kavanaugh's Judicial Approach, Philosophy, and Influences

Notwithstanding the difficulty of predicting a nominee's future behavior, three overarching (and interrelated) considerations may inform an assessment of how a jurist is likely to approach the role of a Supreme Court Justice. First, the nominee's general approach to the craft of judging—a phrase that this report uses to refer to the *process* of how a judge approaches key aspects of the job, including writing legal opinions and resolving legal disputes on a multi-member court—may be an important consideration in predicting how a jurist would behave on the High Court.[63] Second, the judge's overarching judicial philosophy, including how he evaluates legal questions as a *substantive* matter, is another central concern in gauging how a nominee may perform.[64] Third, it may be helpful to reflect on a nominee's influences or judicial heroes, as those individuals may exhibit qualities that the nominee will aspire to emulate.[65]

On all three fronts, there are a host of clues on how President Trump's latest nominee to the High Court views the proper role of a Supreme Court Justice. Indeed, Judge Kavanaugh is a well-known jurist with a robust record, composed of both judicial opinions and non-judicial writings, in which he has made his views on the law and the role of the judge fairly clear.[66] This section begins by discussing how the nominee has approached the craft of judging, including by examining how he prepares for a case, his writing style, his approach to working with his colleagues on the D.C. Circuit, and how his opinions have fared at the Supreme Court. The section then turns to more substantive questions about Judge Kavanaugh's judicial philosophy, noting two key aspects that have undergirded how the nominee has resolved legal disputes in the cases before him on the appellate bench. Finally, this section notes the jurists that Judge Kavanaugh has identified as judicial role models, either because of their general approach to the craft of judging or for their judicial philosophy.

## The Craft of Judging

After his nomination to the Supreme Court, commentators noted Judge Kavanaugh's "reputation on both sides of the aisle as a solid and careful judge,"[67] highlighting his diligence throughout the process of authoring opinions for the D.C. Circuit.[68] For instance, according to *Time Magazine*, the nominee requires his law clerks to create, even for routine cases, "thick black binders" "filled with memos and briefs . . . [and] every law-review article" that has been written on the relevant topic, resulting in "binders stack[ing] up in the kitchenette in [Judge] Kavanaugh's chambers."[69] In this vein, Judge Kavanaugh's colleague, Judge Laurence Silberman, called the nominee "one of the most serious judges" he "ever encountered."[70] Echoing these comments are anonymous evaluations in the *Almanac of the Federal Judiciary* from attorneys who practiced in front of the nominee, describing Judge Kavanaugh as "extremely well prepared," "careful[]," and "thorough" in his approach.[71]

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[63] *See* ROBERT A. KATZMANN, COURTS AND CONGRESS 14 (1997) (suggesting for Supreme Court nominees with prior judicial experience, Senators "can focus on the way nominees approach the craft of judging: how they identify issues, present facts, apply precedent, address opposing arguments, and state the grounds for decision"); LINDA GREENHOUSE, THE U.S. SUPREME COURT: A VERY SHORT INTRODUCTION 28–29 (2012) (observing that a "judicial record that indicates how a potential nominee approaches the craft of judging" can provide insights into how a nominee may approach the role of Supreme Court Justice).

[64] *See* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 98 (2007) (declaring "[j]udicial philosophy" to be the "Holy Grail of Senate confirmation hearings").

**Judge Kavanaugh's Writing Style.** On a technical level, Judge Kavanaugh's writing has been widely praised for its clarity, including by the President, who described the nominee as "a brilliant jurist with a clear and effective writing style."[72] And D.C. Circuit practitioners have likewise described Judge Kavanaugh's writing as "well reasoned," "thorough and clear," and "meticulous."[73] As one commentator remarked, Judge Kavanaugh has "made a name for himself on the D.C. Circuit with clear, concise writing."[74] It has also been observed that Judge Kavanaugh employs a number of mechanical techniques in crafting his judicial opinions, "includ[ing] strong lead-in sentences, lists, summaries, pointed questions, informal expressions and lots of repetition."[75] Such techniques are evident throughout his written opinions wherein the nominee frequently employs bulleted lists,[76] mathematical expressions and logical sequences[77]—quite unusual in judicial writing—and regularly parses out the various components of his analysis through the use of introductory ordinals[78] (i.e., first, second, third). Judge Kavanaugh also

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[65] *See* Richard Wolf, *Supreme Court Brett Kavanaugh Likes Conservative, and Some Liberal, Justices and Judges*, USA TODAY (July 13, 2018), https://www.usatoday.com/story/news/politics/2018/07/13/supreme-court-pick-brett-kavanaugh-conservative-liberal-friends-mentor/780256002/ (noting, with respect to Judge Kavanaugh, that "you can tell a lot about" the nominee based on his judicial friends and mentors); *see also 2006 Confirmation Hearing*, *supra* note 27, at 23–24 (identifying the jurists who have served as "role models" to the nominee).

[66] Nielson, *supra* note 28 (describing Judge Kavanaugh as a "very significant figure" on the D.C. Circuit).

[67] Brian Bennett, *How Brett Kavanaugh Could Change the Supreme Court—and America*, TIME MAG., July 23, 2018, at 22; Jack Goldsmith, *Kavanaugh Will Right the Course of the Court*, TIME MAG., July 23, 2018, at 25 ("Kavanaugh's hundreds of judicial opinions show his commitment to careful, honest, detached interpretation of the Constitution and laws of the United States.").

[68] Bennett, *supra* note 67, at 23 ("On the [D.C. Circuit], Kavanaugh developed a reputation as a diligent judge who often combed through dozens of drafts for even routine opinions . . . .").

[69] *Id.*

[70] *Id.* (quoting Judge Silberman).

[71] *See Brett M. Kavanaugh*, 2 ALMANAC OF THE FED. JUDICIARY, 2018 WL 3222137, at *4 [hereinafter ALMANAC] ("He is extremely well prepared. . . . He asks very hard questions; he understands the issues fully . . . [and] he thinks things through very carefully.").

[72] President Donald J. Trump, Remarks at Supreme Court Nomination Ceremony (July 9, 2018) (transcript available at http://www.cq.com/doc/newsmakertranscripts-5353814?0).

[73] *See* ALMANAC *supra* note 71, at *4.

[74] Jacqueline Bell, *'Not a Complicated Case': Kavanaugh's Straightforward Style*, LAW360 (July 10, 2018), https://www.law360.com/articles/1061755; *see also id.* (observing that "legal writing experts agree: Whatever you think of Judge Kavanaugh's judicial philosophy, this judge can write").

[75] *Id.*

[76] *See, e.g.*, PHH Corp. v. CFPB, 881 F.3d 75, 177–78, 179–81 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 420 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1261 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part); United States v. Cardoza, 713 F.3d 656, 660 (D.C. Cir. 2013).

[77] *See, e.g.*, Priests for Life v. HHS, 808 F.3d 1, 17 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("In most religious liberty cases, the Government has said in essence: 'Do X or suffer a penalty.' The religious objector responds that X violates his or her religious beliefs. . . . Here, the situation is only slightly more complicated. The Government has said in essence: 'Do X or Y or suffer a penalty.' X is provide contraceptive coverage. Y is submit the form."); Seven-Sky v. Holder, 661 F.3d 1, 31 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("But as we learn in logic class, when A=B and B=C, then A=C."), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); *see also* Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 5 ("I tend to be a judge who finds clarity more readily than some of my colleagues—perhaps a little less readily than a couple. I probably apply something approaching a 65/35 or 60/40 rule. In other words, if it is 60/40 clear, it is not ambiguous, and I do not resort to the canons. I think a few of my colleagues and other judges around the country apply more of, say, a 90/10 rule, at least in certain cases. Only if the proffered interpretation is at least 90/10 clear will they call it clear.").

[78] *See, e.g.*, *PHH Corp.*, 881 F.3d at 166–68 (Kavanaugh, J., dissenting); Garza v. Hargan, 874 F.3d 735, 753 (D.C. Cir.

seemingly attempts to enhance the accessibility of his opinions through the occasional witticism or colloquialism.[79] For instance, in one dissent, he equated the majority's decision to grant a writ of mandamus requiring a district court to enter a temporary stay to using a "chainsaw to carve your holiday turkey."[80]

On a more substantive level, the nominee frequently includes an extensive discussion on the background and history of a given issue or topic, particularly in his dissenting opinions.[81] Throughout his judicial and non-judicial writings, moreover, Judge Kavanaugh relies heavily on academic scholarship, citing law review articles, treatises, and other materials,[82] perhaps reflective of the depth of research for which the nominee is renowned.[83] The nominee has commented: "I love looking at treatises, law review articles. The more I can read about how we got in this statute to where we are, in this constitutional provision and how it's been applied. So academic writing does matter to me."[84] In a similar vein, he has advised his fellow jurists:

> [T]o be a good judge . . . we must keep learning. We do not know it all. . . . We have to constantly learn. We should draw from the law reviews and the treatises that professors

2017) (en banc) (Kavanaugh, J., dissenting), *cert. granted, judgment vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018); *U.S. Telecom Ass'n*, 855 F.3d at 417–18 (Kavanaugh, J., dissenting from denial of rehearing en banc); *Priests for Life*, 808 F.3d at 15–16 (Kavanaugh, J., dissenting from denial of rehearing en banc); *Cardoza*, 713 F.3d at 660; *Seven-Sky*, 661 F.3d at 32–34, 48–50 (Kavanaugh, J., dissenting); Heller v. D.C., 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (PCAOB), 537 F.3d 667, 698–700 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010); *id.* at 710–11, 713–15.

[79] Lorenzo v. SEC, 872 F.3d 578, 598 (D.C. Cir. 2017) ("In a Houdini-like move, the Commission rewrote the administrative law judge's factual findings to make those factual findings correspond to the legal conclusion that [the defendant] was guilty and deserving of a lifetime suspension."), *cert. granted sub nom.* Lorenzo v. SEC, 138 S. Ct. 2650 (2018); *U.S. Telecom Ass'n*, 855 F.3d at 429 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("What First Amendment case or principle supports that theory? Crickets."); Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078, 1079 (D.C. Cir. 2017) ("Believe it or not, the fax machine is not yet extinct."); *id.* at 1082 ("If you are finding the FCC's reasoning on this point difficult to follow, you are not alone. We do not get it either."); *Priests for Life*, 808 F.3d at 21 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("To begin with, how do we determine whether the Government has a 'compelling interest' in overriding a fundamental constitutional or statutory right such as RFRA's right to religious freedom? Good question."); *Seven-Sky*, 661 F.3d at 23 (Kavanaugh, J., dissenting) ("The Tax Code is never a walk in the park.").

[80] *See* Belize Soc. Dev., Ltd. v. Gov't of Belize, 668 F.3d 724, 734 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[81] *See, e.g.*, *PHH Corp.*, 881 F.3d at 164–65, 167–71 (Kavanaugh, J., dissenting) (recounting the history of executive and independent agencies before discussing the governance of the CFPB); *Heller*, 670 F.3d at 1287–88 (Kavanaugh, J., dissenting) (recounting the history of semi-automatic rifles in the United States); *Free Enter. Fund*, 537 F.3d at 687–97 ("discuss[ing] the text and original understanding [of Article II and the Appointments Clause] at some length").

[82] *See, e.g.*, *PHH Corp.*, 881 F.3d at 178 (Kavanaugh, J., dissenting) (quoting a number of law review articles to support his assertion that there is a "deeply rooted tradition" that independent agencies are headed by multiple commissioners or board members); *U.S. Telecom Ass'n*, 855 F.3d at 421–22 (Kavanaugh, J., dissenting from denial of rehearing en banc) (quoting a law review article by Stephen Breyer on administrative law and another by Abbe R. Gluck and Lisa Schultz Bressman on statutory interpretation); *Priests for Life*, 808 F.3d at 23 (dissenting from denial of rehearing en banc) (quoting Eugene Volokh on the First Amendment); Vann v. Dep't of Interior, 701 F.3d 927, 929 (D.C. Cir. 2012) (quoting Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane on federal practice and procedure); *Heller*, 670 F.3d at 1273 (Kavanaugh, J., dissenting) (quoting Eugene Volokh and Joseph Blocher on the Second Amendment); *id.* at 1281 (quoting a number of law review articles, including by Mario L. Barnes, Erwin Chemerinsky, Alan Brownstein, Stephen A. Siegel, and Darrell A.H. Miller, in support of the proposition that the application of different levels of scrutiny in individual rights cases amounts to using balancing tests); *Free Enter. Fund.*, 537 F.3d at 690, 692 (citing Akhil Reed Amar and Saikrishna Prakash on Article II); *id.* at 697 (citing Donna M. Nagy and Peter L. Strauss on separation-of-powers issues); *id.* at 713 (quoting Laurence H. Tribe on Article II).

[83] *See* Bennett, *supra* note 67, at 23.

[84] Kavanaugh, *Two Challenges*, *supra* note 14, at 1908.

> have worked on for years to study a problem that we may have a couple of days to focus on. We should study the briefs and precedents carefully and challenge our instincts or prior inclinations. We are not the font of all wisdom.[85]

**Working on a Multi-member Court.** Given Judge Kavanaugh's industrious approach toward legal research and writing, it may be unsurprising that the nominee has been incredibly prolific both on and off the bench,[86] perhaps providing one indication of the quality of the nominee's work.[87] With regard to judicial opinion writing, the nominee frequently writes separately to express his particular views on the law, authoring more separate opinions than any of his colleagues on the D.C. Circuit during the 12 years he served on the appellate bench.[88] Moreover, as **Table A-1** indicates, during the nominee's tenure on the D.C. Circuit, Judge Kavanaugh also authored separate opinions at a *greater rate* than his colleagues who served as active judges on that court during that entire time period.[89]

While a judge's rate of concurrence or dissent in the abstract may reveal very little about the judge's *ideological* approach to a particular area of law,[90] Judge Kavanaugh's tendency to write separately is somewhat probative in understanding his broad views on judging. As a general matter, some legal observers characterize a judge who tends to write separately as being more concerned with "getting the law right" than with countervailing interests that might otherwise lead a judge to join fully the opinion for the court.[91] In a 2016 speech, Judge Kavanaugh noted

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[85] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 689.

[86] *See* CRS Legal Sidebar LSB10170, *Brett M. Kavanaugh: Selected Primary Material*, by Julia Taylor, Keri B. Stophel, and Eva M. Tarnay (noting the nominee has authored more than three hundred opinions during his judicial career, as well as dozens of other writings).

[87] Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1320 (2009) ("All else being equal, a judge who publishes more opinions is better than a judge who publishes fewer opinions."); *but see* Daniel A. Farber, *Supreme Court Selection and Measures of Past Judicial Performance*, 32 FLA. ST. U.L. REV. 1175, 1178 (2005) ("[P]roductivity may measure good judicial traits such as effort or writing ability or bad judicial traits such as self-centeredness or sloppy treatment of facts.").

[88] *See* **Table A-1**.

[89] *Id.*

[90] *See* Eugene Kiely, *Fact Check: Gorsuch's "Mainstream" Measurement*, FACTCHECK.ORG (Apr. 7, 2017), https://www.factcheck.org/2017/04/gorsuchs-mainstream-measurement/ (noting similarities between the dissent rates of Justices Alito, Sotomayor, and Gorsuch in concluding that "[a] circuit court judge's overall dissent rate isn't useful in determining a nominee's ideology"); *cf.* CROSS, *supra* note 45, at 174 (noting that the addition of a more ideologically driven judge to a circuit court panel increases the likelihood that that judge "wield[s] more influence on the ideologically opposed panel member").

[91] *See* Frank B. Cross, *Collegial Ideology in the Courts*, 103 NW. U.L. REV. 1399, 1399–1400 (2009) ("Collegiality and ideology inevitably conflict. Given the range of ideological preferences and political 'hot button' issues facing courts today, one would expect judges to disagree about the resolution of certain legal issues. Because such disagreement puts collegiality and individuality in conflict, any model of judicial decisionmaking must account for the interaction of these potentially opposing factors."); *see generally* Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011). *Cf.* Stephen Choi & Mitu Gulati, *A Tournament of Judges*?, 92 CAL. L. REV. 299, 310–13 (2004) (using a judge's dissents and concurrences as a proxy for how many disagreements a judge had with his or her colleagues); Corey Rayburn Yung, *A Typology of Judging Styles*, 107 NW. U. L. REV. 1757, 1775 (2013) ("Two types of disagreements were incorporated in the measurement: concurrences and dissents. In both situations, a judge presumably writes separately because she cannot find common ground with other written opinions.").

As one commentator has noted, while "a study of dissent alone will exclude instances of judicial disagreement," there may be "compelling reasons to concentrate on the frequency of dissent alone." *See* Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025, 1051–52 (2007) ("The concurring judge is not so easy to pin down: he may agree with the outcome but disagree with the reasoning adopted by the majority; he may agree that the legal regime dictates the outcome of the case but wish to express dissatisfaction with that legal regime; he may be engaged in preemptive exegesis of the opinion to influence future

that, while he "love[s] the idea of courts working together" and trying to "find common ground," he "dissent[s] a fair amount" and that "dissent is good" for a court.[92]

The frequency with which Judge Kavanaugh has authored majority opinions for divided judicial panels may also support the view that consensus is not necessarily a driving force in the nominee's approach to opinion writing.[93] As **Table A-2** demonstrates, while not as pronounced as his own propensity to author concurring or dissenting opinions, Judge Kavanaugh's majority opinions have tended to draw more separate opinions (and dissents specifically) relative to the majority opinions of his colleagues the D.C. Circuit.[94]

Jurists of various backgrounds have long debated the benefits and drawbacks of consensus on a multi-member court,[95] and Judge Kavanaugh himself has claimed that a judge needs to "balance" various, competing interests when deciding whether to write separately.[96] Regardless of the merits of that debate, the fact that the nominee tends to author separate opinions and prompts others to write separately may suggest that the nominee values independence and consistency in his judicial approach over consensus building,[97] ideals the nominee has explicitly endorsed in his

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cases; he may wish to criticize (or expand) dictum in the majority opinion. Only the first of these possibilities represents a disagreement arising from the indeterminacy of the legal regime, and disentangling them requires subjective judgments by the researcher about the degree to which the concurring judge expresses agreement or disagreement with the majority opinion."); *see generally* Wald, *supra* note 50, at 1415 ("Concurrences . . . serve as vehicles for judges to present additional arguments rejected or ignored by the majority, to preserve doubts or reservations about the majority opinion for the future, to caution against its too-broad application, to disagree with all or part of its reasoning. The tone of concurrences is usually calm and rational, not agitated as in a dissent—after all, their authors agree with the result.").

[92] Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., Justice Scalia and Deference, Keynote Address at the Center for the Administrative State Public Policy Conference: Rethinking Judicial Deference: History, Structure, and Accountability, at 36:38 (June 2, 2016), https://vimeo.com/169758593?utm_source=email&utm_medium=vimeo-cliptranscode-201504&utm_campaign=28749 [hereinafter Kavanaugh, *Justice Scalia*].

[93] *Cf.* Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 364–65 (2001) (arguing that Justices, driven by a norm of suppressing dissent in order to preserve consensus, will write broad unanimous opinions).

[94] *See* **Table A-2**.

[95] *Compare* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1640–41 (2003) ("Collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions."), *and* Deanell Reece Tacha, *Judges on Judging: The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 586 (1995) ("I nevertheless believe that there is a value in collegiality that affects the quality of judicial decisionmaking."), *with* RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY, at ix–x (2016) (criticizing the "staleness in the current judicial culture—a tendency of judges to recite propositions of doubtful veracity just because they had been repeated before; a lack of curiosity and imagination; a lack of clarity and candor; and a weak sense of fact"), *and* Antonin Scalia, *Dissents*, *in* SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 274–90 (Christopher J. Scalia & Edward Whelan eds., 2017) (discussing the advantages of "separate opinions . . . both within and without the court").

[96] Kavanaugh, *Justice Scalia*, *supra* note 92, at 37:36.

[97] *See* William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1089–90 (1989) ("One appropriate measure of independence is the frequency a judge submits separate concurring and dissenting opinions. An independent judge is more likely to write separate opinions, rather than simply join colleagues without expressing a distinct point of view."); RICHARD A. POSNER, LEE EPSTEIN & WILLIAM M. LANDES, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 256 (2013) (noting that the aim of a dissent "is to promote one's own legal views"); Rochelle Cooper Dreyfuss, *The Federal Circuit As an Institution: What Ought We to Expect?*, 43 LOY. L.A. L. REV. 827, 835 (2010) (noting a high dissent rate suggests a judge has "locked into a position from which he or she refuses to deviate"); *but see* David C. Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U.L. REV. 1415, 1440 (2005) ("Dissents can (but not always) tell us something about independence, but only a small part of the story.").

non-judicial writings.[98] Moreover, Judge Kavanaugh's apparent propensity to eschew consensus in favor of candor[99] may reflect his preference for clear rules in adjudication, as discussed in more detail below.[100]

There may be limits to the lessons that can be drawn from the frequency in which the nominee writes separately from other colleagues on the bench or prompts others to write separately. The choice to write separately is one that stems from various factors, and may simply depend on the personality and preferences of an individual judge, or the nature of the dispute before the court.[101] More broadly, while the data contained in **Table A-1** and **Table A-2** may indicate Judge Kavanaugh's willingness to depart from the views of his colleagues, legal commentators have broadly noted his "very good reputation" for promoting collegiality on the D.C. Circuit and for "working with people across ideological lines."[102] This reputation aligns with the nominee's public comments about how a judge should behave toward his colleagues. For instance, in a 2016 speech, Judge Kavanaugh described the "proper demeanor" for a judge as having empathy for one's colleagues, "demonstrat[ing] civility," and not "be[ing] a jerk."[103] In his remarks during his Supreme Court nomination ceremony, Judge Kavanaugh described the seventeen other judges he worked with on the D.C. Circuit as "colleague[s]" and "friend[s]."[104]

While a judge's propensity to write on behalf of himself or a divided panel may suggest that the judge has idiosyncratic views on the law,[105] Judge Kavanaugh's record on appeal to the Supreme Court appears to belie such a suggestion. As **Table A-3** indicates, during the nominee's twelve years of service on the D.C. Circuit, the Supreme Court has reversed an opinion authored by Judge Kavanaugh only once,[106] and reversed one additional opinion in which the nominee

[98] *See* Kavanaugh, *Judge As Umpire*, *supra* note 24, at 688 (arguing that "to be a good judge and a good umpire you have to possess some backbone").

[99] *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388 (1995) (noting that "candor is often forsaken in the process of amassing the votes necessary for a majority").

[100] *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1909 ("I believe very deeply in . . . the rule of law as a law of rules . . . ."). Judge Kavanaugh's experience as a law professor may also explain his tendency to write separately. *See* Aaron J. Ley et al., *The Mysterious Persistence of Non-Consensual Norms on the U.S. Supreme Court*, 49 TULSA L. REV. 99, 122 (2013) ("Those Justices having experience as law professors are more likely to write separate opinions than Justices who began their careers in other professions."); *see also* ALMANAC, *supra* note 71, at *4 ("'Intellectually he is a law professor . . . .'").

[101] *See supra* notes 90–91, 97.

[102] Jess Bravin & Brent Kendall, *Kavanaugh's Collegial Nature Could Change Supreme Court's Tenor*, WALL ST. J. (July 15, 2018), https://www.wsj.com/articles/kavanaughs-collegial-nature-could-change-supreme-courts-tenor-1531687687; *see also* Aaron Nielson, *D.C. Circuit Review—Reviewed: Justice Brett Kavanaugh? Some Preliminary Thoughts*, NOTICE & COMMENT (July 13, 2018), http://yalejreg.com/nc/d-c-circuit-review-reviewed-justice-brett-kavanaugh-some-preliminary-thoughts/ (describing Judge Kavanaugh "as nice as he appears" and passing the "collegiality" test); ALMANAC, *supra* note 71, at *4 (describing the nominee as "collegial").

[103] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 689.

[104] Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., Remarks at Supreme Court Nomination Ceremony (July 9, 2018) (transcript available at http://www.cq.com/doc/newsmakertranscripts-5353814?0) [hereinafter Kavanaugh, *Nomination Ceremony*].

[105] *See* Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 510–24 (2012) (discussing the criticism of dissent "as an expression of private idiosyncrasy"); *but see supra* notes 90–91 (noting that a judge's ideology has little to do with his dissent rate).

[106] *See* EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014).

joined.[107] Relative to his colleagues,[108] the dearth of scrutiny by the Supreme Court of Judge Kavanaugh's opinions is notable and could be a metric by which to gauge the nominee's work.[109]

Perhaps more telling of the strength of the nominee's record before the Court are several cases in which the Supreme Court adopted[110] the reasoning in Judge Kavanaugh's opinions.[111] As **Table**

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[107] *See* Munaf v. Geren, 553 U.S. 674 (2008).

[108] For example, comparing Judge Kavanaugh to Judge Thomas B. Griffith, a colleague whose time of service on the D.C. Circuit is nearly identical to the nominee (Judge Griffith was appointed a year earlier than Judge Kavanaugh), Judge Griffith authored at least *three* opinions and joined *six* additional opinions that were reversed or vacated by the Supreme Court during the years he served on the D.C. Circuit with the nominee. *See* United States v. Class, No. 15-3015, 2016 U.S. App. LEXIS 12620 (D.C. Cir. July 5, 2016) (Griffith, J., joining per curiam opinion), *rev'd*, 138 S. Ct. 798 (2018); Perry v. Merit Sys. Prot. Bd., 829 F.3d 760 (D.C. Cir. 2016) (Griffith, J., joining majority opinion), *rev'd*, 137 S. Ct. 1975 (2017); Maqaleh v. Hagel, 738 F.3d 312, 317 (D.C. Cir. 2013), *cert. granted, judgment vacated sub nom.* Amanatullah v. Obama, 135 S. Ct. 1545 (2015), and *cert. granted in part, judgment vacated in part sub nom.* al-Najar v. Carter, 135 S. Ct. 1581 (2015); *EME Homer City*, 696 F.3d 7 (Griffith, J., joining majority opinion authored by Judge Kavanaugh), *rev'd and remanded*, 134 S. Ct. 1584 (2014); Shelby Cty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) (Griffith, J., joining majority opinion), *rev'd*, 133 S. Ct. 2612 (2013); Auburn Reg'l Med. Ctr. v. Sebelius, 642 F.3d 1145 (D.C. Cir. 2011) (Griffith, J.), *rev'd and remanded*, 568 U.S. 145 (2013); Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1228 (D.C. Cir. 2009) (Griffith, J.), *vacated and remanded sub nom.* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189 (2012); Taylor v. Blakey, 490 F.3d 965, 968 (D.C. Cir. 2007) (Griffith, J., joining majority opinion), *vacated and remanded sub nom.* Taylor v. Sturgell, 553 U.S. 880 (2008); Davis v. FEC, 501 F. Supp. 2d 22, 24 (D.D.C. 2007) (Griffith, J.), *rev'd*, 554 U.S. 724 (2008).

Comparable calculations for the time period Judge Kavanaugh served on the D.C. Circuit for other active status colleagues are as follows: Chief Judge Merrick Garland (*zero* written opinions vacated or remanded by the Supreme Court; joined *four* opinions that were vacated or remanded by the Supreme Court); Judge Karen L. Henderson (1, 3); Judge Judith W. Rogers (3, 6); Judge David S. Tatel (4, 3). The methodology for these calculations is contained in **Table A-3**.

[109] *See* William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 325–26 (1998) (hypothesizing that the Supreme Court "rarely takes cases" from certain "top-ranked" federal appellate judges because these judges "get things 'right'"); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1405 (2009) ("[The] Supreme Court selectively reviews the most important decisions rendered by circuit courts, making it reasonable to use these important decisions as a metric. . . . [T]o the degree that evaluation of circuit court judges is employed as a standard for Supreme Court appointments, it seems appropriate to consider the fate of their decisions at the Supreme Court level."); *but see id.* at 1405 (noting the rate of Supreme Court review may not fully gauge the quality of a federal appellate judge's work because "[m]any incorrect circuit court rulings may go unexamined by the Supreme Court, which is not a court of 'error correction'"). *Cf.* Keith Perine, *Sotomayor Poses Difficult Choice for Senate Republicans*, CONG. Q. TODAY ONLINE NEWS (May 26, 2006), http://www.cq.com/doc/news-3125545?0 (quoting Wendy E. Long, Counsel to the Judicial Confirmation Network, arguing that the high reversal rate of then-Judge Sonia Sotomayor indicated that she was a "liberal activist"); *but see* Guy-Uriel Charles et al., *Sonia Sotomayor and the Construction of Merit*, 61 EMORY L.J. 801, 811 (2012) (arguing that "the rate at which the Supreme Court reverses a judge" is a poor metric to gauge judicial activism).

[110] While legal commentators have agreed that the Supreme Court has "adopted" positions taken by Judge Kavanaugh in the lower courts on a number of occasions, discrepancies exist as to the precise number. *Compare* David Lat, *The Supreme Court Sweepstakes: The Case for Judge Kavanaugh*, ABOVE THE LAW (July 3, 2018, 9:59 AM), https://abovethelaw.com/2018/07/the-supreme-court-sweepstakes-the-latest-state-of-play-and-the-case-for-judge-kavanaugh/ ("By my count, Judge Kavanaugh's opinions have been adopted by the justices 11 times . . . ."), *and* Matt Schlapp, *With Brett Kavanaugh, America Will Have a Bold, Brilliant Supreme Court Justice*, THE HILL (July 5, 2018, 7:00 AM), http://thehill.com/opinion/judiciary/395524-with-brett-kavanaugh-america-will-have-a-bold-brilliant-supreme-court ("[D]uring the past decade, the Supreme Court has adopted Kavanaugh's position an astonishing 11 times."), *with* Scott Shane, et al., *Influential Judge, Loyal Friend, Conservative Warrior—and D.C. Insider*, N.Y. TIMES (July 14, 2018), https://www.nytimes.com/2018/07/14/us/politics/judge-brett-kavanaugh.html ("His record in the Supreme Court has been exceptional, with the justices adopting positions advanced in his opinions 13 times."), *and* Carrie Severino, *8 Things You Didn't Know About Brett Kavanaugh*, NAT'L REV. (July 18, 2018, 12:00 PM), https://www.nationalreview.com/bench-memos/8-things-you-didnt-know-about-brett-kavanaugh/ ("On at least 13 occasions, the Supreme Court has adopted positions that Judge Kavanaugh previously took in his opinions.").

[111] *See* Cross & Lindquist, *supra* note 109, at 1402–05 (discussing why the "success of judges' opinions before the

**A-3** demonstrates, the Supreme Court has reversed a number of judgments from which the nominee dissented in the lower court. In at least five of these cases, the nominee's reasoning was adopted, at least in part, by the Supreme Court.[112] Beyond the cases in which the Court *directly* reviewed a judgment in which Judge Kavanaugh authored a substantive opinion, in at least five other cases, the Supreme Court adopted, at least in part, reasoning from an earlier opinion of the nominee in a separate case (i.e., not the lower court opinion under review by the Supreme Court).[113]

More broadly, the Supreme Court has cited Judge Kavanaugh's opinions more frequently than it has cited other judges. As noted in **Table A-4**, the Supreme Court has cited the nominee's separate opinions (i.e., dissents and concurrences), either in a majority or an individual Justice's separate opinion, eight times during the nominee's tenure on the D.C. Circuit. As **Table A-5** indicates, no other D.C. Circuit judge who served on active status for Judge Kavanaugh's entire tenure on that court was cited by the Supreme Court as much during this same time period. And, as **Table A-6** demonstrates, the Supreme Court cited only one other federal appellate judge who served on active duty during Judge Kavanaugh's entire tenure on the D.C. Circuit—Judge Jeffrey Sutton of the Sixth Circuit—more frequently than the nominee.[114]

While there may be limits as to what can reasonably be discerned by the sheer number of times the Supreme Court cites a particular jurist's separate opinions,[115] these quantitative data suggest

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Supreme Court . . . is a legitimate factor to be considered" when evaluating circuit court judges).

[112] *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577 (2018); Michigan v. EPA, 135 S. Ct. 2699 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014); United States v. Jones, 565 U.S. 400 (2012); Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010).

[113] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.4 (2014) (adopting the logic of *Grocery Manufacturers Ass'n v. EPA*, 693 F.3d 169, 180–92 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)); Lagos v. United States, 138 S. Ct. 1684 (2018) (interpreting the Mandatory Victims Restitution Act in a manner largely consistent with Judge Kavanaugh's majority opinion in *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011)); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (agreeing with Judge Kavanaugh's partial dissent in *Doe v. Exxon Mobil Corp*., 654 F.3d 11, 73 (D.C. Cir. 2011), maintaining that the Alien Tort Statute did not apply to claims against foreign corporations); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (agreeing with Judge Kavanaugh's partial dissent in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 72 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), that the presumption against the extraterritorial application of federal law applies to the Alien Tort Statute); Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (concluding, as Judge Kavanaugh concluded in his concurring opinion in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 856–57 (D.C. Cir. 2010) (Kavanaugh, J., concurring), that the political question doctrine generally does not prevent courts from reviewing the constitutionality of federal statutes).

There have been at least two cases in which the Supreme Court resolved a circuit split in a manner that abrogated an earlier opinion authored by Judge Kavanaugh. For instance, in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court abrogated the nominee's earlier opinion in *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010) (Kavanaugh, J.). *See also, e.g.*, Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. *ex rel*. Fed Nat'l Mortg. Ass'n v. Raines, 534 F.3d 779 (D.C. Cir. 2008) (Kavanaugh, J.), *abrogated by* Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553 (2017).

[114] To ensure consistency, the searches for purposes of **Table A-5** and **Table A-6** were limited to majority opinions written by judges who were on active status as circuit judges during the entire period in which Judge Kavanaugh served, from the date after he assumed office as a Circuit Judge (May 31, 2006) through the date of his nomination to the Supreme Court (July 9, 2018). As a consequence, judges who joined the bench *after* May 31, 2006 are excluded from the search, as were judges who retired from active status *before* July 9, 2018. To ensure a somewhat consistent comparison, **Table A-5** and **Table A-6** list only citations to opinions written by the appellate judge between the relevant timeframe. As a result, if a Supreme Court opinion is written in the operative time period, but cites to an opinion written *before* May 31, 2006, that citation is *not* included in either table.

[115] *See* Farber, *supra* note 87, at 1191 n.53 (noting the "problem" with a 2004 study valuating lower court judges by number of citations by the Supreme Court "is that the numbers are small, ranging from 0 to 16," and therefore there was a risk that "the numbers could represent mostly random variation"); *cf.* Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 MO. L. REV. 315, 324

that the nominee is an influential lower court judge, and one the Justices on the Supreme Court hold in some esteem.[116] This assessment also finds support in qualitative assessments of Judge Kavanaugh by legal commentators, who have described the nominee as one who approaches the craft of judging with "serious[ness]" and "commands wide and deep respect among scholars, lawyers and jurists."[117]

## Judicial Philosophy

Turning to the question of judicial philosophy,[118] while commentators have described Judge Kavanaugh's interpretative approach in various ways—including as "conservative"[119] or "pragmatic"[120]—the nominee's own writings have been fairly clear as to his judicial approach. Perhaps the best insights into Judge Kavanaugh's approach toward judging come from a speech he delivered in 2017 at Notre Dame Law School. Specifically, in themes that pervade both his judicial opinions and his non-judicial writing, Judge Kavanaugh focused on two central visions for adjudication in which he "believe[s] very deeply": (1) the "rule of law as a law of rules" and (2) the role of the judge as "umpire."[121]

**The Rule of Law as a Law of Rules.** Judge Kavanaugh's first vision for judging suggests that the nominee embraces a more formalist view of the law, favoring clarity to flexibility when rendering legal opinions. The phrase "rule of law as a law of rules" itself references Justice Antonin Scalia's famous speech from 1989 in which he argued for a more formalist approach that embraced clear rules and principles in lieu of balancing tests that, in the view of Justice Scalia, transformed the judge from a determiner of law to a finder of fact.[122] Judge Kavanaugh has

(2010) (surveying the literature on the assessment of lower court judges based on citation counts and noting the frequent criticism that it is "impossible to measure judicial performance with quantitative data"); Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U.L. REV. 1365, 1389 (2005) (characterizing the argument "that citation rate correlates with judicial excellence" as "somewhat obscure").

[116] *See* Choi & Gulati, *supra* note 91, at 306 (suggesting the number of times an appellate judge is "cited by the Supreme Court" is indicative of the quality of that judge); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 72 (1990) (arguing that "citation studies," despite their imperfections, "remain an attractive tool of judicial evaluation"); *cf.* Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 540 (1994) (arguing that the number of citations to Judge Learned Hand indicates he was a "great judge").

[117] *See* Akhil Reed Amar, *A Liberal's Case for Brett Kavanaugh*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/brett-kavanaugh-supreme-court-trump.html; *see also supra* notes 66–71 and accompanying text.

[118] In critiquing the judicial nomination process, see *supra* note 22, the nominee has commented that "questions regarding general judicial philosophy can shed light on matters relevant to judicial decision making and to the Senate's ultimate decision without threatening judicial independence." Kavanaugh, *Separation of Powers*, *supra* note 22, at 1467.

[119] *See, e.g.*, David G. Savage, *Brett Kavanaugh, a Washington Veteran, Is Trump's Second Pick for the Supreme Court*, L.A. TIMES (July 6, 2018), http://www.latimes.com/politics/la-na-pol-brett-kavanaugh-supreme-court-20180709-story.html ("'I predict that he would be a rock-solid conservative in the Alito-Thomas mold.'" (quoting Justin Walker, former law clerk to Judge Kavanaugh)).

[120] Domenico Montanaro, *Who is Brett Kavanaugh, President Trump's Pick for the Supreme Court?*, NPR.ORG (July 9, 2018), https://www.npr.org/2018/07/09/626164904/who-is-brett-kavanaugh-president-trumps-pick-for-the-supreme-court ("[B]ased on some 300 opinions in 12 years on the federal bench, Kavanaugh is considered a pragmatic but conservative judge, who believes in textualism and originalism."); Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018, 5:48 PM), http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh ("Perhaps because of his years of executive-branch experience, Kavanaugh generally brings a pragmatic approach to judging, although his judicial philosophy is conservative . . . .").

[121] Kavanaugh, *Two Challenges*, *supra* note 14, at 1909 ("I believe very deeply in those visions of the rule of law as a law of rules, and of the judge as umpire.").

[122] Antonin Scalia, Associate Justice, Supreme Court of the U.S., The Rule of Law as a Law of Rules (Feb. 14, 1989),

embraced legal formalism in a variety of contexts. For the nominee, critical questions for the judiciary include how "can we make the rule of law more stable, and how can we increase confidence in judges as impartial arbiters of the rule of law"?[123] The answer to these questions for Judge Kavanaugh is to establish "stable rules of the road" for interpreting law "ahead of time," thereby enhancing the legitimacy of the judiciary by "prevent[ing] [courts] from allowing . . . personal feelings about a particular issue [to] dictate" how a case is resolved.[124] As a result, Judge Kavanaugh has maintained that judicial decisionmaking that is not grounded in clear rules "threatens to undermine the stability of the law and the neutrality (actual and perceived) of the judiciary."[125]

With respect to statutory interpretation, the nominee has criticized binaries in which the invocation of a particular interpretive rule depends on a threshold question about whether the text being interpreted is ambiguous or clear.[126] Ambiguity is often the threshold inquiry for determining whether a court should, for example, employ legislative history as an interpretive aid[127] or defer to an administrative agency's legal interpretation.[128] For Judge Kavanaugh, questioning whether text is ambiguous is problematic because "there is no objective or determinate way to figure out whether something is ambiguous."[129] Because, in Judge Kavanaugh's view, "judgments about clarity versus ambiguity turn on little more than a judge's instincts," such an approach to interpretation threatens judicial legitimacy, as "it is hard for judges to ensure that they are separating their policy views from what the law requires of them."[130] Instead, as discussed in more detail below,[131] the nominee has argued that judges should "stop" using the "ambiguity trigger" in statutory interpretation and instead "strive to find the best reading of the statute" based on the text, context, and established rules of construction.[132]

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*in* 56 U. CHI. L. REV. 1175 (Fall 1989).

[123] Brett M. Kavanaugh, *One Government, Three Branches, Five Controversies: Separation of Powers Under Presidents Bush and Obama*, MARQ. LAW., Fall 2016, at 19 [hereinafter Kavanaugh, *One Government*].

[124] *Id.*

[125] *See* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2143.

[126] *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1910 ("Here's my biggest problem. Several substantive canons of statutory interpretation, such as constitutional avoidance, legislative history, and *Chevron*, depend on an initial determination of whether the text is clear or ambiguous.").

[127] *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous . . . .").

[128] *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[129] Kavanaugh, *Two Challenges*, *supra* note 14, at 1913; *see also* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2137 ("One judge will say that the statute is clear, and that should be the end of it. The other judge will respond that the text is ambiguous, meaning that one or another canon of construction should be employed to decide the case. Neither judge can convince the other. That's because there is no right answer."); Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 5 ("Here is the problem. And it is a major problem. All of these canons depend on a problematic threshold question. Courts may resort to the canons only if the statute is not clear but rather is ambiguous. But how do courts know when a statute is clear or ambiguous?").

[130] *See* Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 6.

[131] *See* discussion *infra* in *Statutory Interpretation*.

[132] *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1912; *see also* Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 7, 10 ("[C]ourts should seek the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that way, they can depart from that baseline if required to do so by any of the relevant substantive canons.").

Judge Kavanaugh's criticism of modern constitutional interpretation parallels his apprehensions about statutory interpretation, with the nominee expressing his broad concerns about "vague and amorphous" standards employed in constitutional interpretation, which he views as "antithetical to impartial judging."[133] One of the nominee's primary criticisms concerns the use of tiers of scrutiny, such as strict scrutiny or rational basis review, to evaluate whether government action is permissible.[134] Central to the nominee's criticism of the tiers of scrutiny is their requirement that a judge make a determination about whether a governmental interest is sufficiently "compelling" or "important," an inquiry that he views as lacking any objective measurement, and which puts the judge "in the position of making judgment calls that inevitably seem rooted in policy, not law."[135] In this vein, Judge Kavanaugh's critique of the tiers of scrutiny echoes similar criticisms by Justice Clarence Thomas, who observed in a 2016 dissent that the "Constitution does not prescribe tiers of scrutiny,"[136] as well as Justice Scalia, who once described the tiers of scrutiny as adding an "element of randomness" to constitutional interpretation.[137]

While Judge Kavanaugh has been less specific as to how judges "should square up to the problem" of ambiguity in constitutional interpretation,[138] his dissent in *Heller v. District of Columbia (Heller II)* suggests that he believes focusing on a constitutional provision's "text, history, and tradition" provides a more stable alternative.[139] The "key threshold question" in *Heller II* concerned the constitutional test that a court should "employ to assess" whether a gun law comported with the Second Amendment.[140] And while acknowledging that in its cases interpreting the Second Amendment, "the [Supreme] Court never said something as succinct as 'Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations,'" Judge Kavanaugh concluded that the "clear message" to "take away from the Court's holdings and reasoning"[141] is to eschew balancing tests "in favor of categoricalism—with the categories defined by text, history, and tradition."[142]

At the same time, there are limits to Judge Kavanaugh's formalism. As the nominee has acknowledged, "there are areas of the law that sometimes entail discretion. And it is important to acknowledge that sometimes judges must exercise reasoned decision-making within a law that gives judges some discretion over the decision."[143] Accordingly, Judge Kavanaugh has cautioned against a vision of judging that could be "caricatured as being 'every case is simply mechanical

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[133] *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1919.

[134] *See id.* at 1915.

[135] *Id.*

[136] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting).

[137] *See* United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

[138] *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1919 ("At the moment, I do not have a solution to this concern. Requiring judges to focus on history and tradition, as Justice Scalia suggested, might establish a much clearer strike zone for these 'exceptions' cases.").

[139] Heller v. District of Columbia, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[140] *Id.* at 1271.

[141] *Id.*; *see also id.* at 1273 ("[T]he Court made no mention of strict or intermediate scrutiny when approving such laws. Rather, the test the Court relied on—as it indicated by using terms such as 'historical tradition' and 'longstanding' and 'historical justifications'—was one of text, history, and tradition.").

[142] *Id.* at 1282.

[143] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 692; Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 5 ("To be sure, on occasion, the relevant constitutional or statutory provision may actually *require* the judge to consider policy and perform a common-law-like function. Federal Rule of Evidence 501 is a good example.").

and robotic for judges.'"[144] To the nominee, there are certain cases where "[t]here is a body of precedent that helps inform" a decision, but nonetheless the judge must exercise some degree of discretion in reaching a decision.[145] Judge Kavanaugh identifies a number of questions that he believes require such discretion, including, among others: "what is 'reasonable' under the Fourth Amendment?"; "[w]hat is a 'compelling government interest' under the Religious Freedom Restoration Act?"; and "what are 'unreasonable restraints of trade' for purposes of the Sherman Act."[146] At the same time, the nominee has contended that ambiguity in the law exists in "far fewer places than one would think,"[147] and, to the extent possible, judges should avoid "injecting" ambiguity into the heart of interpretation.[148]

**Judge as Umpire.** The second, and closely related, pillar of Judge Kavanaugh's judicial philosophy—an embrace of the role of the judge as "umpire"—derives from an analogy Chief Justice John Roberts used during his Supreme Court confirmation hearing wherein he likened a judge's job to that of an umpire in baseball. During that hearing, the future Chief Justice described the umpire and judge as having "limited" roles in that a good judge, like an umpire, does not "make the rules," but instead "applies" them to ensure "everybody plays by the rules."[149] Judge Kavanaugh has discussed "the notion of judges as umpires" extensively[150] in his non-judicial writings, highlighting his "agree[ment] with that vision of the judiciary."[151] According to the nominee:

> The American rule of law . . . depends on neutral, impartial judges who say what the law *is*, not what the law should be. Judges are umpires, or at least should always strive to be umpires. In a perfect world, at least as I envision it, the outcomes of cases would not often vary based solely on the backgrounds, political affiliations, or policy views of judges.[152]

In this vein, Judge Kavanaugh has defined "a neutral, impartial judiciary" as one "that decides cases based on settled principles without regard to policy preferences or political allegiances or which party is on which side in a particular case."[153] This vision of a neutral, impartial judiciary is

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[144] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 692.

[145] *Id.*

[146] *Id.* ("[W]hat is 'reasonable' under the Fourth Amendment? There is a body of precedent that helps inform that, but what's 'reasonable' under the Fourth Amendment is not a question that can be answered by staring at a code or dictionary. What is a 'compelling government interest' under the Religious Freedom Restoration Act? 'Compelling government interest' is all the statute says—what are judges supposed to do with that? Rule 501 of the Federal Rules of Evidence directs judges to devise evidentiary privileges in light of 'reason and experience.' How are we supposed to do that? The Sherman Act prohibits 'unreasonable restraints of trade.' How are we supposed to figure out what are unreasonable restraints of trade?").

[147] Kavanaugh, *Our Anchor*, *supra* note 24, at 1926–27.

[148] Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 7.

[149] *Roberts Confirmation Hearing*, *supra* note 26, at 55.

[150] *See, e.g.*, Kavanaugh, *Judge As Umpire*, *supra* note 24, *passim*; Kavanaugh, *Two Challenges*, *supra* note 14, *passim*; Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2119–21; Kavanaugh, *Our Anchor*, *supra* note 24, at 1927.

[151] Kavanaugh, *Two Challenges*, *supra* note 14, at 1919.

[152] Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 4.

[153] Kavanaugh, *Two Challenges*, *supra* note 14, at 1909. In his remarks during his nomination ceremony, moreover, Judge Kavanaugh stated: "I revere the Constitution. I believe that an independent judiciary is the crown jewel of our constitutional republic." Kavanaugh, *Nomination Ceremony*, *supra* note 104; *see also* Kavanaugh, *2006 Confirmation Hearing*, *supra* note 27, at 45 ("In terms of the independence of the judiciary, I think that is something that is the hallmark of our judiciary, the hallmark of our system that judges are independent from the legislative branch and independent from the executive branch. I think that is central to my understanding of the proper judicial role.").

echoed throughout the nominee's non-judicial writings and speeches,[154] as well as in his written opinions[155] and during his confirmation hearing in 2006 as a nominee to the D.C. Circuit.[156] For instance, Judge Kavanaugh emphasized at that hearing his view that "the worst moments in the Supreme Court's history have been moments of judicial activism . . . where the Court went outside its proper bounds . . . in interpreting clauses of the Constitution to impose its own policy views and to supplant the proper role of the legislative branch."[157] As a result, the nominee has highlighted his belief "in judicial restraint, recognizing the primary policymaking role of the legislative branch in our constitutional democracy."[158]

These broad statements about the role of the judge as a neutral umpire may prompt the question as to how the nominee strives to achieve such neutrality. In accepting the nomination to the Supreme Court, Judge Kavanaugh articulated what he viewed as a "straightforward" means to ensure that a judge remains "independent" and "interpret[s] the law" but does "not make the law." Specifically, Judge Kavanaugh stated that a judge must interpret the Constitution "as written, informed by history and tradition and precedent."[159] At a high level, this statement summarizes the three main aspects of the nominee's approach to ensuring that a judge remains an umpire, an approach that emphasizes (1) the primacy of the text of the law being interpreted, (2) an awareness of history and tradition, and (3) adherence to precedent. Each of these themes is examined below.

*Textualism.* A foundational aspect of Judge Kavanaugh's judicial philosophy is his embrace of textualism, the doctrine that the words of a governing text are paramount to understanding the meaning of a law.[160] As discussed in more detail below,[161] Judge Kavanaugh has, like Justice Scalia, emphasized the "centrality of the words of the statute" and counseled against the use of certain "substantive principles of interpretation"[162] that, in the nominee's view, pose risks to

[154] *See, e.g.*, Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2120 ("For me, one overarching goal is to make judging a neutral, impartial process in all cases—not just statutory interpretation cases. Like cases should be treated alike by judges of all ideological and philosophical stripes, regardless of the subject matter and regardless of the identity of the parties to the case."); *id.* at 2121 (describing "the neutral and impartial rule of law, and . . . the ideal and reality of a principled, nonpartisan judiciary).

[155] *See, e.g.*, Garza v. Hargan, 874 F.3d 735, 756 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) ("As a lower court, our job is to follow the law as it is, not as we might wish it to be."), *cert. granted, judgment vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[T]he Supreme Court could always refine or reconsider the major rules doctrine or its decisions in the *Turner Broadcasting* cases. But as a lower court, we do not possess that power."); Heller v. District of Columbia, 670 F.3d 1244, 1295–96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("If our job were to decree what we think is the best policy, I would carefully consider the issues through that different lens and might well look favorably upon certain regulations of this kind. But our task is to apply the Constitution and the precedents of the Supreme Court, regardless of whether the result is one we agree with as a matter of first principles or policy.").

[156] Kavanaugh, *2006 Confirmation Hearing*, *supra* note 27, at 29 ("I absolutely believe in the idea that judges are neutral and . . . once you put on the black robe, you're impartial and you represent the law. . . . There's no such thing on the courts as a Republican judge or a Democratic judge. Once you're on the court, all the judges are there representing the justice system, representing the idea of justice.").

[157] *Id.* at 46.

[158] *Id.* at 45.

[159] Kavanaugh, *Nomination Ceremony*, *supra* note 104.

[160] *Textualism*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "textualism" as the "doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means").

[161] *See* discussion *infra* in *Statutory Interpretation*.

[162] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2118.

judges' roles as "neutral, impartial umpires in certain statutory interpretation cases."[163] Thus, Judge Kavanaugh has advised that "[t]he 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."[164] In this vein, the nominee has described his embrace of textualism as intended to promote a neutral, impartial judiciary; in his words: "This tenet—adhere to the text—is neutral as a matter of politics and policy. The statutory text may be pro-business or pro-labor, pro-development or pro-environment, pro-bank or pro-consumer. Regardless, judges should follow clear text where it leads."[165]

In addition to figuring prominently in statutory interpretation, Judge Kavanaugh's textualist approach extends to constitutional interpretation. The nominee has remarked that the one factor that "matters above all in constitutional interpretation and in understanding the grand sweep of constitutional jurisprudence . . . is the precise wording of the constitutional text. It's not the only factor, but it's the anchor, the magnet, the most important factor that directs and explains much of constitutional law . . . ."[166] Accordingly, Judge Kavanaugh has instructed that judges must "[r]ead the text of the Constitution as written . . . . Don't make up new constitutional rights that are not in the Constitution. Don't shy away from enforcing constitutional rights that are in the text of the Constitution. Changing the Constitution is for the amendment process. Changing policy within constitutional bounds is for the legislatures."[167]

Nonetheless, there are limits to Judge Kavanaugh's embrace of textualism.[168] Specifically, the nominee has "emphasize[d] that the text is not the end-all of statutory interpretation,"[169] and has remarked that "on occasion the relevant constitutional or statutory provision may actually *require* the judge to consider policy and perform a common law-like function."[170] Judge Kavanaugh suggests there are a variety of cases "where the judicial inquiry requires determination of what is reasonable or appropriate," and these "are less a matter of pure interpretation than of common law-like judging."[171] Accordingly, while the nominee's writings demonstrate a clear subscription to textualism and a belief that "[m]any cases come down to interpretation of the text of the

[163] *Id.* at 2118–19.

[164] Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 4.

[165] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2135. Judge Kavanaugh has tied his conception of textualism to the Constitution itself, remarking that "[t]he text of the document is not just something that we're supposed to look at just for interest. . . . It is binding law. It says in Article VI it's the supreme law of the land, and it is binding on us." Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., Remarks on a Panel Discussion at the George Washington University Law School (Nov. 4, 2011), *in A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1897–98 (2012) [hereinafter Kavanaugh, *Role of History*].

[166] Kavanaugh, *Our Anchor*, *supra* note 24, at 1908.

[167] Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 4.

[168] *See, e.g.*, Kavanaugh, *Judge As Umpire*, *supra* note 24, at 692 ("[T]here are areas of law where there is judicial discretion, where it is not purely interpretive, it is not just figuring out what the meaning of a term is. And there will probably always be some discretion in some areas in the law.").

[169] Kavanaugh, *Administrative State*, *supra* note 22, at 717.

[170] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2120.

[171] *Id.* at 2120 n.12 ("To take one example, we should not expect all judges to agree on whether a particular kind of search is 'reasonable' under the Fourth Amendment. Or what evidentiary privileges should be recognized 'in the light of reason and experience.' Or whether attorney's fees are in 'the interest of justice.' Or what constitutes a 'restraint of trade.'" (quoting U.S. CONST. amend. IV; Riley v. California, 134 S. Ct. 2473 (2014); FED. R. EVID. 501; Swidler & Berlin v. United States, 524 U.S. 399 (1998); 15 U.S.C. §§ 2072(a), 1 (2012))).

Constitution, a statute, a rule, or a contract," he also seems to leave room for a recognition that "not every case comes down to pure interpretation."[172]

*History and Tradition.* Beyond a reliance on a law's text to promote judicial neutrality, Judge Kavanaugh's judicial opinions are frequently guided by what he refers to as "history and tradition."[173] The nominee, however, has not embraced a narrow view as to what particular "history" and "tradition" can inform legal interpretation, including constitutional interpretation. While some commentators have labeled Judge Kavanaugh an originalist in the Scalia tradition,[174] others have observed that the nominee does not appear to "call himself an originalist, and his opinions on the appellate court suggest that he uses less originalist analysis than Justice Thomas or Justice Gorsuch."[175] Indeed, in a 2017 speech, while suggesting that Justice Scalia's focus on "history and tradition" "might" be consistent with the vision of a judge as an impartial umpire, Judge Kavanaugh stated that he does not "[a]t the moment . . . have a solution" to his concerns about the indeterminacy of constitutional interpretation.[176]

In contrast to Justice Neil M. Gorsuch, who as a judge on the Tenth Circuit openly endorsed constitutional interpretations that relied on the Constitution's "original public meaning,"[177] Judge Kavanaugh has not been as explicit. In perhaps the nominee's closest embrace of originalism,

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[172] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 692.

[173] *See, e.g.*, PHH Corp. v. CFPB, 881 F.3d 75, 179 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) ("A long line of Supreme Court precedent commands that we heed history and tradition in separation of powers cases not resolved by the constitutional text alone."); Am. Meat Inst. v. Dep't of Agric., 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) ("Here, as elsewhere in First Amendment free-speech law, history and tradition are reliable guides."); United States v. Burwell, 690 F.3d 500, 534 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (describing the mens rea presumption as informed by "history and tradition"); Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (describing the relevant test for "determining the scope of the Second Amendment right" as being guided by "history and tradition"); Newdow v. Roberts, 603 F.3d 1002, 1018 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (concluding that "history and tradition" inform the interpretation of the Establishment Clause).

[174] *See, e.g.*, Ann E. Marimow, *Brett Kavanaugh, Trump's Supreme Court Pick, Has Sided with Broad Views of Presidential Powers*, WASH. POST (July 9, 2019), https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-trumps-supreme-court-pick-has-sided-with-broad-views-of-presidential-powers/2018/07/09/1618bec0-83a8-11e8-8553-a3ce89036c78_story.html?utm_term=.66b5b211fd60 ("On the bench, Kavanaugh is a proponent of 'originalism,' the practice of interpreting the Constitution and statutes by looking at the original meaning and text."); John Kass, *How to Maintain the Republic? Originalist Justices Like Brett Kavanaugh*, CHI. TRIB. (July 10, 2018), http://www.chicagotribune.com/news/columnists/kass/ct-met-brett-kavanaugh-supreme-court-kass-20180710-story.html; Schlapp, *supra* note 110 ("Over his 12 years on the D.C. Circuit, Judge Kavanaugh has consistently, boldly, and fearlessly applied textualism and originalism to a striking range of legal issues."); Sarah E. Pitlyk, *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism*, NAT'L REV. (July 3, 2018), https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/ ("Judge Kavanaugh . . . has . . . fearlessly defended his textualist and originalist philosophy.").

[175] Jeffrey Rosen, *What We Learn From Supreme Court Confirmation Hearings*, WALL ST. J. (July 13, 2018), https://www.wsj.com/articles/what-we-learn-from-supreme-court-confirmation-hearings-1531493146; *see also* Eric Posner, *Is Brett Kavanaugh an Originalist?*, ERICPOSNER.COM (July 18, 2018), http://ericposner.com/is-brett-kavanaugh-an-originalist/ ("[I]n his writings, Kavanaugh hardly mentions originalism at all. A textualist, yes. An enthusiastic fan of Justice Scalia, yes. But also a fan of William Rehnquist, no one's idea of an originalist.").

[176] Kavanaugh, *Two Challenges*, *supra* note 14, at 1919.

[177] *See, e.g.*, Cordova v. City of Albuquerque, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring) (maintaining that the Constitution "isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning"); United States v. Krueger, 809 F.3d 1109, 1123 (10th Cir. 2015) (Gorsuch, J., concurring) ("When interpreting the Fourth Amendment we start by looking to its original public meaning—asking what traditional protections against unreasonable searches and seizures were afforded by the common law at the time of the framing." (internal citations and quotations omitted)).

Judge Kavanaugh contended in his dissenting opinion in *Heller II* that the "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text."[178] Notably, the dissent continued:

> The Constitution is an enduring document, and its principles were designed to, and do, apply to modern conditions and developments. The constitutional principles do not change (absent amendment), but the relevant principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution's Framers. To be sure, applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins. But that is hardly unique to the Second Amendment. It is an essential component of judicial decisionmaking under our enduring Constitution.[179]

Nonetheless, in his *Heller II* dissent and elsewhere, Judge Kavanaugh, when discussing history and tradition to "inform the interpretation of a constitutional provision," has looked to *both* pre- and post-ratification history and tradition.[180] In a dissenting opinion in *PHH Corp. v. CFPB*, for instance, the nominee wrote that "in separation of powers cases not resolved by the constitutional text alone, historical practice helps define the constitutional limits on the Legislative and Executive Branches."[181] In *PHH Corp.*, the majority of the D.C. Circuit sitting en banc held that the CFPB's structure of governance was constitutional under Article II.[182] Judge Kavanaugh disagreed, canvassing the nation's historical post-ratification experience with the structure of independent agencies, and concluding that "the CFPB's departure from historical practice matters in this case because historical practice matters to separation of powers analysis."[183]

More broadly, Judge Kavanaugh's non-judicial writings might be read to suggest he elevates a textualist approach over an originalist philosophy.[184] For instance, the nominee has suggested:

> When we think about the Constitution and we focus on the specific words of the Constitution, we ought to not be seduced into thinking that it was perfect and that it remains perfect. The Framers did not think that the Constitution was perfect. And they knew, moreover, that it might need to be changed as times and circumstances and policy views changed.[185]

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[178] Heller v. District of Columbia, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasis in original).

[179] *Id.* at 1275. For more on the nominee's views on the Second Amendment, see discussion *infra* in *Second Amendment*.

[180] *Heller*, 670 F.3d at 1274.; *see also* PHH Corp. v. CFPB, 881 F.3d 75, 179 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (noting "that the [Supreme] Court has treated [historical] practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era" (internal citations omitted)).

[181] *PHH Corp.*, 881 F.3d at 181 (Kavanaugh, J., dissenting); *see also id.* at 183 ("The historical practice of structuring independent agencies as multi-member commissions or boards is the historical practice for a reason: It reflects a deep and abiding concern for safeguarding the individual liberty protected by the Constitution."); *id.* at 187 ("When examining the relevant history, we can see that the original design, common understanding, and consistent historical practice of independent agencies as multi-member bodies reflect the larger values of the Constitution.").

[182] *Id.* at 77 (majority opinion).

[183] *Id.* at 179 (Kavanaugh, J., dissenting).

[184] *See, e.g.*, *Role of History*, *supra* note 165, at 1912 ("[U]ltimately, one of my theses is that the words actually tell us a lot more than we often assume, that they're not so complicated. It's not mystifying to actually read this and get some meaning out of it."); Kavanaugh, *From the Bench*, *supra* note 24, at 2.

[185] Kavanaugh, *From the Bench*, *supra* note 24, at 2.

The nominee has also cast some doubt on the reliability of some of the source materials frequently relied upon by originalists:

> [B]e careful about even *The Federalist* . . . That's not the authoritative interpretation of the words. You've got to be careful about some of the ratification debates. You've got to be careful about different people at the Convention itself. They had different views. So when there's compromise, all the more reason for me to stick as close as you can to what the text says.[186]

At the same time, while seemingly "not a dyed-in-the-wool originalist like Scalia," as one observer has put it, Judge "Kavanaugh has relied on originalist principles."[187] In several speeches, for example, the nominee has endorsed the originalist concept of the "enduring constitution,"[188] albeit in connection with an overarching textualist approach to constitutional interpretation: "For those of us who believe that the judges are confined to interpreting and applying the Constitution and laws as they are written and not as we might wish they were written, we . . . believe in a Constitution that lives and endures."[189] And the notion of an enduring Constitution has figured in Judge Kavanaugh's written opinions for the D.C. Circuit. Beyond his dissent in *Heller II*, in his dissent in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB), for instance, Judge Kavanaugh stressed the importance of original meaning in conjunction with a textualist approach, asserting that "it is always important in a case of this sort to begin with the constitutional text and the original understanding, which are essential to proper interpretation of our enduring Constitution."[190]

*Precedent.* Judge Kavanaugh's vision of a neutral, impartial judiciary—composed of judges strictly applying stable rules of law—perhaps suggests how the nominee might view the doctrine of stare decisis[191] and the role of precedent in deciding cases. During his confirmation hearing in 2006 as a nominee to the D.C. Circuit, Judge Kavanaugh stated: "I believe very much . . . in following the Supreme Court precedent strictly and absolutely. . . . I think that is very important for the stability of our three-level system for lower courts to faithfully follow Supreme Court precedent . . . ."[192] Indeed, in his non-judicial writings, the nominee has emphasized the importance of stare decisis:

> We operate in a system built on Supreme Court precedent. As lower court judges, we must adhere to absolute vertical stare decisis, meaning we follow what the Supreme Court says.

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[186] Kavanaugh, *Role of History*, *supra* note 165, at 1912–13.

[187] Roberts, *supra* note 120.

[188] *See* Kavanaugh, *From the Bench*, *supra* note 24, at 3–4 (contrasting the concept of a "living constitution," under which "the Constitution is a living document, and the Court must ensure that the Constitution adapts to meet the changing times," with that of an "enduring constitution," or the belief "in a Constitution that lives and endures," but "that changes to the Constitution and laws are to be made by the people through the amendment process and, where appropriate, through the legislative process—not by the courts snatching that constitutional or legislative authority for themselves").

[189] *Id.*; *see also* Kavanaugh, *Our Anchor*, *supra* note 24, at 1927 ("As enduring constitutionalists argue, however, paying close attention to the precise words of the constitutional text is a mainstream and long accepted mode of constitutional interpretation. . . . Text matters.").

[190] 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

[191] *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "stare decisis" as "the doctrine of precedent under which a court must follow earlier judicial decisions when the same points arise again in litigation").

[192] Kavanaugh, *2006 Confirmation Hearing*, *supra* note 27, at 45; *see also id.* at 23 ("[O]n the question of *Roe v. Wade*, if confirmed to the D.C. Circuit, I would follow *Roe v. Wade* faithfully and fully. That would be binding precedent of the Court.").

> And to be a good lower court judge, you must follow the Supreme Court precedent in letter and in spirit. 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 . . . .[193]

That Judge Kavanaugh's judicial philosophy incorporates adherence to precedent is also evident in his written opinions issued in a number of high-profile cases over the last decade. Recently, in *Garza v. Hargan*, for instance, the nominee dissented from the court's en banc order in a case involving whether an alien minor without lawful immigration status in federal custody may obtain an abortion.[194] In so doing, Judge Kavanaugh emphasized that "our job as lower court judges is to apply the precedents and principles articulated in Supreme Court decisions to the new situations."[195] More generally, the nominee has warned that judges should follow Supreme Court cases both "in letter and in spirit,"[196] and has stated that even where the governing precedent is controversial or has engendered "vigorous dissents," the job of the lower court is not "to re-litigate or trim or expand Supreme Court decisions," but to follow those decisions "as closely and carefully and dispassionately as we can."[197] In another dissenting opinion, Judge Kavanaugh more colorfully stated that lower courts must "follow both the words and the music of Supreme Court opinions."[198]

Notwithstanding these broad statements about the role of precedent for *lower courts*, it is difficult to state with certainty how Judge Kavanaugh would apply the doctrine of stare decisis in a particular case if he were *elevated* to the Supreme Court due to the unique nature of that position relative to his current role. The nominee's previous judicial writings were from the perspective of a D.C. Circuit judge—one bound to follow Supreme Court precedent and able to override existing circuit precedent only with the concurrence of a majority of the en banc court.[199] Stare decisis applies quite differently, however, when the Supreme Court reconsiders its own cases.[200]

Nonetheless, Judge Kavanaugh's writings give some clues as to how he might approach the question of whether to overturn existing precedent. In one speech, the nominee stated that horizontal stare decisis—that is, the precedential effect that a court's own decisions have on that same court—"has some flexibility."[201] In another talk, Judge Kavanaugh doubted whether

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[193] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 686.

[194] 874 F.3d 735 (D.C. Cir. 2017) (en banc), *cert. granted, judgment vacated sub nom*. Azar v. Garza, 138 S. Ct. 1790 (2018). For more on the nominee's views on the constitutionality of abortion, see discussion *infra* in *Substantive Due Process and Fundamental Rights*.

[195] *Garza*, 874 F.3d at 756 (Kavanaugh, J., dissenting) ("As a lower court, our job is to follow the law as it is, not as we might wish it to be.").

[196] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 686.

[197] Priests for Life v. HHS, 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[198] United States v. Martinez-Cruz, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

[199] *See, e.g.*, Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc).

[200] Horizontal stare decisis binds the issuing court to its "own prior decisions," while "[v]ertical stare decisis requires that courts of lower rank follow decisions of higher courts." Alaska Pub. Interest Research Grp. v. Alaska, 167 P.3d 27, 43 (Alaska 2007). Because the Supreme Court is the highest court in the United States, the Justices are bound only by horizontal stare decisis, and the Court has articulated five general principles governing horizontal stare decisis. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) (identifying as factors to consider when determining whether to overturn precedent (1) the quality of a prior ruling's reasoning, (2) the workability of the rule the precedent established, (3) its consistency with other related decisions, (4) developments since the decision was handed down, and (5) reliance on the decision).

[201] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 687 (2016) (emphasis added).

existing Supreme Court case law on stare decisis provided a principled, restraining test for when to overrule prior cases.[202] Responding to a question as to whether there is a single standard a court could use to determine whether to overturn a prior decision, the nominee noted that it is "hard to have a set formula for overruling that's going to work in all cases."[203] Judge Kavanaugh described the Supreme Court's existing test as one that requires the Court to overrule when a case is "really wrong and has really significant practical effects, and there hasn't been reliance interests of the kind you would have with a property or contract decision."[204] Nevertheless, the nominee criticized this test, remarking that it does "not really" "bind[ ]," or "tell[ ] you in advance with Justices of different stripes when" to overrule a case.[205] In line with his general judicial philosophy that tends to emphasize stability and clear rules from the judiciary,[206] Judge Kavanaugh expressed concern that the current formula does not give "much predictability or guidance."[207]

While the nominee has not further elaborated on his overarching theory for when to diverge from precedent, his general judicial philosophy, as noted, is based in part on the theory that judges should set clear rules in advance and then follow those rules.[208] As Judge Kavanaugh has noted, "[e]ven in those cases where there is discretion . . . [and] judges are assigned what may be described as common-law-like authority," they must still adhere to certain principles: "we try to follow precedent and have a stable body of precedent"; "we try to write our decisions in reasoned and clear ways"; "we try to be consistent in how we go about deciding like cases alike"; and "we do so candidly."[209] This emphasis on stability and predictability may suggest a reluctance to overturn well-established precedent.[210]

At the same time, Judge Kavanaugh's opinions reveal that he is less likely to follow Supreme Court case law or prior D.C. Circuit decisions when he believes a prior case has been significantly undermined by subsequent factual developments[211] or is inconsistent with prevailing doctrine.[212] For example, in *United States v. Burwell*, Judge Kavanaugh argued in dissent that the D.C. Circuit should not have followed its prior opinion that had "been undermined" by a

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[202] Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., The Court: Power, Policy, and Self-Government (interview at the American Enterprise Institute), at 49:04 (Mar. 31, 2016), http://www.aei.org/events/the-court-power-policy-and-self-government/ [hereinafter Kavanaugh, *AEI Interview*].

[203] *Id.* at 48:56.

[204] *Id.* at 49:04; *see also* Kavanaugh, *Justice Scalia*, *supra* note 92, at 14:01 (noting that for a decision to be overturned it must not only be wrong but also have "serious" "negative" consequences).

[205] Kavanaugh, *AEI Interview*, *supra* note 202, at 49:04 ("To speak in common parlance, when it's really wrong and has really significant practical effects, and there hasn't been reliance interests of the kind you would have with a property or contract decision, that seems to be a descriptive of when the Court will overrule something—but is that a formula that binds? Is that a formula that tells you in advance with justices of different stripes when to do it and when to not? Not really.").

[206] *See supra* notes 123–25 and accompanying text.

[207] Kavanaugh, *AEI Interview*, *supra* note 202, at 50:11.

[208] Kavanaugh, *Judge As Umpire*, *supra* note 24, at 686 ("[T]o be a good judge and a good umpire, you also have to follow the established rules and the established principles. . . . Following established rules includes stare decisis: we follow the cases that have been decided.").

[209] *Id.* at 692.

[210] *See, e.g.*, Kavanaugh, *Two Challenges*, *supra* note 14, at 1909 (emphasizing the importance of predictable results, and agreeing with Justice Scalia's characterization of "the rule of law as a law of rules").

[211] *See* Agape Church, Inc. v. FCC, 738 F.3d 397, 414–15 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

[212] *See* United States v. Burwell, 690 F.3d 500, 543 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting); *In re* Aiken Cty., 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

subsequent Supreme Court decision.[213] And, as discussed in more detail below,[214] in a series of cases[215] the nominee has questioned the continuing viability of the Supreme Court's decision in *Turner Broadcasting System, Inc. v. FCC*,[216] most recently and most directly in a concurring opinion in *Agape Church, Inc. v. FCC*.[217] In *Agape Church*, Judge Kavanaugh maintained that the factual foundation for *Turner*—the monopolistic nature of the cable television market—had been altered since the case was written in 1994, and, therefore, "the constitutional foundation . . . collapsed with it."[218] The nominee suggested that future courts reviewing the constitutionality of the relevant provisions could reach a different result than the Supreme Court did in *Turner*, stating that stare decisis required courts to follow only the "constitutional principles that undergird *Turner*," and that applying those principles to the modern market would "lead[] to an entirely different result."[219] As a consequence, Judge Kavanaugh's *Agape Church* concurrence seems to express a belief that in certain circumstances, a court may depart from a prior decision's result so long as it remains true to its broader, underlying principles.[220]

Finally, it should be noted that the nominee has in several opinions criticized two Supreme Court decisions that declined to strike down statutes restricting the President's power to remove certain executive officers: *Humphrey's Executor v. United States*[221] and *Morrison v. Olson*.[222] While judges may be reluctant or unable to overrule prior cases, they frequently *distinguish* precedent with which they disagree from the disputes before them.[223] As discussed below,[224] Judge Kavanaugh has authored a number of opinions arguing that the courts should construe the scope of *Humphrey's Executor* and *Morrison* narrowly.[225] Perhaps his most pointed remarks on *Morrison* came at an event in 2016 at the American Enterprise Institute: when asked whether he

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[213] *Burwell*, 690 F.3d at 543 (Kavanaugh, J., dissenting).

[214] *See* discussion *infra* in *Freedom of Speech*.

[215] *Agape Church*, 738 F.3d at 414–15 (Kavanaugh, J., concurring); Comcast Cable Communc'ns, LLC v. FCC, 717 F.3d 982, 992–94 (D.C. Cir. 2013) (Kavanaugh, J., concurring); Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1315 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).

[216] 512 U.S. 622 (1994).

[217] 738 F.3d at 414–15 (Kavanaugh, J., concurring).

[218] *Id. See also id.* at 415 ("In short, as a matter of constitutional law and technological reality, the 1992 Cable Act's various program carriage and non-discrimination regimes rest on a hollowed-out foundation.").

[219] *Id.* In his view, "[a] contrary approach to precedent . . . would reflect a mindless perversion of stare decisis, not a faithful application of stare decisis." *Id.* at 414.

[220] *See id.* at 415.

[221] 295 U.S. 602 (1935).

[222] 487 U.S. 654 (1988).

[223] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7–8 (Amy Gutmann ed., 1997).

[224] *See* discussion *infra* in *Separation of Powers*.

[225] *In re* Aiken Cty., 645 F.3d 428, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (noting that "*Humphrey's Executor* is an entrenched Supreme Court precedent, protected by stare decisis," but suggesting that the case might, in the future, be limited by doctrines that seek to "enhance the accountability and effectiveness of independent agencies in a manner consistent with *Humphrey's Executor*."); Free Enter. Fund v. PCAOB, 537 F.3d 667, 696 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (stating that *Humphrey's Executor* and *Morrison* "have long been criticized by many as inconsistent with the text of the Constitution, with the understanding of the text that largely prevailed from 1789 through 1935, and with prior precedents"); *see also* PHH Corp. v. CFPB, 881 F.3d 75, 176 n.3 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (arguing "that the independent counsel experiment ended with nearly universal consensus that the experiment had been a mistake and that Justice Scalia had been right back in 1988 [in his dissenting opinion in *Morrison*] to view the independent counsel system as an unwise and unconstitutional departure from historical practice and a serious threat to individual liberty").

would give an example of "a case that deserves to be overturned," the nominee volunteered "*Morrison v. Olson*,"[226] stating that the case had been "effectively overruled, but [he] would put the final nail in."[227] While this comment was made in off-the-cuff remarks, when viewed together with his judicial opinions, it suggests that Judge Kavanaugh disagrees with the reasoning of *Morrison*, and may consider the case sufficiently "wrong"[228] that it should be reconsidered.[229]

## Judicial Influences

Finally, it may be instructive to note some of Judge Kavanaugh's judicial influences or contemporaries whose approach to judging the nominee has praised, as these jurists may provide insight into who he might model his judicial approach after if he were to be elevated to the High Court.[230] As is perhaps evident in the importance the nominee places on judicial formalism and the concept of the judge as a neutral umpire, Justice Scalia and Chief Justice Roberts are two of the nominee's judicial role models. With regard to Justice Scalia, Judge Kavanaugh has stated that "Justice Scalia was and remains a judicial hero and role model to many throughout America," one who believed "that federal judges are not common-law judges and should not be making policy-laden judgments."[231] Of particular note, the nominee credits Justice Scalia with bringing "about a massive and enduring change in statutory interpretation,"[232] one focused on "the centrality of the words of the statute."[233] And with regard to Chief Justice Roberts, Judge Kavanaugh has described him as "lead[ing] the Court and the judiciary with [a] firm but humble touch."[234]

But Justice Scalia and Chief Justice Roberts are not the only jurists Judge Kavanaugh has commented on when describing who has influenced his view of judging. The nominee has lauded several jurists with varying judicial philosophies, including former Chief Justice William Rehnquist, as well as Justices Robert Jackson, Byron White, and Elena Kagan. In a speech dedicated to Chief Justice Rehnquist, the nominee described him as his "first judicial hero" and stated that "few justices in history have had as much impact as [Chief Justice] Rehnquist."[235] The nominee remarked that as early as his law school days, he found frequent agreement with Chief Justice Rehnquist's opinions.[236] Of particular significance to Judge Kavanaugh is the "importance

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[226] Kavanaugh, *AEI Interview*, *supra* note 202, at 50:43.

[227] *Id.* at 51:12.

[228] *Id.* at 49:04.

[229] *See also* Kavanaugh, *Justice Scalia*, supra note 92, at 11:38 (arguing that Justice Scalia "never wrote a better dissent" than the one in *Morrison* and predicting that it will one day become the law of the land).

[230] *See* Wolf, *supra* note 65 (noting, with respect to Judge Kavanaugh, that "you can tell a lot about" the nominee based on his judicial friends and mentors); *see also* Kavanaugh, *2006 Confirmation Hearing*, *supra* note 27, at 23–24 (discussing the jurists who have been "role models" to the nominee).

[231] Kavanaugh, *Two Challenges*, *supra* note 14, at 1908–09.

[232] *Id.* at 1910; *see also* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2118 ("Statutory interpretation has improved dramatically over the last generation, thanks to the extraordinary influence of Justice Scalia."); Kavanaugh, *Administrative State*, *supra* note 22, at 719 ("We made great progress in statutory interpretation, I think, over the last couple of decades—again, Justice Scalia deserves a lot of credit, and many others do as well—but we still have a ways to go, even with our shared grounding in the importance of the statutory text.").

[233] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2118 ("By emphasizing the centrality of the words of the statute, Justice Scalia brought about a massive and enduring change in American law.").

[234] Kavanaugh, *From the Bench*, *supra* note 24, at 19.

[235] *Id.* at 6, 18.

[236] *Id.* at 6 ("In case after case after case during law school, I noticed something. After I read the assigned reading, I would constantly make notes to myself: Agree with Rehnquist majority opinion. Agree with Rehnquist dissent. . . . And

of [Chief Justice] Rehnquist to modern constitutional law."[237] Judge Kavanaugh has attributed to Chief Justice Rehnquist many of the principles that inform the nominee's judicial philosophy. According to the nominee, "[d]uring [Chief Justice] Rehnquist's tenure, the Supreme Court unquestionably changed and became more of an institution of law, where its power is to interpret and to apply the law as written, informed by historical practice, not by its own personal and policy predilections."[238]

As to Justices Jackson and White, Judge Kavanaugh identified both as "role models" during his confirmation hearing in 2006 as a nominee to the D.C. Circuit.[239] Specifically, Judge Kavanaugh pointed to Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, a landmark separation-of-powers case wherein Justice Jackson established a three-part framework for assessing executive wartime powers.[240] The nominee described the framework as "a work of genius . . . in terms of setting out the different categories of Presidential power and Congressional power in times of war and otherwise,"[241] and has cited it throughout his writings and speeches as influential on the nominee's view of the separation of powers.[242] Judge Kavanaugh has also identified Justice Jackson as the "role model for all executive branch lawyers turned judges," such as Judge Kavanaugh himself.[243] As to Justice White, Judge Kavanaugh has written less about his influence, but approved of Justice White's "approach to judging" characterized by "judicial restraint."[244]

Finally, Judge Kavanaugh has suggested an affinity with Justice Kagan based, in part, on their similar backgrounds in the executive branch.[245] He has also cited Justice Kagan throughout his

his opinions made a lot of sense to me. In class after class, I stood with Rehnquist.").

[237] *Id.* at 5; *see also id.* at 6 ("For a total of 33 years, William Rehnquist righted the ship of constitutional jurisprudence.").

[238] *Id.* at 5.

[239] Kavanaugh, *2006 Confirmation Hearing*, *supra* note 27, at 24.

[240] 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[241] Kavanaugh, *2006 Confirmation Hearing*, *supra* note 27, at 33.

[242] *See, e.g.*, Kavanaugh, *Role of History*, *supra* note 165, at 1908 ("David Baron and Marty Lederman did this huge survey following *Youngstown*, about the Commander-in-Chief power. I devoured that. That's influenced how I think about the issue."); Kavanaugh, *Our Anchor*, *supra* note 24, at 1922; Kavanaugh, *Separation of Powers*, *supra* note 22, at 1479–82; *id.* at 1480 ("In applying Justice Jackson's *Youngstown* framework, courts have a corresponding responsibility to ensure that their opinions are especially clear and provide necessary guidance to the political branches."); Kavanaugh, *Judge as Umpire*, *supra* note 24, at 688 (citing *Youngstown* as one of several "great[] moments in American judicial history" where "judges stood up to the other branches, were not cowed, and enforced the law. That takes backbone, or what some call judicial engagement. To be a good judge and a good umpire, you have to possess strong backbone.").

[243] Kavanaugh, *Administrative State*, *supra* note 22, at 714 ("Of course, we all think of Justice Robert Jackson in the *Youngstown* case, a role model for all executive branch lawyers turned judges."); Kavanaugh, *Judge as Umpire*, *supra* note 24, at 686 ("For those who come from the Executive Branch, the model, of course, is Justice Robert Jackson, who had been Attorney General.").

[244] Kavanaugh, *2006 Confirmation Hearing*, *supra* note 27, at 47 ("The reason I chose Justice White is for several reasons: He was a rock of integrity. His work as Deputy Attorney General in the Department of Justice enforcing the civil rights laws in the early 1960s I think was heroic.").

[245] *See, e.g.*, Kavanaugh, *Judge as Umpire*, *supra* note 24, at 686; Kavanaugh, *Administrative State*, *supra* note 22, at 714.

judicial[246] and non-judicial[247] writings, often alongside citations to Justice Scalia.[248] While citations alone may not suggest more than respect for a colleague and agreement on discrete issues, as opposed to a wholesale endorsement of a jurist's judicial philosophy, at least one commentator has suggested that "[t]he Kavanaugh-Kagan relationship may be one to watch in particular, should they serve together. As her offer—and his acceptance—to teach at Harvard suggests, both have seen advantage in detente."[249]

[246] *See, e.g.*, PHH Corp. v. CFPB, 881 F.3d 75, 191 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 413 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting); White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1261 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom*. Michigan v. EPA, 135 S. Ct. 2699 (2015); Grocery Mfrs. Ass'n v. EPA, 704 F.3d 1005, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting from denial of rehearing en banc); Morley v. CIA, 719 F.3d 689, 690 (D.C. Cir. 2013) (Kavanaugh, J., concurring); United States v. Cardoza, 713 F.3d 656, 661 (D.C. Cir. 2013); Free Enter. Fund v. PCAOB, 537 F.3d 667, 689, 695 n.4, 708 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

[247] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2118 ("As Justice Kagan recently stated, 'we're all textualists now.'"); *id.* at 2161 ("This is a very indeterminate task for judges. Justice Kagan highlighted this problem in her brilliant dissent in *Yates v. United States*, a case involving an obstruction of justice statute where the majority relied on the ejusdem generis canon." (footnotes omitted)); Kavanaugh, *Two Challenges*, *supra* note 14, at 1912 ("As Justice Kagan stated two years ago, legislative history is usually icing on a cake already frosted."); Kavanaugh, *Separation of Powers*, *supra* note 22, at 1472 n.84.

[248] *See, e.g.*, *PHH Corp.*, 881 F.3d at 191 (Kavanaugh, J., dissenting).

[249] Bravin & Kendall, *supra* note 102; *see also* Matt Viser, *At Harvard Law School, He's Professor Kavanaugh*, BOSTON GLOBE, (July 11, 2018), https://www.bostonglobe.com/news/politics/2018/07/10/kagankavanaugh/gToNHQ4Ko7LzW4si4NI1QM/story.html.

# Statutory Interpretation[250]

One cross-cutting issue foundational to understanding Judge Kavanaugh's jurisprudence is his theory of statutory interpretation. The nominee has been quite clear about his own views on this subject, actively engaging in ongoing debates within the legal community over the proper theories and tools to employ when interpreting statutes.[251] Judge Kavanaugh is an avowed textualist—that is, a jurist who will generally favor a statute's text over its purpose when interpreting the law's meaning, only crediting statutory purpose to the extent that it is evident from the text.[252] As the nominee remarked in a 2016 book review: "The text of the law is the law."[253] In this vein, Judge Kavanaugh has lauded Justice Scalia's textualist influence[254] on the field of statutory interpretation[255]—and has also praised Justice Kagan for her more textualist opinions.[256]

Because of his commitment to textualism, Judge Kavanaugh's approach to statutory interpretation potentially differs from Justice Kennedy's, as the retiring Justice did not necessarily adhere to one single theory of statutory interpretation.[257] In practice, though, the two jurists appear to have more in common than their general approaches toward reading statutes might suggest. Similar to Judge Kavanaugh, and many other judges,[258] Justice Kennedy would "begin with the text" of a statute[259] and would give that text's ordinary meaning significant weight.[260] Moreover, Justice Kennedy, at times, disclaimed attempts to discover Congress's original intent as divorced from the text.[261] But

[250] CRS Legislative Attorney Valerie C. Brannon authored this section of the report.

[251] *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1909–10; Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2120; Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 4–5. *See also, e.g.*, Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 191 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[252] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33 (2012). For more information on the textualist theory of statutory interpretation, as well as a general overview of statutory interpretation, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[253] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2118. *See also, e.g.*, Al-Bihani v. Obama, 619 F.3d 1, 24 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) ("Interpretation of a statute begins (and often ends) with its text.").

[254] For more on Justice Scalia's views on statutory interpretation, see CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by Andrew Nolan and Brandon J. Murrill.

[255] *E.g.*, Kavanaugh, *Two Challenges*, *supra* note 14, at 1908 (describing Justice Scalia as "a judicial hero and role model").

[256] *E.g.*, Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2161 (describing Justice Kagan's dissent in *Yates v. United States*, 135 S. Ct. 1074 (2015), as "brilliant"). For a discussion on the jurists who have influenced the nominee, including Justices Scalia and Kagan, see *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[257] *See CRS Kennedy Report*, *supra* note 17, at 4.

[258] For example, all of the current Supreme Court Justices have echoed this principle when writing majority opinions for the Court. *E.g.*, Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1721 (2017) (Gorsuch, J.); Ross v. Blake, 136 S. Ct. 1850, 1856 (2016) (Kagan, J.); Nebraska v. Parker, 136 S. Ct. 1072, 1079 (2016) (Thomas, J.); Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1755 (2014) (Sotomayor, J.); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7 (2011) (Breyer, J.); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (Alito, J.); Bates v. United States, 522 U.S. 23, 29 (1997) (Ginsburg, J.).

[259] Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R. Co., 516 U.S. 152, 156 (1996). *See also, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 250 (2006) ("We turn first to the text and structure of the [statute]."); United States v. Granderson, 511 U.S. 39, 60 (1994) (Kennedy, J., concurring) (beginning with a "close analysis of the text and structure of the statute").

[260] *See, e.g.*, *Gonzales*, 546 U.S. at 250, 269; *Granderson*, 511 U.S. at 60 (Kennedy, J., concurring); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 680 (1990) (Kennedy, J., dissenting).

[261] *E.g.*, *Granderson*, 511 U.S. at 67–68; Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 470–77 (1989) (Kennedy, J.,

Justice Kennedy would also sometimes go beyond the disputed text to consider the statutory scheme as a whole, looking to its operation and the practical consequences of various interpretations.[262] In one concurring opinion, Justice Kennedy said: "Faced with a choice between two difficult readings of what all must admit is not optimal statutory text, the Court is correct to adopt the interpretation that makes the most sense."[263] Though Judge Kavanaugh's textualist philosophy would on its face appear to be inconsistent with Justice Kennedy's more pragmatic approach, the nominee's opinions and other writings reveal that he also considers the legislative process and gives significant weight to the way a statute will be implemented.[264] Accordingly, if confirmed, while Judge Kavanaugh could further tip the Court toward a more textualist approach to statutory interpretation, he might still invoke some of the more pragmatic considerations that Justice Kennedy sometimes relied on in his own analyses.

This section first outlines Judge Kavanaugh's general theory of statutory interpretation, as announced in his non-judicial writings and in his opinions. It then explores in more detail how the nominee has applied this theory to resolve specific cases, examining the interpretive tools the nominee has used to determine a statute's meaning. Finally, it describes the nominee's views on severability, a doctrine closely related to statutory interpretation that may arise when courts consider the constitutionality of a provision situated within a larger statutory scheme.

## General Theory

Judge Kavanaugh's theory of statutory interpretation is based on his broader views about separation of powers. As discussed, the nominee has argued that the Constitution requires judges to adhere to a specific role: to serve as "neutral, impartial . . . umpires" who "say what the law is, not what the law should be."[265] In his view, focusing on a statute's text is the best way to fulfill this judicial role.[266] Because it is "Congress and the President—not the courts" who "together possess the authority and responsibility to legislate," he believes that "clear statutes are to be followed."[267] In one article, Judge Kavanaugh described his approach to "determin[ing] the 'best reading' of a statutory text" as follows:

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dissenting). *But see, e.g.*, Rapanos v. United States, 547 U.S. 715, 804 (2006) (Kennedy, J., concurring) (relying on statutory purpose).

[262] *See, e.g.*, *Gonzales*, 546 U.S. at 270–75; Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1998); Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995).

[263] Johnson v. United States, 529 U.S. 694, 714 (2000) (Kennedy, J., concurring).

[264] *See, e.g.*, Seven-Sky v. Holder, 661 F.3d 1, 23, 29–30 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316, 1324–28 (D.C. Cir. 2007).

[265] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2120. For more on Judge Kavanaugh's views on the role of the judiciary, see discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[266] *See, e.g.*, EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 12 (D.C. Cir. 2012) ("Congress could well decide to alter the statute to permit or require EPA's preferred approach . . . . Unless and until Congress does so, we must apply and enforce the statute as it's now written. . . . It is not our job to set environmental policy. Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set."); *Seven-Sky*, 661 F.3d at 23, 46 (Kavanaugh, J., dissenting) ("[W]e must adhere to the congressional choice reflected in the statutory text."). *But cf., e.g.*, al Bahlul v. United States, 767 F.3d 1, 68 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part) (considering "textually stated purpose" of disputed statute); Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *73 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc) (considering the "overall objectives" of a statute).

[267] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2135.

> Courts should try to read statutes as ordinary users of the English language might read and understand them. That inquiry is informed by both the words of the statute and conventional understandings of how words are generally used by English speakers. Thus, the "best reading" of a statutory text depends on (1) the words themselves, (2) the context of the whole statute, and (3) any other . . . general rules by which we understand the English language.[268]

As this statement suggests, like other textualists, Judge Kavanaugh favors text-based tools of statutory interpretation and generally eschews the use of legislative history.[269] The nominee has argued on textualist grounds that judges should be cautious not only of legislative history, but of any interpretive tools that rely on ambiguity as a trigger for application.[270] Judges frequently agree that a court should turn only to certain tools—like legislative history—if the statutory text is ambiguous.[271] Judge Kavanaugh has raised concerns about this approach, arguing that it is difficult to determine whether a particular statute is ambiguous "in a neutral, impartial, and predictable fashion."[272] In line with his broader formalist views, he has expressed concern that the ambiguity determination "turns on little more than a judge's instincts," making it "harder for judges to ensure that they are separating their policy views from what the law requires of them."[273] Accordingly, the nominee has called for judges to examine carefully their use of any doctrines that are dependent on an initial finding of ambiguity.[274]

## Application and Interpretive Tools

Using his textualist philosophy to interpret a disputed statutory provision, Judge Kavanaugh often begins by looking to a word's "plain meaning,"[275] asking how the term would be understood in

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[268] *See id.* at 2144–45, 2149.

[269] *E.g.*, Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1288 (D.C. Cir. 2007) ("'The best evidence of [the statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the President,' which means the legislative history and earlier statutory language cannot trump the current statute's plain import here." (quoting W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991))).

[270] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2144–45.

[271] *See, e.g.*, Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 304 (2006); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 508–09 (1989).

[272] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2137.

[273] *Id.* at 2139; *see also id.* at 2142 (arguing that whether a statute is clear or ambiguous "turns out to be an entirely personal question, one subject to a certain sort of *ipse dixit*").

[274] *E.g.*, Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2144–45. Notably, Judge Kavanaugh has advocated for a uniform, two-step approach to interpreting statutes: "First, courts could determine the best reading of the text of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any other appropriate semantic canons of construction. Second, once judges have arrived at the best reading of the text, they can apply—openly and honestly—any substantive canons (such as plain statement rules or the absurdity doctrine) that may justify departure from the text." *Id.* at 2144. Others have also described the constitutionally grounded substantive canons as "clear statement rules," *see, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992), so named because courts will generally require Congress to make a "clear statement" in order to overcome the relevant presumption. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991); *see also, e.g.*, Shwab v. Doyle, 258 U.S. 529, 537 (1922).

[275] *E.g.*, Sierra Club v. EPA, 536 F.3d 673, 680 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (stating as a "bedrock principle[] of statutory interpretation" that "the plain meaning of the text controls"); Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316, 1323 (D.C. Cir. 2007) (rejecting an interpretation that would "distort[] the plain meaning" of the statutory phrase). *See also* Howmet Corp. v. EPA, 614 F.3d 544, 555 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (rejecting an agency's interpretation "as a matter of plain English").

"common parlance."[276] He sometimes relies on dictionaries as evidence of a word's ordinary meaning.[277] The nominee also looks to the surrounding statutory text for interpretive context.[278] Judge Kavanaugh's opinion in *United States v. Papagno* provides a clear example of this textualist approach.[279] In that case, the D.C. Circuit was asked to interpret the Mandatory Victims Restitution Act (MVRA), which requires, in relevant part, that defendants reimburse victims of specified crimes for, among other things, "necessary . . . expenses incurred during participation in the investigation or prosecution of the offense."[280] The defendant in *Papagno* had stolen computer equipment from his employer, the Naval Research Laboratory (NRL).[281] At issue was whether the MVRA encompassed the costs of an *internal investigation* conducted by the NRL, where that investigation "was neither required nor requested by the criminal investigators or prosecutors,"[282] and the NRL stated that the investigation was conducted for its "own purposes."[283]

Writing the majority opinion for a unanimous panel, Judge Kavanaugh concluded that the MVRA did not authorize restitution for the internal investigation.[284] He relied on dictionary definitions, "common parlance,"[285] and Supreme Court cases interpreting other federal statutes to decide that the NRL was not "participat[ing] in the investigation or prosecution of the offense" when it conducted the internal investigation.[286] Judge Kavanaugh also reviewed the statutory context, situating the disputed provision of the MVRA within the "landscape" of other federal statutes governing restitution.[287] He compared the disputed provision of the MVRA to a 2008 amendment of a different restitution statute, noting that in the other statute, Congress had "authorized restitution for 'an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.'"[288] In

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[276] Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 459 (D.C. Cir. 2017).

[277] *See generally* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2150 n.158. *E.g.*, *Mexichem Fluor*, 866 F.3d at 458–59; Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1287 (D.C. Cir. 2007).

[278] *See, e.g.*, Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *70–71 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc); EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 33 (D.C. Cir. 2012); *Am. Fed'n of Gov't Emps.*, 486 F.3d at 1322–24.

[279] 639 F.3d 1093 (D.C. Cir. 2011).

[280] 18 U.S.C. § 3663A(b)(4).

[281] *Papagno*, 639 F.3d at 1095.

[282] *Id.*

[283] *Id.* at 1099 (internal quotation marks omitted).

[284] *Id.* at 1095.

[285] Judge Kavanaugh provided a series of hypotheticals to reject the NRL's argument that "participation" included "assistance":

> The company that provides electricity to power the sound system at our oral arguments assists the proceedings, but its employees are not ordinarily said to have participated in the oral argument. Engineers who design soldiers' weapons aid the war effort, but the engineers are not thought to participate in the war; rather, they are said to provide support. . . . A health insurance company may pay for a patient's operation, but the insurer does not participate in the operation at the hospital. The hardy Bostonians who hold cups of water on the side of the road help runners in the marathon, but they do not themselves participate in the race. The officers who provide security at a Taylor Swift show certainly assist, but no one would say that they participate in the performance.

*Id.* at 1098.

[286] *Id.* at 1098–99.

[287] *Id.* at 1096–97.

[288] *Id.* at 1099 (quoting 18 U.S.C. § 3663(b)(6)).

his view, this other statute *would* "authorize the restitution" that the NRL sought.[289] He inferred that because "Congress did not add similar language to" the MVRA provision disputed in the case before the court, Congress did not intend to authorize such restitution in the MVRA.[290]

Thus, Judge Kavanaugh's opinion in *Papagno* relied on quintessential textualist tools like ordinary meaning and statutory context to resolve the interpretive question. Notably, the nominee acknowledged in the opinion that "several other courts of appeals have taken a broader view of the restitution provision,"[291] and ultimately, the courts of appeals in eight other circuits concluded that the MVRA *did* cover the costs of private investigations.[292] This last term, the Supreme Court resolved the split in *Lagos v. United States*, ultimately adopting a more narrow view of the MVRA.[293]

Judge Kavanaugh sometimes invokes the canons of construction, which provide general presumptions about how courts should read statutes.[294] There are two types of canons: *semantic canons*, which reflect the ways that people ordinarily use words, often mirroring ordinary rules of grammar; and *substantive canons*, which create presumptions favoring or disfavoring a particular substantive outcome.[295] Textualists generally "favor the use of canons, particularly the traditional linguistic canons."[296] Judge Kavanaugh uses these canons, especially the semantic canons,[297] but has called for some reforms in their use. Notably, he advocates the use of semantic canons only to the extent that they actually reflect the way people "understand the English language,"[298] and, in line with his formalist views, has argued against both semantic and substantive canons that, in his view, cannot be applied in a consistent and principled way.[299]

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[289] *Id.*

[290] *Id.* at 1099–1100. This analysis invoked a semantic canon stating that where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)) (internal quotation mark omitted). For a discussion of the semantic canons of construction, see *infra* notes 297 to 307 and accompanying text.

[291] *Papagno*, 639 F.2d at 1101.

[292] *See* Lagos v. United States, 138 S. Ct. 1684, 1687 (2018); Petition for Writ of Certiorari at 15, Lagos v. United States, 138 S. Ct. 1684 (2018) (No. 16-1519).

[293] *Lagos*, 138 S. Ct. at 1688. It is unclear whether the construction adopted by the *Lagos* Court perfectly aligns with what the D.C. Circuit held in *Papagno*. Unlike *Papagno*, *Lagos* involved an internal investigation by a private entity, and the Court did not squarely resolve whether the MVRA could require reimbursement for the costs of a government agency's internal investigation if it is unrelated to a criminal prosecution. On one hand, the Supreme Court held that the relevant portion of the MVRA is "limited to government investigations and criminal proceedings." *Id.* at 1688. Elsewhere, however, the Court suggested that the term "investigation" should be construed to mean "a government's criminal investigation." *Id.* The investigation in *Papagno* was a government investigation, but it may not have been a *criminal* investigation. *See* 639 F.3d at 1098–99.

[294] *See, e.g.*, *Papagno*, 639 F.2d at 1099. For a more in-depth discussion of the canons, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[295] *E.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 202 (2d ed. 2013).

[296] John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2d 283, 284 (2002).

[297] Judge Kavanaugh, however, does not always refer to the canons as such or use their Latin names, making it more difficult to catalog his use of the canons. *See, e.g.*, Loving v. IRS, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (noting that the use of "and" instead of "or" provides "a strong indication that Congress did not intend the requirements as alternatives"); Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *72 (D.C. Cir. Dec. 20, 2012) (following the presumption that Congress uses words consistently throughout a statute).

[298] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2145.

[299] *See, e.g.*, *id.* at 2154–62.

First, Judge Kavanaugh has argued that judges should "shed" any semantic canons that do not actually "reflect the meaning that people, including Members of Congress, ordinarily intend to communicate with their choice of words."[300] For instance, the nominee has questioned the rule against surplusage, which states that courts should generally presume that each word and clause of a statute has a distinct, non-redundant meaning,[301] noting that "humans speak redundantly all the time, and it turns out that Congress may do so as well."[302] Accordingly, in one dissenting opinion, Judge Kavanaugh concluded that the language of the disputed statute made "redundancy . . . inevitable," arguing that the court should "read the provisions according to their terms, recognizing that Congress often wants to make 'double sure'—a technique so common that it has spawned its own Latin canon, *ex abundanti cautela*."[303] The nominee has also argued against using any semantic canons that "require judges to make difficult policy judgments that they are ill-equipped to make."[304]

In contrast to the semantic canons, Judge Kavanaugh has more broadly questioned the use of the substantive canons, arguing that canons should be eliminated if they are not justified by "constitutional or quasi-constitutional values."[305] But, for example, he has applied the presumption of mens rea—the presumption that crimes include a mental state requirement—noting that it "embodies deeply rooted principles of law and justice that the Supreme Court has emphasized time and again."[306] Based on his broader concerns about the use of any tools that are only invoked in the case of textual ambiguity, he has suggested that judges should not turn to the substantive canons until after they have sought "the *best reading* of the statute by interpreting the

[300] *Id.* at 2159–60.

[301] *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001).

[302] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2161. *Cf.* Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316, 1324 (D.C. Cir. 2007) (reading distinct statutory provisions so that none is redundant and each has "independent meaning").

[303] Seven-Sky v. Holder, 661 F.3d 1, 23, 38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[304] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2160. Primarily, Judge Kavanaugh has questioned "the ejusdem generis canon," "the anti-redundancy canon" (i.e., the rule against surplusage), and "the consistent usage canon." *Id.* at 2160–62. *See, e.g.*, Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *80–83 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting that the presumption of consistent usage is not "an inflexible command," concluding that the statutory context rebutted the presumption in that case).

[305] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2156. *See, e.g.*, Al-Bihani v. Obama, 619 F.3d 1, 32–36, 42 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (arguing against the application of the *Charming Betsy* canon, "which counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law"); Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (cautioning against extending "the canon against interpreting ambiguous statutes to abrogate treaties" to the context of non-self-executing treaties). Judge Kavanaugh has questioned the canon of constitutional avoidance. *See, e.g.*, Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2146; *see also, e.g.*, Free Enter. Fund v. PCAOB, 537 F.3d 667, 704 n.12 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (rejecting application of the doctrine where the text was clear), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010); *cf.* Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1319 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (stating that because a litigant invoked the canon of constitutional avoidance, the court could not reject the litigant's challenge without analyzing the constitutional question). He has nonetheless relied on the closely related "last resort" rule, *see* Ashwander v. TVA, 297 U.S. 288, 346 (1936), arguing in at least one case that the D.C. Circuit should "wait[ ] to decide" a case by citing "the bedrock principle of judicial restraint that courts avoid prematurely or unnecessarily deciding constitutional questions." *Seven-Sky*, 661 F.3d at 23, 46.

[306] United States v. Burwell, 690 F.3d 500, 527 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting).

words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons."[307]

For this reason, Judge Kavanaugh has, as discussed, argued that courts generally should not use legislative history to interpret statutes: "the clarity versus ambiguity trigger for resorting to legislative history means that the decision whether to resort to legislative history is often indeterminate."[308] Accordingly, he has declined to use legislative history to interpret a statute if the text is clear.[309] The nominee has also echoed other textualist concerns regarding the use of legislative history.[310] For example, in a dissenting opinion in *Agri Processor Co. v. National Labor Relations Board*, Judge Kavanaugh argued that the court should not rely on a committee report because it was "in no way anchored in the text" of the relevant statute.[311] At issue in that case was whether "undocumented aliens" qualified as "'employees' protected by the National Labor Relations Act [(NLRA)]."[312] Relying primarily on the statutory text and a substantive canon, the majority opinion concluded that the NLRA covered undocumented aliens.[313] But the court also invoked legislative history to support its conclusion, in the form of two committee reports.[314] Judge Kavanaugh rejected these committee reports, citing "the usual cautions":

> Committee reports are highly manipulable, often unknown by most Members of Congress and by the President, and thus ordinarily unreliable as an expression of statutory "intent." Committee reports are not passed by the House and Senate and presented to the President, as required by the Constitution in order to become law.[315]

Ultimately, the nominee concluded that, because "the term 'employee' in the NLRA must be interpreted in conjunction with the immigration laws," that term excluded "an illegal immigrant worker."[316]

Although Judge Kavanaugh has expressed concern about doctrines that invite judges to rely on personal assessments of meaning, he has also acknowledged that in some circumstances it is unavoidable that a judge will have to "consider policy and perform a common law-like function."[317] In many cases, he relies on his own assessments of whether a particular interpretation aligns with "common" meaning or practice, adverting to his own understanding of what is "common."[318] In this regard, the nominee invokes more pragmatic concerns that could be

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[307] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2121.

[308] *Id.* at 2149.

[309] *E.g.*, Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 459 (D.C. Cir. 2017).

[310] *See, e.g.*, Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 191 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). But like other textualists, Judge Kavanaugh may be willing to use legislative history under certain circumstances. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316, 1325–26 (D.C. Cir. 2007) (using legislative history to rebut the argument that a particular interpretation could not have been what Congress intended); *cf.* SCALIA & GARNER, *supra* note 252, at 388 (approving of the use of legislative history "to refute attempted application of the absurdity doctrine").

[311] 514 F.3d 1, 14 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting Shannon v. United States, 512 U.S. 573, 583 (1994)) (internal quotation marks omitted).

[312] *Id.* at 2 (majority opinion).

[313] *Id.* at 4.

[314] *Id.* at 4–5.

[315] *Id.* at 13–14 (Kavanaugh, J., dissenting).

[316] *Id.* at 10.

[317] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2142, 2121.

[318] *See, e.g.*, Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 459 (D.C. Cir. 2017) ("In common parlance, the word 'replace' refers to a new thing taking the place of the old. For example, President Obama replaced President Bush at a specific moment in time: January 20, 2009, at 12 p.m. President Obama did not 'replace' President Bush every time

seen as extra-textual, asking how a statutory scheme functions and whether a particular interpretation makes sense within that scheme.[319] In one case, for instance, writing for a majority of the court, Judge Kavanaugh rejected a reading of a statute that would have "tie[d] the system in knots and greatly hinder[ed] (if not prevent[ed]) the Department's exercise of any discretionary authority set forth by the regulations."[320]

To take another example, dissenting in *White Stallion Energy Center v. EPA*, Judge Kavanaugh interpreted a statutory term by reference to "common sense, common parlance, and common practice."[321] In that case, the D.C. Circuit considered the EPA's decision to issue a rule governing emissions from electric utilities.[322] The governing statute gave the EPA authority to issue "appropriate and necessary" regulations.[323] The nominee argued that the EPA violated this statute when it "exclude[d] consideration of costs in determining whether it [was] 'appropriate'" to issue the regulation.[324] To support this "common sense" understanding of the word "appropriate," Judge Kavanaugh drew from a variety of sources, including statements from administrative law experts and past practices of the executive branch.[325] The nominee also used legislative history to support his understanding of "the congressional compromise" that was embodied in the relevant statute.[326]

In a similar vein, Judge Kavanaugh has invoked two different substantive canons that draw from general understandings about how Congress operates: the absurdity doctrine, which allows courts to depart from the text's plain meaning if it would produce an absurd result,[327] and the "elephants in mouseholes" canon, which provides that courts should not presume that Congress "alter[ed] the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[328] Scholars and judges have argued these two canons may be inconsistent with textualism because they are focused on congressional intent[329] and because the trigger for application is unclear, meaning that these canons cannot be applied consistently.[330] The nominee has himself characterized the absurdity doctrine as an "off-ramp[ ] from the text" and suggested that courts should be wary of employing the canon in a way that allows them to "adopt what they conclude Congress *meant*

President Obama thereafter walked into the Oval Office."); Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316, 1324 (D.C. Cir. 2007) ("This kind of experimental program is common.").

[319] *See, e.g.*, EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 28 (D.C. Cir. 2012).

[320] *Am. Fed'n of Gov't Emps.*, 486 F.3d at 1328.

[321] 748 F.3d 1222, 1261 (D.C. Cir. 2014) (Kavanaugh, J., dissenting), *rev'd*, Michigan v. EPA, 135 S. Ct. 2699 (2015).

[322] *Id.* at 1260.

[323] *Id.* (quoting 42 U.S.C. § 7412(n)(1)(A)). Judge Kavanaugh has suggested that where a statute "requires determination of what is reasonable or appropriate," the case presents "less a matter of pure interpretation than of common law-like judging." Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2120 n.12.

[324] *White Stallion*, 748 F.3d at 1261.

[325] *Id.* at 1261–62.

[326] *Id.* at 1264–65.

[327] *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) ("From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results.").

[328] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

[329] *E.g.*, Manning, *supra* note 327, at 2390–91.

[330] *See, e.g.*, Nina Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV., at *48–49 (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117143 (last visited Aug. 20, 2018).

rather than what Congress *said*."[331] Nonetheless, Judge Kavanaugh has cited the canon against absurd results to support his decision in multiple cases.[332] And he has frequently employed[333] the relatively new "elephants in mouseholes" canon.[334]

## Severability

Finally, in an issue that has prompted significant commentary on the nominee,[335] Judge Kavanaugh has criticized the modern approach to severability, a doctrine that is closely related to statutory interpretation.[336] When a court concludes that a particular statute violates the Constitution, it will generally declare that the statute is void and strike down the unconstitutional provision.[337] If a law is only partially unconstitutional, a court sometimes has to decide *which* provisions to "sever and excise as inconsistent with" the Constitution.[338] Courts generally attempt to retain as much of the statutory scheme as possible.[339] Under some circumstances, however, the Supreme Court has recognized that "it is not possible to separate that which is unconstitutional . . . from that which is not."[340] In such a case, the statutory provision is inseverable, and the court will strike the whole statute.[341] This issue may arise when courts are considering the constitutionality of one provision within a larger, and more complicated, statutory scheme—such as the Patient Protection and Affordable Care Act (ACA).[342]

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[331] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2158, 2159.

[332] *See, e.g.*, PHH Corp. v. CFPB, 839 F.3d 1, 54–55 (D.C. Cir. 2016), *overruled in part by* 881 F.3d 75 (D.C. Cir. 2018) (en banc); Doe v. Exxon Mobil Corp., 654 F.3d 11, 88 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *vacated by* 527 F. App'x 7 (D.C. Cir. 2013); Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *66, 70 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc). *But see, e.g.*, Stovic v. R.R. Ret. Bd., 826 F.3d 500, 505 (D.C. Cir. 2016) (rejecting application of canon where proffered interpretation was "not even close to absurd").

[333] *See PHH Corp.*, 839 F.3d at 54; Loving v. IRS, 742 F.3d 1013, 1021 (D.C. Cir. 2014); EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 28 (D.C. Cir. 2012); *Coal. for Responsible Regulation*, 2012 U.S. App. LEXIS 25997, at *37 (Kavanaugh, J., dissenting from denial of rehearing en banc); Al-Bihani v. Obama, 619 F.3d 1, 44 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc); *In re* Any & All Funds or Other Assets, in Brown Bros. Harriman & Co. Account #8870792 in the Name of Tiger Eye Invs. Ltd., 613 F.3d 1122, 1130 (D.C. Cir. 2010); Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316, 1325–26 (D.C. Cir. 2007).

[334] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); *see also* Epic Sys. Corp. v. Lewis, 1626–27 (2018); Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1071–72 (2018); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 984 (2017); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1947 (2016); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 116 (2008); Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

[335] *See, e.g.*, Abbe Gluck, *The Fate of the ACA Could Turn on Judge Kavanaugh's Appointment*, VOX (July 23, 2018, 8:50 AM), https://www.vox.com/the-big-idea/2018/7/23/17596430/kavanaugh-kennedy-supreme-court-health-care-aca-confirmation-hearings (discussing severability and Judge Kavanaugh); Colby Itkowitz, *The Health 202: Kavanaugh May Not Completely Gut Obamacare If He Makes It to the Supreme Court*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/07/11/the-health-202-kavanaugh-may-not-completely-gut-obamacare-if-he-makes-it-to-the-supreme-court/5b44f0e01b326b3348adde1b (similar).

[336] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2148.

[337] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

[338] United States v. Booker, 543 U.S. 220, 258 (2005).

[339] *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987).

[340] United States v. Reese, 92 U.S. 214, 221 (1875).

[341] *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1482 (2018).

[342] There is at least one case currently pending in a federal district court in which the litigants are arguing that a provision of the ACA—the individual mandate—is unconstitutional and that this provision is not severable from the rest of the Act, so that the ACA as a whole must fall. *See* CRS Legal Sidebar LSB10119, *Déjà Vu All Over Again: States Renew Constitutional Challenge to the ACA's Individual Mandate*, by Edward C. Liu and Jennifer A. Staman.

To determine whether an unconstitutional provision is severable, courts consider whether Congress would have enacted the constitutional provisions independently of the unconstitutional portions, asking whether the remaining provisions are capable "of functioning independently."[343] If "Congress has explicitly provided for severance by including a severability clause in the statute," this creates a strong presumption in favor of severability.[344] Recently, Justice Thomas called for the Court to reconsider the modern severability inquiry, arguing that it "does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make 'a nebulous inquiry into hypothetical congressional intent.'"[345] Judge Kavanaugh has expressed similar concerns. He has described severability principles as a "mess" and questioned how a court can know what Congress would have wanted, characterizing this inquiry as an "inherently suspect exercise."[346] The nominee suggested instead that "courts might institute a new default rule: sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute."[347]

Judge Kavanaugh seemed to echo these concerns about the inquiry into congressional intent in his dissenting opinion in *PHH Corp. v. CFPB*.[348] After concluding that the statutory provision providing the Director of the CFPB with for-cause protection for removal from office was unconstitutional,[349] he asked whether the entire statute authorizing the CFPB must be struck down, or whether the for-cause removal protection was severable from the rest of the statute.[350] The nominee described the usual severability inquiry requiring courts to "speculate" as to Congress's intent, but concluded that no such speculation was required in the case before the court because the relevant statute contained a severability clause providing that if any provision in the statute were found unconstitutional, "the remainder . . . shall not be affected thereby."[351] In Judge Kavanaugh's view, this express statutory provision controlled.[352] It remains to be seen whether other Supreme Court Justices agree with Justice Thomas and Judge Kavanaugh's concerns about the severability doctrine, and so it is unclear whether the nominee's appointment to the Court would create a majority willing to reconsider the doctrine. In any event, the nominee's writings suggest that he takes a narrow view of a court's role in striking down unconstitutional legislation, (1) favoring severing unconstitutional provisions and striking down as little as possible and (2) giving conclusive effect to statutory provisions expressly providing either for severability or for inseverability.[353]

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[343] *Alaska Airlines*, 480 U.S. at 685. *See also* Allen v. Louisiana, 103 U.S. 80, 84 (1880) ("The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.").

[344] *Alaska Airlines*, 480 U.S. at 686.

[345] *Murphy*, 138 S. Ct. at 1486 (Thomas, J., dissenting) (quoting United States v. Booker, 543 U.S. 220, 320 n.7 (2005) (Thomas, J., dissenting)).

[346] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2148.

[347] *Id.*

[348] 881 F.3d 75, 199 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

[349] *Id.* at 198.

[350] *Id.*

[351] *Id.* at 199 (quoting 12 U.S.C. § 5302).

[352] *See id.* ("It will be the rare case when a court may ignore a severability provision set forth in the text of the relevant statute. . . . I see no justification for tilting at that windmill in this case." (citing Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987))).

[353] *See* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2148; *PHH Corp.*, 881 F.3d at 199.

# Administrative Law[354]

Administrative law is another critical area to consider when evaluating Judge Kavanaugh's judicial record, as the subject raises important questions about the scope of authority Congress has granted to federal agencies, as well as the Constitution's division of power among the three branches of government.[355] While the jurist Judge Kavanaugh may replace, Justice Kennedy, was perhaps less influential in the area of administrative law than he was in other areas, he did often find himself as a decisive vote in important administrative law cases during the Roberts Court era.[356] In the Supreme Court's most recent term, moreover, less than a week before announcing his retirement, Justice Kennedy authored an opinion in which he called for the Court to "reconsider"[357] the doctrine of judicial deference to agency interpretations of their statutory authority under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[358] Because Justice Kennedy previously provided the fifth vote to defer to an agency's statutory interpretation under *Chevron* several times,[359] this move signals to some that the Court may be on the verge of recrafting foundational administrative law doctrines, depending on who replaces the recently retired Justice.

Given this context, it is notable that Judge Kavanaugh has a fairly robust record on administrative law matters. This is unsurprising, considering the D.C. Circuit's location in the nation's capital coupled with the composition of its docket, which is composed of a substantial number of administrative law cases as compared to its sister circuits, as a result of various statutes vesting the court with (sometimes exclusive) jurisdiction to hear challenges to agency actions.[360] The nominee has accordingly ruled in numerous cases posing administrative law questions, including some in which the sitting panel was divided. In such cases, he authored a considerable number of concurring and dissenting opinions that articulate his understanding of the disputed legal issue.

Perhaps most notably, Judge Kavanaugh wrote a number of separate opinions to explain his disagreement with other judges' views concerning the scope of a federal agency's statutory authority, reflecting a tendency to view agency attempts to expand their regulatory power with skepticism. In particular, echoing Justice Kennedy's recent concurrence, as well as similar opinions from other Justices,[361] the nominee has signaled some discomfort with the *Chevron* framework, possibly indicating a willingness to cabin that doctrine to certain circumstances. To the extent his past opinions and scholarly work reflect how he would approach such matters if confirmed to the Supreme Court, he might be a vote to limit the circumstances in which courts defer under the *Chevron* doctrine to federal agencies. Before delving into the nominee's views on *Chevron* deference, however, this section first examines Judge Kavanaugh's writings on the

[354] CRS Legislative Attorney Jared P. Cole authored this section of the report.

[355] *See generally* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 1–2 (5th ed. 2010).

[356] *See CRS Kennedy Report*, *supra* note 17.

[357] Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018).

[358] 467 U.S. 837 (1984).

[359] *See*, *e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 224 (2009); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 100 (2007); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 21 (2007).

[360] *See* discussion *supra* in *Predicting Nominees' Future Decisions on the Court*.

[361] *See*, *e.g.*, City of Arlington v. FCC, 569 U.S. 290, 323 (2013) (Roberts, C.J., dissenting, joined by Kennedy and Alito, JJ.) (arguing that courts should not apply *Chevron* deference to an agency's jurisdictional determination of the scope of its own authority); Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

threshold issue of when litigants may challenge agency actions in court. It then turns to the nominee's approach to agency interpretations of their statutory authority, including the *Chevron* framework, and concludes with an examination of the nominee's views with regard to discretionary and factual review of agency decisions.

## Justiciability Issues

An important threshold issue in administrative law cases concerns whether an agency action is suitable for judicial review in a particular case.[362] The nominee's views in this area contrast somewhat with that of one of his judicial heroes,[363] Justice Scalia, who authored a number of opinions that interpreted Article III of the Constitution to prevent federal courts from hearing challenges to agency actions.[364] In particular, Justice Scalia had relatively influential views on the constitutional requirements for individuals to establish standing to seek judicial relief from an Article III court, considering the standing doctrine to be an important limitation on the jurisdiction of federal courts and essential to preserving the broader principle of separation of powers.[365] In contrast, while the nominee has certainly applied the Supreme Court's case law to dismiss a case on standing grounds,[366] Judge Kavanaugh does not appear to take an especially restrictive view of standing under Article III, especially relative to his colleagues on the D.C. Circuit. In a number of cases that divided the D.C. Circuit, Judge Kavanaugh has departed from his colleagues to vote in favor of allowing individuals to challenge agency actions in court.[367]

In particular, Judge Kavanaugh has often found that plaintiffs established standing to sue federal agencies under Article III, even when his colleagues ruled to dismiss the suit. For instance, in *Morgan Drexen, Inc. v. CFPB*, a corporation subject to a CFPB enforcement action and an attorney who contracted with that corporation by hiring it to perform paralegal services, brought

[362] This assessment may be informed by constitutional, prudential, and statutory considerations. *See* Lujan v. Defs. of Wildlife, 504 U.S 555, 560 (1992); Bennett v. Spear, 520 U.S. 154, 162 (1997).

[363] *See* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[364] *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) (holding that environmental organizations lacked standing to challenge U.S. Forest Service regulations exempting small fire-rehabilitation and timber-salvage projects from the notice, comment, and appeal process); Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 109 (1998) (holding that organization lacked standing to employ the citizen suit provision of an environmental statute against a private party for violating reporting requirements where the complaint alleged only past infractions, and not a continuing violation or the likelihood of a future violation, meaning that court-ordered injunctive relief would not redress the organization's injuries).

[365] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 881 (1983). Justice Scalia's opinion in *Lujan*, 504 U.S. 555, is an important case in modern standing law. In that case, Justice Scalia clarified that in order to establish standing under Article III, parties must show an injury in fact caused by the defendants that would be redressable by judicial relief. *Id.* at 560–61.

[366] *See, e.g.*, State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48, 57 (D.C. Cir. 2015) (ruling that state plaintiffs lacked standing to challenge the orderly liquidation authority of the government under the Dodd-Frank Act); Am. Bird Conservancy, Inc. v. FCC, 516 F.3d 1027, 1036 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); Fla. Bankers Ass'n v. Dep't of the Treasury, 799 F.3d 1065, 1072 (D.C. Cir. 2015).

[367] *See, e.g.*, John Doe Co. v. CFPB, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Morgan Drexen, Inc. v. CFPB, 785 F.3d 684, 698 (D.C. Cir. 2015) (Kavanaugh, J., dissenting); Grocery Mfrs. Ass'n v. EPA, 704 F.3d 1005, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting from denial of rehearing en banc); Ege v. Dep't of Homeland Sec., 784 F.3d 791, 797 (D.C. Cir. 2015) (Kavanaugh, J., concurring); Koretoff v. Vilsack, No. 09-5286, 2010 U.S. App. LEXIS 25409, at *3 (D.C. Cir. Dec. 13, 2010) (Kavanaugh, J., concurring in denial of panel rehearing); Koretoff v. Vilsack, 614 F.3d 532, 541 (D.C. Cir. 2010); Honeywell Int'l, Inc. v. EPA, 705 F.3d 470, 474 (D.C. Cir. 2013); Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1299 (D.C. Cir. 2007); *see also* Util. Air Regulatory Grp. v. EPA, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring).

suit in federal court challenging the agency's structure as unconstitutional.[368] The D.C. Circuit majority panel ruled that the attorney did not have Article III standing to sue because she failed to establish an injury—an enforcement action against the corporation she contracts with was insufficient to satisfy this requirement.[369] The nominee wrote a dissenting opinion, arguing that courts have "a tendency to make standing law more complicated than it needs to be."[370] To Judge Kavanaugh, because the CFPB was regulating a business that the attorney engaged in through the corporation, she had established Article III standing and her suit should not have been dismissed.[371]

Similarly, in *Grocery Manufacturers Ass'n v. EPA*, discussed in more detail below,[372] the majority panel ultimately denied a food group's petition to review an EPA decision because it lacked prudential standing.[373] The majority found the food group was not within the "zone of interests" protected by the relevant statute, although one judge on the panel noted he would also have held that the food group lacked Article III standing.[374] In that case, the EPA issued a waiver with regard to ethanol use for entities that competed with the food groups in the market for the purchase of corn, the effect of which would increase the price of corn for the food group.[375] Judge Kavanaugh dissented, arguing, among other things, that under the D.C. Circuit's "competitor standing cases," an entity does indeed have Article III standing to challenge agency regulations in situations where an agency regulates an entity's economic competitor in a manner that harms the entity's interests.[376]

Likewise, in *Ege v. Department of Homeland Security*, a plaintiff brought suit seeking removal of his name from the government's No-Fly List.[377] The majority panel found the plaintiff lacked Article III standing because, while the court had statutory jurisdiction over the Transportation Security Administration (TSA), it did not possess jurisdiction to issue an order binding on the Terrorist Screening Center, the entity with responsibility for removing names from the List.[378] Judge Kavanaugh wrote separately, arguing that the plaintiff established Article III standing and had followed the appeals process mandated by Congress and properly petitioned the D.C. Circuit for review of the TSA's final order.[379] The nominee observed that the TSA, the agency that actually controls access to planes, conceded it would comply with a court order directing it to allow the plaintiff on a plane.[380] For Judge Kavanaugh, this was sufficient to establish standing under Article III.[381]

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[368] *Morgan Drexen*, 785 F.3d at 687.

[369] *Id.* at 689–93.

[370] *Id.* at 698 (Kavanaugh, J., dissenting).

[371] *Id*.

[372] *See* discussion *infra* in *Environmental Law*.

[373] Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 179 (D.C. Cir. 2012).

[374] *Id.* Chief Judge David B. Sentelle would have found that the food group lacked Article III standing, but voted with Judge Tatel to dismiss the claims of the food group because it lacked prudential standing. *Id.* at 179–80 n.1 (Sentelle, C.J., concurring).

[375] *Id.* at 172–73; *id.* at 182–83 (Kavanaugh, J., dissenting).

[376] *Id.* at 182–83 (Kavanaugh, J., dissenting).

[377] 784 F.3d 791, 792–93 (D.C. Cir. 2015).

[378] *Id.* at 795–96.

[379] *Id.* at 797 (Kavanaugh, J., concurring in the judgment).

[380] *Id.*

[381] *Id.*

Beyond constitutional standing issues, Judge Kavanaugh has written several opinions aiming to clarify what he considers the D.C. Circuit's muddled approach to prudential standing questions. For instance, as mentioned above, in *Grocery Manufacturers Ass'n v. EPA*, the majority panel ultimately denied a food group's petition to review an EPA decision because it lacked prudential standing as it was not in the "zone of interests" protected by the relevant statute.[382] In addition to his point concerning Article III standing,[383] Judge Kavanaugh wrote separately to argue that the majority's conclusion that the zone of interests test is jurisdictional—meaning it concerns the power of a court to hear a case and requires the court to consider the issue even though the EPA did not raise it—was incorrect in light of recent Supreme Court decisions.[384] According to the nominee, the zone of interests test simply asks whether a statute provides a cause of action to a party to bring suit.[385] The following year, the Supreme Court in a unanimous decision favorably cited the nominee's opinion on this point.[386]

Similarly, in *White Stallion Energy Center v. EPA*, also discussed in more detail below,[387] the majority panel denied petitions challenging an EPA regulation that set emission standards for certain air pollutants emitted by electric steam generating units.[388] With respect to one plaintiff, the majority panel found that, although the party established standing under Article III to bring its challenge in federal court, it nevertheless was not within the zone of interests protected by the Clean Air Act because it was challenging the EPA's failure to more stringently regulate its competitors.[389] Judge Kavanaugh wrote separately to again note his concern with the D.C. Circuit's application of the "zone of interests" test, case law he described as "in a state of disorder" that "needs to be cleaned up."[390] The nominee noted that under the Supreme Court's zone of interests test, there is a "presumption in favor of allowing suit . . . unless the [relevant] statute evinces discernible congressional intent to preclude review."[391] Further, under Supreme Court precedent, plaintiffs challenging an agency's alleged failure to regulate sufficiently its competitors are "presumptively within the zone of interests under the APA . . . absent discernible evidence of contrary congressional intent."[392] Despite the Supreme Court's permissive application of the zone of interests test, Judge Kavanaugh noted, the D.C. Circuit has sometimes required evidence of an intent to benefit the plaintiff class within the relevant statute in order to fall with its zone of interests, essentially applying a presumption against allowing suit.[393] Further, the nominee asserted, the D.C. Circuit at times barred competitors from suing as they were outside of the relevant statute's zone of interest, but at others permitted such suits "without any apparent

[382] 693 F.3d 169, 175–79 (D.C. Cir. 2012). The panel also ruled that another group lacked standing under Article III to bring suit. *Id.*

[383] *Id.* at 182–83 (Kavanaugh, J., dissenting).

[384] *Id.* at 183–85.

[385] *Id.* Judge Kavanaugh also wrote that the parties were nonetheless within the zone of interests under the Supreme Court's recent decision applying the test in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 211 (2012). *Grocery Mfrs. Ass'n*, 693 F.3d at 186 (Kavanaugh, J., dissenting).

[386] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.4 (2014).

[387] *See* discussion *infra* in *Environmental Law*.

[388] 748 F.3d 1222, 1229 (D.C. Cir. 2014), *rev'd sub nom.* Michigan v. EPA, 135 S. Ct. 2699 (2015).

[389] *Id.* at 1256–58.

[390] *Id.* at 1259 (Kavanaugh, J., concurring in part and dissenting in part).

[391] *Id.* at 1269.

[392] *Id.*

[393] *Id.* at 1270–71.

distinguishing principle."[394] Judge Kavanaugh thus urged the court to reconsider carefully its "crabbed approach to the zone of interests test" and align its cases with Supreme Court precedent.[395]

## Statutory Review

Another critical area of administrative law to consider when evaluating Judge Kavanaugh is his approach to when a court must review an administrative agency's legal interpretations. Under the Administrative Procedure Act (APA),[396] courts must set aside agency action that is "not in accordance with law" or that is "in excess of statutory jurisdiction, authority, or limitations."[397] Pursuant to the Supreme Court's framework from *Chevron*, courts generally apply a two-step analysis when reviewing an agency's interpretation of a statute it administers.[398] At step one, a court must generally determine whether Congress "has spoken to the precise question at issue."[399] If so, courts must enforce the clear meaning of the statute, notwithstanding an agency's contrary interpretation.[400] If a statute is silent or ambiguous on the matter, however, *Chevron*'s second step requires a court to defer to an agency's interpretation if it is reasonable.[401] Under a related, but distinct doctrine, the Supreme Court's opinions in *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co*. instruct courts generally to defer to an agency's interpretation of its own *regulations* as long as that reading is reasonable.[402]

*Applying* Chevron. In his writings on and off the court, Judge Kavanaugh has questioned broader readings of both *Chevron* and *Auer*. In his non-judicial writings, the nominee has argued that the *Chevron* doctrine establishes improper incentives for federal agencies, encouraging regulators to push the boundaries of their statutory authority and take actions unless they are "*clearly forbidden*."[403] Further, the nominee has noted that the mechanics of applying the *Chevron*

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[394] *Id.* at 1271.

[395] *Id.* at 1272–73.

[396] 5 U.S.C. §§ 551–59.

[397] *Id.* § 706(2)(A), (C).

[398] 467 U.S. 837 (1984). The Court has explained that *Chevron* deference does not apply to every agency statutory interpretation; in determining whether *Chevron* deference is appropriate, courts must examine whether Congress delegated to the agency authority to "speak with the force of law," and the relevant interpretation was "promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226–27, 229 (2001). In a series of cases, the Supreme Court has limited *Chevron*'s applicability by introducing a threshold inquiry that uses a multifactor balancing test to determine whether the two-step *Chevron* analysis is appropriate. *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002); Christensen v. Harris Cty., 529 U.S. 576, 587 (2000). This threshold inquiry is often referred to as *Chevron* "step zero." *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). For more on the *Chevron* doctrine, see CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

[399] *Chevron*, 467 U.S. at 842.

[400] *Id.* at 842–43.

[401] *Id.* at 843. Even when the *Chevron* framework of review does not apply, a court may still give some weight to an agency's interpretation of a statute. Under the Supreme Court's opinion in *Skidmore v. Swift & Co.*, when an agency leverages its expertise to interpret a "regulatory scheme" that is "highly detailed," courts may accord an agency's interpretation "a respect proportional to its 'power to persuade.'" *Mead Corp.*, 533 U.S. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[402] 519 U.S. 452, 461 (1997); 325 U.S. 410, 413–14 (1945).

[403] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2151 ("We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope (a philosophy that, I should note, seems present in the administrations of both political parties). After all, an executive branch decisionmaker might theorize, 'If we can just convince a court that the statutory provision is ambiguous, then our interpretation of the statute should pass muster as reasonable. And we can achieve an important policy goal if our interpretation of the statute is

framework are imprecise.[404] *Chevron* requires courts to enforce the clear meaning of a statute at step one, and only to move to step two when a statute is "ambiguous."[405] To Judge Kavanaugh, however, the degree of clarity required in a statute to conclude that its terms are "clear" is uncertain, resulting in uneven application of this test by federal courts.[406] For his part, Judge Kavanaugh has indicated that his threshold for finding ambiguity in a statute—thereby triggering deference under the *Chevron* framework—is likely higher compared to other judges.[407]

While Judge Kavanaugh has written opinions that apply the *Chevron* doctrine and defer at its second step to agencies' reasonable interpretations of statutory ambiguity,[408] his separate opinions often reflected his larger concerns about the *Chevron* framework.[409] For example, when the *Chevron* doctrine applies to an agency's interpretation of a statutory provision, Judge Kavanaugh may be more likely than other judges to find clarity, rather than ambiguity, in a statutory provision.[410] The nominee wrote separately, for example, when the majority found a statute

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accepted. And isn't just about every statute ambiguous in some fashion or another? Let's go for it.'").

[404] Kavanaugh, *Role of the Judiciary*, *supra* note 24.

[405] *See supra* note 401.

[406] Kavanaugh, *Role of the Judiciary*, *supra* note 24.

[407] *Id.*

[408] *See, e.g.*, Ill. Pub. Telecomms. Ass'n v. FCC, 752 F.3d 1018, 1023 (D.C. Cir. 2014); Nat. Res. Def. Council v. EPA, 749 F.3d 1055, 1060 (D.C. Cir. 2014).

[409] *See, e.g.*, Lorenzo v. SEC, 872 F.3d 578, 601 (D.C. Cir. 2017), *cert. granted sub nom.* Lorenzo v. SEC, No. 17-1077, 2018 U.S. LEXIS 3813 (U.S. June 18, 2018) ("For decades, however, the SEC has tried to erase that distinction so as to expand the scope of primary liability under the securities laws."); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 403 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (criticizing the majority for failing "to fairly engage [with *Chevron*], both overrating the role of the statutory ambiguity here and underrating the application of the clear statement rule to major questions"); Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 734–35 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (arguing that, whether under *Chevron* or *State Farm*, an agency "must consider the costs of its actions unless Congress has barred consideration of costs"); White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1261 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom.* Michigan v. EPA, 135 S. Ct. 2699 (2015) (arguing that agency's failure to consider costs of regulation fails under *Chevron* Step 2 or under *State Farm*); Texas v. EPA, 726 F.3d 180, 203 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (arguing that EPA orders could not be squared with plain text of EPA regulations); Ctr. for Biological Diversity v. EPA, 722 F.3d 401, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("But in addition to the reasons given in Judge Tatel's opinion for the Court, which I join in full, I would say that none of those doctrines applies in this case for an even more fundamental reason: The doctrines do not trump the fact that EPA simply lacks statutory authority to distinguish biogenic carbon dioxide from other forms of carbon dioxide for purposes of the PSD and Title V permitting programs."); Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *63 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc) (concluding that EPA "had exceeded its statutory authority"); Ne. Hosp. Corp. v. Sebelius, 657 F.3d 1, 11, 18 (D.C. Cir. 2011) (Kavanaugh, concurring in the judgment) ("Because HHS misapplied the statute, I would rule for Beverly Hospital and affirm the judgment of the District Court on that ground."). *See also* Howmet Corp. v. EPA, 614 F.3d 544 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("I would reject EPA's interpretation of its 1985 regulations as contrary to the clear language of the regulations."); Cablevision Sys. Corp. v. FCC, 597 F.3d 1306 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("The FCC's exclusivity ban thus is no longer necessary to further competition. . . . I would hold that the FCC's exclusivity rule violates the First Amendment, and thus also violates the 1992 Cable Act as construed to conform to the First Amendment."); Agri Processor Co. v. NLRB, 514 F.3d 1, 10 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("I would vacate the Board's order upholding the union election because the Board's order rested on the incorrect conclusion that illegal immigrant workers are 'employees' under the NLRA."). *But see* Competitive Enter. Inst. v. Dep't of Transp., 863 F.3d 911 (D.C. Cir. 2017) (Kavanaugh, J., concurring); Miller v. Clinton, 687 F.3d 1332 (D.C. Cir. 2012); Sierra Club v. EPA, 536 F.3d 673 (D.C. Cir. 2008). Judge Kavanaugh has also written separately to invalidate agency actions on the grounds that an agency's structure violated the Constitution. *See* discussion *infra* in *Separation of Powers*.

[410] *See* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2137 ("I tend to be a judge who finds clarity more readily than some of my colleagues but perhaps a little less readily than others."). For more on the canons of construction Kavanaugh utilizes in statutory interpretation, see discussion *supra* in *Statutory Interpretation*.

ambiguous and eligible for *Chevron*'s second step, while Judge Kavanaugh found the statute's meaning clear and would resolve the case at *Chevron*'s first step.[411]

For instance, in *Northeast Hospital Corp. v. Sebelius*, a panel of the D.C. Circuit examined whether the Medicare statute authorized certain patients to receive benefits under separate provisions of the law.[412] The majority opinion first applied the *Chevron* doctrine and held that the law did not "clearly foreclose[]" the agency's interpretation as Congress had "left a statutory gap" that the agency was entrusted to fill.[413] The court ultimately rejected the agency's position, however, because the agency improperly applied its interpretation retroactively.[414] Judge Kavanaugh wrote a concurring opinion to express disagreement with the majority opinion's finding of ambiguity. The nominee concluded that the statute was sufficiently clear and the agency's interpretation contradicted the law.[415] He observed that while the legal questions in the case were "embedded within a very complex legal scheme,"[416] the ultimate issue could be resolved by interpreting a specific provision of the law, not the entire Medicare statute.[417] While it may take time and effort to determine the meaning of a statutory provision given a complex statutory backdrop, Judge Kavanaugh noted, that did not itself mean the statute was ambiguous.[418] "What matters," he continued, "for the *Chevron* analysis is not how long it takes to climb the statutory mountain; what matters is whether the view is sufficiently clear at the top."[419]

Ultimately, because of Judge Kavanaugh's apparent penchant for finding clarity in statutory terms, he is more likely to resolve a case at *Chevron*'s first step, rather than at step two.[420] In other words, when reviewing a federal agency's interpretation of a statute it administers, to the extent that the nominee finds congressional intent clear in a statutory provision, he is more likely to independently analyze an agency's assertion of authority at *Chevron*'s first step, rather than find a statute ambiguous and potentially defer to an agency's reasonable interpretation at *Chevron*'s second step.[421] In this vein, the nominee's methodology echoes the approach of a

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[411] *See, e.g.*, Competitive Enter. Inst. v. Dep't of Transportation, 863 F.3d 911, 921 (D.C. Cir. 2017) (Kavanaugh, J., concurring) ("Even without affording *Chevron* deference to the Department's interpretation of the statute, I would still reach the same result in this case. In my view, although it is a close call, the better interpretation of the term 'smoking' in this statute covers e-cigarettes as well as conventional tobacco cigarettes."); White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1264–65 (D.C. Cir. 2014), *rev'd sub nom.* Michigan v. EPA, 135 S. Ct. 2699 (2015) ("The majority opinion here says that the term 'appropriate' is ambiguous. But the Supreme Court often looks to legislative history to help inform interpretation of otherwise ambiguous statutes, including in *Chevron* cases. And here, the legislative history should resolve any lingering ambiguity on the key point of what 'appropriate' encompasses. It establishes that Congress in 1990 chose to impose these threshold requirements on EPA specifically because it wanted EPA to consider costs before regulating electric utilities under the MACT program." (citations omitted)).

[412] 657 F.3d 1, 5–13 (D.C. Cir. 2011).

[413] *Id.* at 13. The majority opinion did not decide whether the agency's construction of the statute was reasonable at step 2 because it concluded that the agency could not apply its interpretation retroactively. *Id.* at 13–14.

[414] *Id.* at 13–17.

[415] *Id.* at 24 (Kavanaugh, J., concurring).

[416] *Id.* at 19.

[417] *Id.*

[418] *Id.*

[419] *Id.*

[420] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984).

[421] One study that examined a number of federal judges' tendencies when reviewing agency actions concluded that Judge Kavanaugh was relatively even-handed in applying the *Chevron* doctrine to agency decisions on both sides of the political spectrum. *See* Kent Barnett, Christina Boyd, & Christopher Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. (forthcoming 2018) (manuscript at 50).

majority of the Supreme Court in *Wisconsin Central Ltd. v. United States*,[422] a case last term where a five-Justice majority applied a more rigorous inquiry at *Chevron's* first step than the dissenters to find a statutory provision unambiguous.[423]

Judge Kavanaugh's approach to such issues might also reflect agreement with an underlying tension commentators have observed with *Chevron*'s second step; namely, that a court's task at step two essentially elides any distinction between questions of law and questions of policy.[424] In other words, according to this view, when a court defers under *Chevron*'s second step, it sometimes upholds an agency's legal interpretation of a statutory term, but at other times it is effectively affirming a reasonable policy choice made within the limits of congressionally delegated authority. Judge Kavanaugh arguably aims to distinguish more clearly between questions of law, on which courts should, in his view, retain interpretive authority, and policy, in which agencies exercise broader discretion to reach decisions according to their respective statutory delegations.

*Major Questions Doctrine.* Perhaps in an effort to urge more clarity and certainty in statutory review cases, Judge Kavanaugh has stressed that agencies need clear authorization from Congress to pass regulations with major economic and political significance,[425] a concept the Supreme Court first enunciated in *FDA v. Brown & Williamson Tobacco Corp.*[426] For example, as explained in more detail below,[427] in *Coalition for Responsible Regulation, Inc. v. EPA*, the nominee dissented from a denial of rehearing en banc, arguing that the EPA had exceeded its statutory authority in promulgating certain regulations to curb global warming.[428] Judge Kavanaugh explained that the agency was faced with two competing interpretations of its authority under the Clean Air Act, the broader of which would create absurd results given other requirements in the statute.[429] But rather than choose the narrow, more plausible interpretation of its power, the EPA nevertheless adopted the broader reading of its authority—which would impose permitting requirements on a far larger number of entities—and simply, in the nominee's view, "re-wrote" via regulation those aspects of the statute that triggered implausible results.[430] Judge Kavanaugh rejected this reading of the statute, remarking that such an approach "could significantly enhance the Executive Branch's power at the expense of Congress's."[431] After

[422] Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074–75 (2018).

[423] In that case, the Court held that employee stock options do not qualify as "taxable" compensation under the Railroad Retirement Tax Act because such options do not count as "money remuneration." *Id.* Justice Breyer's dissenting opinion found the statutory language ambiguous and would have deferred to the government's reading as a reasonable construction of a statutory gap. *Id.* at 2075–80 (Breyer, J., dissenting). But Justice Gorsuch, in the majority opinion, found the statute unambiguous and ruled against the government. *Id.* at 2074–75 (majority opinion). In reaching this conclusion, the Court did not claim that the statute expressly addressed the issue, but instead looked to the broader statutory context and structure and concluded the statute was "clear enough that the term 'money' excludes 'stock.'" *Id.* at 2074.

[424] *See* Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1087 (2016); Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990).

[425] For more on the tools of construction Judge Kavanaugh used when interpreting statutes, see discussion *supra* in *Statutory Interpretation*.

[426] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000).

[427] *See* discussion *infra* in *Environmental Law*.

[428] Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *63 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[429] *Id.* at 15.

[430] *Id.* The Supreme Court ultimately reversed the D.C. Circuit's decision upholding the EPA rule and cited favorably to Judge Kavanaugh's dissent on this point. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014).

[431] *Coal. for Responsible Regulation*, 2012 U.S. App. LEXIS 25997, at *69 (Kavanaugh, J., dissenting from denial of

noting several reasons why he thought the EPA's broad interpretation was not supported by the statute,[432] the nominee observed that the EPA's proffered reading would significantly increase the number of entities subject to regulation, which, in turn, "will impose enormous costs on" businesses, homeowners, and the economy-at-large.[433] Judge Kavanaugh argued that there was no indication that Congress intended such a "dramatic expansion" of the requirements of the statute, pointing to the Supreme Court's admonition in *Brown & Williamson* that when Congress intends to delegate authority to regulate matters with major "economic and political significance," it does so clearly.[434]

Another case emblematic of this approach is Judge Kavanaugh's dissenting opinion in *SeaWorld of Florida, LLC v. Perez*.[435] This case concerned a citation issued by the Secretary of Labor to SeaWorld of Florida, LLC (SeaWorld) for violating the Occupational Safety and Health Act's (OSHA's) "general duty" clause, which requires employers to provide employees with a workplace free of "recognized hazards" that may cause death or serious physical harm.[436] SeaWorld violated the statute, according to the Secretary, when it exposed animal trainers who conducted performances with killer whales to recognized hazards of injury or drowning.[437] The D.C Circuit panel majority denied a petition for review of the citation, concluding that the agency's decision was not arbitrary and capricious, and that it was supported by substantial evidence.[438]

Judge Kavanaugh dissented, concluding that, under current law, the Department of Labor (DOL) was not authorized to regulate these activities.[439] The nominee noted that the DOL is charged with ensuring that employers provide a reasonably safe workplace for their employees, and OSHA requires employers to provide employees with employment free from "recognized hazards" likely to cause death or physical harm.[440] But, according to Judge Kavanaugh, the DOL had "not traditionally tried to stretch its general authority under the Act" to regulate the normal activities of participants in sports events or entertainment shows.[441] Nonetheless, the nominee found, the Department here "departed from tradition and stormed headlong into a new regulatory arena."[442] Judge Kavanaugh explained that, under a prior decision from the Occupational Safety and Health Review Commission that binds the Department, hazards intrinsic to an industry's normal activities are not subject to penalties under OSHA because the alternative interpretation would potentially eliminate industries that are by nature dangerous.[443] The DOL thus lacked, in the

rehearing en banc).

[432] *Id.* at 16–17.

[433] *Id.* at 18.

[434] *Id.* (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000)).

[435] SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1218 (D.C. Cir. 2014) (Kavanaugh, J., dissenting). For more on Judge Kavanaugh's opinion in this case, see discussion *infra* in *Business Law*.

[436] *See* 29 U.S.C. § 654(a)(1).

[437] *SeaWorld*, 748 F.3d at 232. The Secretary of Labor's citation was reviewed by an administrative law judge (ALJ), whose decision became final when the Occupational Safety and Health Review Commission declined to review the ALJ's decision. *Id.* at 231–33.

[438] *Id.* at 241–43.

[439] *Id.* at 244 (Kavanaugh, J., dissenting). Judge Kavanaugh concluded that the Department lacked legal authority to regulate SeaWorld's shows, and that its decision to do so was arbitrary and capricious. *Id*. at 243–47.

[440] *Id.* at 244; *see* 29 U.S.C. § 654(a)(1).

[441] *SeaWorld*, 748 F.3d at 244 (Kavanaugh, J., dissenting).

[442] *Id.* at 244.

[443] *Id.* at 244–45.

nominee's view, the authority to "regulate the normal activities of participants in sports events or entertainment shows" such as SeaWorld.[444] Moreover, as he did in *Coalition for Responsible Regulation*, Judge Kavanaugh pointed to the Supreme Court's admonition in *Brown & Williamson* that when Congress delegates authority to regulate substantial areas of economic and political significance, it does so clearly.[445] Thus, the nominee concluded, when passing OSHA Congress was well aware of the dangers of various popular sports and entertainment shows, and "it is simply not plausible" that Congress intended to authorize implicitly the Department, through the vague terms of OSHA, to regulate the sports and entertainment industry, including by eliminating familiar practices in those industries.[446]

Perhaps most prominently, Judge Kavanaugh returned to these considerations in a dissent from a denial of rehearing en banc in *United States Telecom Ass'n v. FCC*, wherein he articulated a fairly stringent judicial framework for evaluating certain agency regulations that implicate so-called "major questions."[447] This case concerned the FCC's net neutrality rule, which reclassified broadband Internet service providers (ISPs) as offering a telecommunications service, rather than an information service, thereby subjecting them to common carrier regulation under the Communications Act of 1934.[448] The panel majority, applying *Chevron*, concluded the FCC's regulation was a reasonable interpretation of an ambiguous statute and thus upheld the rule at *Chevron*'s second step.[449] Judge Kavanaugh, however, concluded that the agency lacked authority to issue the regulations.[450] Drawing on various Supreme Court cases establishing what he referred to as the "major rules doctrine" (or "major questions doctrine"), including *Brown & Williamson*, he argued that when courts review agency rules, "two competing canons of statutory interpretation come into play."[451] According to the nominee, on the one hand, the *Chevron* framework applies to "ordinary rules"; but, on the other, "Congress must *clearly* authorize" agencies to issue "major agency rules of great economic and political significance."[452] If Congress only "*ambiguously* supplies authority for the major rule, the rule is unlawful."[453] In other words, according to Judge Kavanaugh, while the *Chevron* doctrine permits agencies to issue

[444] *Id.*

[445] *Id.* at 247–48 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000)).

[446] *Id.* at 248.

[447] *Compare* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 418–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc), *with id.* at 382–88 (majority opinion). *See* Mila Sohoni, King's *Domain*, 93 NOTRE DAME L. REV. 1419, 1434 (2018).

[448] *See* 47 U.S.C. § 153(31).

[449] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 706 (D.C. Cir. 2016).

[450] *U.S. Telecom*, 855 F.3d at 418 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[451] *Id.* 419, 421. The Supreme Court has declined to uphold agency statutory interpretations in a number of cases posing questions of major economic and political significance, but has not adopted the term "major questions doctrine." Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 n.3 (2016) (listing other scholarly labels for the doctrine, and noting "the Court itself does not use a particular name"). It bears mention that Judge Kavanaugh's application of the major questions doctrine finds support in some, but not all Supreme Court cases considering whether agency interpretations of statutes raising questions of "economic and political significance" fit within the *Chevron* framework itself. *Compare* City of Arlington v. FCC, 569 U.S. 290, 303–04 (2013) (noting that *Chevron* applied in *FDA v. Brown & Williamson Tobacco Corp.*, which posed a question of "vast 'economic and political magnitude'" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))), *with* King v. Burwell, 135 S. Ct. 2480, 2487 (2015) (noting that because the issue was of "deep 'economic and political significance,'" the *Chevron* framework was inapplicable (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014))).

[452] *U.S. Telecom Ass'n*, 855 F.3d at 419.

[453] *Id.*

ordinary rules based on statutory ambiguity, "the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules."[454]

While acknowledging that the Supreme Court had not established a bright-line rule distinguishing major rules from non-major ones, the FCC net neutrality rule, in Judge Kavanaugh's view, clearly qualified as a major rule for purposes of the major rules doctrine.[455] The nominee based this conclusion on several factors that mirrored situations in which the Supreme Court previously found a rule to be "major": the agency was basing its authority on a "long-extant statute"; the net neutrality rule affected a vast number of companies and consumers by "fundamentally transform[ing] the Internet," taking its control away from the people and giving it to the government; and the financial impact of the rule was "staggering."[456] Because Congress did not clearly authorize the FCC to promulgate the net neutrality rule, Judge Kavanaugh ultimately concluded it was invalid.[457]

Judge Kavanaugh's approach to the major questions doctrine seems notable in at least two ways. First, at least relative to his colleagues on the D.C. Circuit, the nominee appears to have a lower threshold when considering whether regulatory actions constitute "major rules" that require clear congressional authorization.[458] To the extent that the nominee takes an expansive view of what regulations fall into the "major rules doctrine" rubric, his approach would flatly deny application of the *Chevron* framework to a number of agency rules.[459] Accordingly, if confirmed to the

[454] *Id*.

[455] *Id*.

[456] *Id*. at 423.

[457] *Id*. at 424. Importantly, Judge Kavanaugh conceded that a prior Supreme Court opinion, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), ruled that the statute was ambiguous "about whether Internet service was . . . a telecommunications service," a ruling that would generally result in deference to the agency on the question under *Chevron*. *U.S. Telecom Ass'n*, 855 F.3d at 419, 425–26 (Kavanaugh, J., dissenting from denial of rehearing en banc). But the nominee distinguished that case because the Court had simply upheld the FCC's earlier decision to classify Internet service over cable as an information service, which resulted in the imposition of only minimal regulations on service providers. *Id.* For the nominee, the Court had simply upheld an "ordinary rule" under the *Chevron* framework. *Id.* at 426 n.5. Here, by contrast, the FCC promulgated a major rule by reclassifying Internet service as a telecommunications service, imposing substantial new common-carrier regulations on ISPs. *Id.* at 425–26. Under the major rules doctrine, the FCC could not, in Judge Kavanaugh's view, rely on statutory ambiguity to justify the imposition of these new regulations; instead, the rule was invalid absent clear statutory authorization. *Id.*

[458] *Id.* at 418–26 (per curiam); SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1218 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *63 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc). *See* Sohoni, *supra* note 447, at 1436–37 (arguing that Judge Kavanaugh's decision in *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932 (D.C. Cir. 2017), indicates that his threshold for finding a rule to be "major" for purposes of the major rules doctrine is low).

[459] Judge Kavanaugh has also indicated in other cases that concerns about the significance of an agency's regulation might counsel skepticism toward its actions. *See, e.g.*, Loving v. IRS, 742 F.3d 1013, 1021 (D.C. Cir. 2014) ("If we were to accept the IRS's interpretation of Section 330, the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry. Yet nothing in the statute's text or the legislative record contemplates that vast expansion of the IRS's authority. This is the kind of case, therefore, where the *Brown & Williamson* principle carries significant force."); District of Columbia. v. Dep't of Labor, 819 F.3d 444, 446 (D.C. Cir. 2016) ("The novelty of the U.S. Department of Labor's interpretation strongly buttresses our conclusion that the Act does not apply here."); Multicultural Media, Telecom & Internet Council v. FCC, 873 F.3d 932, 936 (D.C. Cir. 2017) ("If Congress intended to require multi-lingual communications in general, and multi-lingual emergency alerts in particular, we would expect Congress to have spoken far more clearly than it has done in this general statement of policy.").

Supreme Court, Judge Kavanaugh might be a vote to further cabin the reach of the *Chevron* framework in certain circumstances.[460]

Second, in those cases that do raise the question whether a major rule is supported by statutory authority, his encapsulation of a "major rules doctrine" appears to also apply a more stringent analysis of whether an agency is authorized to promulgate a rule than the Supreme Court has in some of the cases the nominee cites for establishing the doctrine.[461] For instance, in *King v. Burwell*, the Court initially decided that, due to its importance, the issue of whether the ACA established tax credits for states with a federal health care exchange was ineligible for the *Chevron* framework, but continued by simply independently examining the statute without a presumption either way.[462] As Judge Kavanaugh explained in *United States Telecom Ass'n*, the approach in *King* might be appropriate in typical, non-major-questions cases where *Chevron* does not apply, as the court "simply determine[s] the better reading of [a] statute" in order to determine if an agency's regulation is authorized.[463] However, under the nominee's approach to major questions, a court places a "thumb on the scale" that requires clear statutory authorization to support a regulation,[464] meaning that not only does *Chevron* not apply in such cases, but that the agency has a heavy burden to demonstrate that its underlying action is lawful.

Auer *Deference.* Judge Kavanaugh's approach to the *Chevron* framework might also extend to other doctrines of deference to agency actions, such as *Auer* deference. In a 2016 speech, the nominee predicted that the dissenting opinion in *Decker v. Northwest Environmental Defense Center*,[465] in which Justice Scalia objected to *Auer* deference because it violates separation of powers principles,[466] will one day become the law.[467] While Judge Kavanaugh does not appear to have made this argument in a judicial opinion, his approach to cases requiring review of an agency's interpretation of its own regulation appears somewhat analogous to his method in

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[460] *See* Sohoni, *supra* note 447, at 1435 ("The approach laid out in [Judge Kavanaugh's] opinion would . . . nullify *Chevron* whenever a statute contains an ambiguity and a court regards an agency's regulatory action premised on that ambiguity as 'major.'"). It is important to note that the Supreme Court is sometimes closely divided as to whether a case merits *Chevron* deference. *See, e.g.*, Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (5-4 ruling finding *Chevron* deference inappropriate). The Court also sometimes disagrees about when the doctrine applies at all. *Compare* City of Arlington v. FCC, 569 U.S. 290, 306–07 (2013) (concluding that *Chevron* deference applies to an agency's interpretation of the scope of its own regulatory authority or jurisdiction), *with id.* at 308–12 (Breyer, J., concurring in part and concurring in the judgment) ("I say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant."), *and id.* at 312–28 (Roberts, C.J., joined by Kennedy & Alito, JJ., dissenting) (arguing that a "court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference").

[461] Sohoni, *supra* note 447, at 1434 (describing Judge Kavanaugh's requirement of clear statutory authorization for major regulations as "shifting the burden of proof" required in traditional statutory interpretation cases); Jeffrey Pojanowski, *Cabining the* Chevron *Doctrine the Kavanaugh Way*, LAW & LIBERTY, (June 12, 2017), http://www.libertylawsite.org/2017/06/12/cabining-the-chevron-doctrine-the-kavanaugh-way/ (noting that Judge Kavanaugh's "restatement of the doctrine came with a twist. After canvassing the Supreme Court's jurisprudence and scholarly commentary, he identified what he dubbed the "–rule" exception to *Chevron* deference," and concluding that this clear statement approach is more stringent than that which is generally applied when courts independently examine the scope of an agency's authority).

[462] King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

[463] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419, 426 n.7 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[464] *Id.*

[465] Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013).

[466] *Id.* at 616–17 (Scalia, J., dissenting).

[467] Kavanaugh, *Justice Scalia*, *supra* note 92, at 17:29.

statutory review cases. In *Howmet Corp. v. EPA*, for instance, the D.C. Circuit panel's majority opinion upheld the EPA's interpretation of what constitutes "spent material" subject to its regulations, concluding that it was a reasonable interpretation of ambiguous language.[468] Judge Kavanaugh wrote a dissenting opinion on the grounds that the EPA's proffered interpretation contradicted the text of its own regulation by expanding its reach.[469] The nominee noted that agencies may not broadly interpret the scope of their own rules in order to "create de facto a new regulation."[470] In Judge Kavanaugh's view, that was precisely what the EPA did, expanding the definition of "spent material" in order to "enlarge its regulatory authority" beyond the terms of the regulation.[471] The nominee thus concluded that the regulations were clear and declined to defer to the agency.[472]

## Discretionary and Factual Review

In contrast to his views on *Chevron* and *Auer* deference, Judge Kavanaugh does not appear to have objections to the deferential approach applied by courts when conducting discretionary and factual review of agency decisions,[473] another major area of administrative law under which courts will invalidate "agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."[474] The nominee appears comfortable with upholding an agency's reasonable policy choice made within the scope of its own statutory authority,[475] although he has invalidated agency decisions that he considered to be arbitrary and capricious.[476] For instance, in

[468] 614 F.3d 544, 553 (D.C. Cir. 2010).

[469] *Id.* at 555 (Kavanaugh, J., dissenting).

[470] *Id.* (quoting Christensen v. Harris Cty., 529 U.S. 576, 588 (2000)).

[471] *Id.*

[472] *Id.*

[473] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2153–54.

[474] 5 U.S.C. § 706(2)(A). The Supreme Court has viewed this provision as requiring agencies to "examine the relevant data and articulate a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[475] Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2153–54. *See, e.g.*, Nw. Corp. v. Fed. Energy Regulatory Comm'n (FERC), 884 F.3d 1176 (D.C. Cir. 2018) (holding that FERC did not act arbitrarily in ordering an electric utility to revise the rate it charges customers based on FERC's determination that the utility's proposed rate for regulation service was not just and reasonable); Energy Future Coal. v. EPA, 793 F.3d 141 (D.C. Cir. 2015) (concluding that EPA regulation was not arbitrary and capricious because, among other things, it was reasonable for the EPA to mandate that manufacturers use the same fuels in emissions testing that vehicles will use on the road and, moreover, the regulation was rooted in the text of the Act); Nat'l Ass'n of Mfrs. v. EPA, 750 F.3d 921 (D.C. Cir. 2015) (holding that the EPA acted reasonably when it promulgated a rule tightening the emissions standards for particulate matter); Nuvio Corp. v. FCC, 473 F.3d 302, 310 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (agreeing that the agency acted reasonably in requiring that voice-over-Internet-providers ensure adequate 911 connections within 120 days of the agency's order). A court's role in assessing whether an agency action is arbitrary and capricious overlaps somewhat with the analysis at *Chevron*'s second step, which assesses the reasonableness of an agency's interpretation of an ambiguous statute. *See* Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011).

[476] *See, e.g.*, St. Francis Med. Ctr. v. Azar, No. 17-5098, 2018 U.S. App. LEXIS 17878 (June 29, 2018) (Kavanaugh, J., concurring); Laccetti v. SEC, 885 F.3d 724 (D.C. Cir. 2018) (holding that the PCAOB acted arbitrarily and capriciously by denying request for accounting expert to be present during an investigative interview.); S. New England Tel. Co. v. NLRB, 793 F.3d 93, 96 (D.C. Cir. 2015) ("In this case, we conclude that the Board applied the 'special circumstances' exception in an unreasonable way."); Ind. Boxcar Corp. v. R.R. Ret. Bd., 712 F.3d 590, 591 (D.C. Cir. 2013) (holding that the Railroad Retirement Board's decision was arbitrary and capricious because it did not adhere to its own precedent and failed to explain reasonably or justify its deviation); *see also* City of South Bend v. Surface Transp. Bd., 566 F.3d 1166 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("Our deference in applying the arbitrary and capricious standard has limits.").

*American Radio Relay League, Inc. v. FCC*, the D.C. Circuit examined a rule issued by the FCC concerning the use of electric power lines for broadband Internet access.[477] The majority panel voted to remand the rule for further explanation because the agency had not sufficiently explained why it chose not to change the "extrapolation factor" used to measure the interference caused by broadband over power lines.[478] Judge Kavanaugh wrote separately to dissent from this aspect of the panel's ruling, concluding that the agency's rule should be upheld as it had sufficiently explained its reasoning.[479] The nominee noted that the FCC's choice of an extrapolation factor was "a highly technical determination committed to the Commission's expertise and policy discretion," and the agency's explanation that the evidence was not sufficiently conclusive to merit a change was sufficient.[480] Judge Kavanaugh also noted that lower courts have transformed the "narrow" scope of review that the Supreme Court has applied pursuant to the arbitrary and capricious test into a "far more demanding test," with "inherently unpredictable" results for federal agencies.[481] He reiterated that while courts must carefully police the boundaries of an agency's statutory authority, when Congress has delegated policymaking discretion to an agency, courts are not permitted to substitute their own judgment for that of the agency.[482]

Judge Kavanaugh has also written to signal disagreement with the judicial application of procedural requirements on federal agencies that are not expressly required by statute. In addition to remanding to the FCC to explain its reasoning regarding its rule concerning broadband access, the majority panel in *American Radio* also remanded the rule for the FCC to release redacted portions of internal staff studies relied on to issue the regulation.[483] The nominee wrote separately to emphasize that, while the majority panel's decision was consistent with D.C. Circuit precedent—namely its 1973 decision in *Portland Cement Ass'n v. Ruckelshaus*—that precedent was itself inconsistent with the text of the APA, which did not impose any such requirement on the rulemaking process.[484] Further, Judge Kavanaugh noted that then-Justice Rehnquist's 1978 opinion for the Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[485] required invalidatation of the D.C. Circuit's imposition of additional procedural requirements on agencies beyond those found in the APA generally, ruling that the APA established the maximum procedures Congress required for agency rulemaking.[486] The D.C. Circuit's precedent from *Portland Cement*, Judge Kavanaugh argued, was thus inconsistent with the text of the APA and *Vermont Yankee*.[487]

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[477] 524 F.3d 227, 240–41 (D.C. Cir. 2008).

[478] *Id.* at 242.

[479] *Id.* at 245 (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[480] *Id.* at 248.

[481] *Id.*

[482] *Id.* at 247–48.

[483] *Id.* at 240 (majority opinion).

[484] *Id.* at 245–47 (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[485] *See* 435 U.S. 519, 524 (1978).

[486] *American Radio*, 524 F.3d at 245–47 (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[487] *Id.* at 246–47. It bears mention that the Supreme Court in 2015 invalidated another procedural requirement imposed on agencies by the D.C. Circuit because it exceeded the maximum rulemaking procedures required by the APA. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015). Judge Kavanaugh was not on the lower court panel in that decision. *See* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013).

## Conclusion

Judge Kavanaugh's views on administrative law are a significant consideration for his nomination, as the Court may consider issues relating to Article III standing and deference to federal agencies under the *Chevron* and *Auer* frameworks in the near future.[488] The nominee's scholarly writings and opinions in administrative law cases at the D.C. Circuit reveal several trends that may reflect how he would approach such matters if confirmed to the Supreme Court. The nominee has not articulated particularly stringent views on establishing standing under Article III to bring suit in federal court; likewise, Judge Kavanaugh appears comfortable with the relatively deferential review applied by courts when reviewing the discretionary decisions of an agency delegated to it by statute.[489] At the same time, the nominee has voiced concern as to the deference accorded to agencies on questions of statutory and regulatory interpretation.[490] Specifically, Judge Kavanaugh may be a vote to cabin the reach of *Chevron* deference by finding that regulations pose major questions; and even when applying the doctrine, Judge Kavanaugh may more frequently find clarity in statutory language, thus resolving disputes independently at *Chevron*'s first step, rather than deferring to reasonable agency interpretations at *Chevron* step two.[491]

[488] *See, e.g.*, Knick v. Twp. of Scott, 862 F.3d 310, 317 (3d Cir. 2017), *cert. granted in part*, 138 S. Ct. 1262 (2018) (granting certiorari on the question "[w]hether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 19496 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims"); Cal. Sea Urchin Comm'n v. Bean, 883 F.3d 1173, 1177 (9th Cir. 2018), petition for cert. filed (U.S. June 4, 2018) (No. 17-1636) (raising issue of whether statutory silence triggers *Chevron* deference). *See also* Garco Const., Inc. v. Speer, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (arguing the Court should reconsider *Auer* and *Seminole Rock* deference); *Mortg. Bankers Ass'n*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment) (noting that the *Auer* and *Seminole Rock* doctrines "may be incorrect").

[489] *See* discussion *supra* notes 367-81, 473-82, and accompanying text.

[490] *See* discussion *supra* notes 403-72, and accompanying text.

[491] *See* discussion *supra* notes 403-63, and accompanying text.

# Business Law[492]

Judge Kavanaugh is likely to represent a key vote in the Supreme Court's business law cases. Last term, the Roberts Court issued a number of business-related decisions in which Justice Kennedy sided with bare majorities of the Court to conclude, for example, that arbitration agreements providing for the individualized resolution of disputes between employers and employees must be enforced;[493] that federal antitrust law does not prohibit contractual provisions barring merchants from expressing a preference that customers use certain credit cards;[494] and that foreign corporations may not be sued under the Alien Tort Statute (ATS).[495] Decisions like these have prompted a debate among legal commentators as to whether the Roberts Court can be fairly described as overly "pro-business."[496]

Regardless of one's assessment of the Roberts Court's approach to business issues, Judge Kavanaugh would have the opportunity to influence the Court's business law jurisprudence if confirmed.[497] However, Judge Kavanaugh's views on a range of business law issues—including class action litigation, the reach of the Federal Arbitration Act, and federal preemption of state tort law[498]—remain unclear, as the nominee has no significant writings on these issues as the D.C. Circuit confronts "relatively few explicit business cases."[499]

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[492] CRS Legislative Attorney Jay B. Sykes authored this section of the report.

[493] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[494] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[495] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

[496] According to one study examining the Court's decisions from 1946 to 2011, the Roberts Court is "much friendlier to businesses" than the Rehnquist and Burger Courts that preceded it, taking more cases in which a business litigant lost in the lower court, reversing more of these lower court decisions, and affirming more decisions in which a business litigant was the respondent than its predecessor Courts. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 U. MINN. L. REV. 1431, 1472 (2013). *See also* J. Mitchell Pickerill, *Is the Roberts Court Business Friendly? Is the Pope Catholic?*, *in* BUSINESS AND THE ROBERTS COURT 35, 36 (Jonathan H. Adler ed., 2016) (concluding that, based upon an analysis of its decisions through the end of the 2009 term, "the Roberts Court is somewhat more likely than previous Courts to reach outcomes that favor business interests"); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019 (2009) (finding that during its first three terms, the Roberts Court granted petitions for certiorari supported by amicus briefs from the Chamber of Commerce "at an unusually high rate," and that parties supported by the Chamber at the merits stage prevailed more than two-thirds of the time).

However, others have rejected this characterization of the Roberts Court. Some observers have questioned the probative value of quantitative studies that evaluate only whether a business litigant won or lost a case without accounting for the content of the Court's decisions or the doctrinal baseline that preceded those decisions. *See* Jonathan H. Adler, *Introduction: In Search of the Probusiness Court*, *in* BUSINESS AND THE ROBERTS COURT 1, 5–7 (Jonathan H. Adler ed., 2016); James R. Copeland, *What Do We Mean by a "Pro-Business" Court—And Should We Care?*, 67 CASE W. RES. L. REV. 743, 748–57 (2017) (cataloguing methodological concerns with quantitative assessments of the Roberts Court's business law decisions); Martin J. Newhouse, *Business Cases and the Roberts Supreme Court*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 90, 93 n.50 (Nov. 2011) (questioning the value of a quantitative study of the Roberts Court's business law decisions that "ignore[d] not only the substantive issues in the cases it review[ed], but the statutory and regulatory background of each matter"). Other commentators have argued that the outcomes of many of the Roberts Court's prominent business-related decisions have been driven principally by the Justices' jurisprudential commitments, such as suspicion of policymaking through litigation and a preference for predictable legal rules, rather than by any pro-business biases. *See* Adler, *supra*, at 12; Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997, 1013–14 (2009); Kenneth W. Starr, *The Roberts Court & The Business Cases*, 35 PEPP. L. REV. 541, 541 (2008).

[497] *See CRS Kennedy Report*, *supra* note 17, at 15–16.

[498] Judge Kavanaugh has participated in cases that tangentially concern these topics, but do not directly implicate the sorts of business law issues that make their way to the Supreme Court. *See, e.g.*, Belize Soc. Dev. Ltd. v. Gov't of

Nonetheless, the nominee's rulings provide some clues as to how he might address business law issues if elevated to the Supreme Court. Many of Judge Kavanaugh's most important decisions, which are discussed in more detail elsewhere in this report, have had potentially significant implications for business regulation. In *PHH Corp. v. CFPB*, for example, the nominee dissented from a decision affirming the constitutionality of the CFPB's structure, reasoning that for-cause tenure protections for the CFPB's Director unconstitutionally infringed on the President's removal power in light of, among other things, the Director's "enormous power over American businesses, American consumers, and the overall U.S. economy."[500] And in *Doe v. Exxon Mobil Corp.*, Judge Kavanaugh dissented in part from a D.C. Circuit decision concerning corporate liability under the ATS, concluding that certain ATS claims against a corporation for its overseas conduct should be dismissed because, among other reasons, the executive branch had "reasonably explained that adjudicating those ATS claims would harm U.S. foreign policy interests."[501]

Whether these opinions reflect Judge Kavanaugh's approach to business-related cases more generally is open to debate, as they arguably reflect broader concerns about the separation of powers and national security, rather than any specific views of business regulation. However, the nominee's decisions concerning matters of substantive business law—specifically, antitrust law, labor law, and securities law—offer some insight into his views of certain federal statutes that regulate key aspects of the nation's economy. In these decisions, Judge Kavanaugh has expressed skepticism toward broad views of administrative power over business entities,[502] evinced hesitance to find that federal statutes establish rights and remedies that are not textually explicit,[503] and adopted a narrower view of federal antitrust law than some of his colleagues.[504] This section of the report discusses how the nominee might approach business law cases by examining his prominent decisions concerning antitrust law, labor law, and securities law.

## Antitrust Law

Among the cases the Supreme Court confronts, antitrust disputes are unique in affording economic analysis a central role in the Court's decisionmaking. As the Supreme Court has explained, "[i]n antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute,"[505] as judicial interpretations of general statutory terms "evolve to meet the dynamics of present economic conditions."[506] A number of commentators have accordingly observed that the evolution of antitrust doctrine in the 20th century can be viewed

Belize, 668 F.3d 724, 734 (D.C. Cir. 2012) (Kavanaugh, J. dissenting) (arguing that the majority opinion was incorrect in concluding that the district court appropriately issued a writ of mandamus allowing the assignee of a foreign arbitration award to obtain consideration of its petition to confirm and enforce its award under the Federal Arbitration Act).

[499] James B. Stewart, *On Business Issues, Republicans Might Want a Justice Garland*, N.Y. TIMES (Mar. 24, 2016), https://www.nytimes.com/2016/03/25/business/on-business-issues-republicans-might-want-a-justice-garland.html.

[500] 881 F.3d 75, 167 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[501] 654 F.3d 11, 88 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[502] *See* Lorenzo v. SEC, 872 F.3d 578, 598–900 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); SeaWorld of Fla. LLC v. Perez, 748 F.3d 1202, 1218–20 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

[503] *See* Johnson v. Interstate Mgmt. Co., 849 F.3d 1093, 1097–98 (D.C. Cir. 2017); Int'l Union, Sec., Police & Fire Prof'ls of Am. v. Faye, 828 F.3d 969, 984–85 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

[504] *See* United States v. Anthem, 855 F.3d 345, 371 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1058 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

[505] Nw. Airlines, Inc. v. Transport Workers, 451 U.S. 77, 98 n.42 (1981).

[506] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).

largely as a story of the evolution of economic thought during that period.[507] A judge's views on antitrust law can therefore offer insight into his broader approach to questions of federal economic regulation.

While the Court has over the past forty years interpreted the antitrust laws as being principally concerned with maximizing economic efficiency,[508] some commentators have argued for a return to an era in which courts considered other goals in antitrust cases—including promoting consumer choice and product diversity, ensuring open markets in which new businesses have a reasonable opportunity for entry, and limiting the political power of large firms.[509] Although Judge Kavanaugh has not been involved in a large number of antitrust cases, he has authored two critical opinions in the field that suggest he is unlikely to be receptive to these attempts to reorient the Court's antitrust jurisprudence toward an emphasis on social and political goals beyond the maximization of economic efficiency, measured through short-term effects on prices and output.

In *United States v. Anthem, Inc.*, for example, Judge Kavanaugh dissented from a panel majority opinion affirming a permanent injunction blocking the merger of Anthem and Cigna, two of the nation's four largest health insurers.[510] In that case, the federal government, along with eleven states and the District of Columbia, sought to enjoin the Anthem-Cigna merger under Section 7 of the Clayton Act[511] on the grounds that it would substantially lessen competition in the market for the sale of health insurance to "national accounts"—that is, employers purchasing health insurance for more than 5,000 employees across more than one state.[512] The U.S. District Court for the District of Columbia agreed with the plaintiffs and permanently enjoined the merger after concluding that its overall effect on the relevant market would be anticompetitive in light of the market share that the merged firm would possess, and a three-judge panel of the D.C. Circuit affirmed.[513] Judge Kavanaugh, however, dissented from the panel's decision, arguing that the merger would likely generate efficiencies that would benefit the companies' customers.[514] Specifically, Judge Kavanaugh concluded that because the merged company would have greater bargaining power, it would be able to negotiate lower rates with healthcare providers (e.g., hospitals and doctors) and pass savings along to its customers.[515]

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[507] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 83–104 (5th ed. 2015); *see generally* Robert D. Atkinson & David B. Audretsch, *Economic Doctrines and Approaches to Antitrust*, INFO. TECH. & INNOVATION FOUND. (Jan. 2011), http://www.itif.org/files/2011-antitrust.pdf; Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, 50 LAW AND CONTEMPORARY PROBLEMS 181 (1987); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

[508] *See* HOVENKAMP, *supra* note 507, at 85–98.

[509] *See generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C.L. REV. 551 (2012).

[510] 855 F.3d 345, 371 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[511] Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such [merger] may be substantially to lessen competition." 15 U.S.C. § 18.

[512] *Anthem*, 855 F.3d at 351–52.

[513] *Id.* at 369.

[514] *Id.* at 373–75 (Kavanaugh, J., dissenting).

[515] *Id.* While Judge Kavanaugh rejected the district court's conclusion that the merger would harm competition in the market for the sale of health insurance to "national accounts," he explained that the government may have ultimately been able to block the merger because of its effects on hospitals and doctors in the healthcare provider market—an alternative argument that the government had presented at trial. *Id.* at 377–78. Because the district court had not addressed that separate claim, Judge Kavanaugh indicated that he would remand the case for a resolution of that issue.

In his dissent, Judge Kavanaugh sharply criticized a portion of the majority opinion suggesting that "it is not at all clear" that efficiencies likely to result from a merger "offer a viable legal defense to illegality under Section 7."[516] While the D.C. Circuit majority ultimately assumed for purposes of the case that such efficiencies are relevant in assessing a merger's impact on competition, it also observed that the Supreme Court held in a 1967 decision that efficiencies are not relevant in Section 7 cases, and that the Court had neither explicitly nor implicitly overturned that decision.[517] The nominee criticized this portion of the majority opinion as "ahistorical drive-by dicta," reasoning that in the 1970s, the Court "shifted away from the strict anti-merger approach [it] . . . had employed in the 1960s."[518] Judge Kavanaugh concluded that under "the modern approach" to antitrust law reflected in subsequent Supreme Court decisions, courts "must take account of the efficiencies and consumer benefits that would result from [mergers]," and not limit their analysis to an assessment of how concentrated the relevant market would become as a result of a merger.[519]

Judge Kavanaugh also expressed his preference for "the modern approach" to antitrust law over the approach taken by the 1960s Court in his dissent in *Federal Trade Commission (FTC) v. Whole Foods Market*.[520] In that case, the FTC sought a preliminary injunction to block the merger of Whole Foods and another grocery store chain, Wild Oats.[521] The key issue in the case was the scope of the relevant "product market" in which Whole Foods and Wild Oats competed. The scope of the product market in which a firm competes is often a critical question in merger cases, because mergers are less likely to harm competition in markets with many competitors than in markets with few competitors.[522] In *Whole Foods Market*, the FTC contended that the relevant market involved what it called "premium, natural, and organic supermarkets" (PNOS)—that is, supermarkets that focus on high-quality perishables and specialty organic produce, target affluent and well-educated customers, and emphasize social and environmental responsibility.[523] Because Whole Foods and Wild Oats were the only PNOS in eighteen cities, the FTC contended that the merger violated Section 7 because it would substantially decrease competition in the PNOS market in those cities.[524] By contrast, Whole Foods argued that because it competed with a wide

*Id.* at 377.

[516] *Id.* at 353 (majority opinion).

[517] *Id.*

[518] *Id.* at 376 (Kavanaugh, J., dissenting).

[519] *Id.* at 377.

[520] 548 F.3d 1028, 1058–59 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

[521] *Id.* at 1032–33 (majority opinion).

[522] The Supreme Court has explained that the relevant product market for purposes of Section 7 of the Clayton Act generally includes the product at issue and its substitutes—that is, other products that are "reasonably interchangebl[e]" with the product at issue. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Stated differently, whether two products compete in the same market principally depends on the extent to which an increase in the price of one product would cause consumers to purchase the other product instead. *See* HOVENKAMP, *supra* note 507, at 111–17.

This inquiry into "market definition" is important because whether a merger would harm competition often depends on the market power that the merged company would possess; that is, on the merged company's "ability to increase its profits by reducing output and charging more than a competitive price for its product." *Id.* at 106. *See also* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391–92 (1956) (defining market power as "the power to control prices or exclude competition"). Determining which products could reasonably substitute for the products sold by the merged company in the event that the merged company were to reduce its output or increase its prices is an important part of assessing whether the merged company would be able to profit from either of those strategies. HOVENKAMP, *supra* note 507, at 111–17.

[523] *Whole Foods Mkt.*, 548 F.3d at 1032.

[524] *Id.* at 1032–33.

range of non-PNOS grocery stores, the relevant market for purposes of Section 7 was far broader than PNOS.[525] Whole Foods contended that because the merged company would not possess a large share of the relevant market (which included non-PNOS grocery stores), the merger would not substantially lessen competition in that broader market.[526]

While the district court sided with Whole Foods and denied the FTC's motion for a preliminary injunction, the D.C. Circuit reversed that decision on appeal.[527] Writing separately, Judge Janice Rogers Brown and Judge David S. Tatel both concluded that the district court erred.[528] Relying in part on the Supreme Court's 1962 decision in *Brown Shoe Co. v. United States*, which identified seven non-exhaustive "practical indicia" to guide courts' market definition inquiry,[529] Judge Brown concluded that the FTC had presented strong evidence showing that PNOS constituted a distinct "submarket" that catered to a "core group" of customers who would continue to shop at the merged firm over non-PNOS grocery stores even if the merged firm raised its prices.[530] In an opinion concurring in the judgment, Judge Tatel likewise concluded that the district court erred by rejecting the FTC's evidence suggesting that PNOS constituted a distinct product market.[531] The court accordingly remanded the case to the district court for a determination of whether the equities favored granting the FTC's motion for a preliminary injunction.[532]

In his dissent, Judge Kavanaugh rejected his colleagues' market definition analysis, arguing that it "call[ed] to mind the bad old days when mergers were viewed with suspicion regardless of their economic benefits."[533] Judge Kavanaugh reasoned that because the FTC had not presented evidence showing that Whole Foods was able to set higher prices in areas where Wild Oats stores were absent, the district court correctly concluded that Whole Foods competed with a range of non-PNOS grocery stores.[534] Echoing his broader views on the importance of formal rules,[535] the nominee also noted his "strong[ ]" disagreement with what he described as his colleagues' effort to "resuscitate[ ] the loose antitrust standards of *Brown Shoe Co. v. United States*."[536] According to Judge Kavanaugh, *Brown Shoe*'s malleable "practical indicia" approach to market definition "ha[d] not stood the test of time," and had been rightly abandoned in favor of more rigorous approaches that emphasize quantitative assessments of market concentration and price elasticities.[537]

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[525] *Id.* at 1033.

[526] *Id.* at 1036–37.

[527] *Id.*

[528] *Id.* at 1039–41; *id*. at 1049 (Tatel, J., concurring in the judgment).

[529] *Id.* at 1039. In *Brown Shoe*, the Court explained that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." 370 U.S. 294, 325 (1962). However, the Court also noted that "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* The Court explained that "the boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

[530] *Whole Foods Mkt.*, 548 F.3d at 1039.

[531] *Id.* at 1043–49 (Tatel, J., concurring in the judgment).

[532] *Id.* at 1041 (Brown, J.).

[533] *Id.* at 1052 (Kavanaugh, J., dissenting).

[534] *Id.* at 1054–55.

[535] *See* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[536] *Whole Foods Mkt.*, 548 F.3d at 1058 (Kavanaugh, J., dissenting).

[537] *Id.* at 1058–59.

While the evidence is limited, Judge Kavanaugh's general approach to antitrust law appears to be broadly similar to the approach reflected in Justice Kennedy's prominent antitrust opinions. Justice Kennedy's tenure on the Court included several rulings limiting the scope of the antitrust laws[538] based in part on insights from what has been called the "Chicago School" of antitrust analysis—an approach to antitrust that heavily emphasizes the use of economic reasoning, rejects reliance on values other than economic efficiency, and is generally confident that markets are efficient and self-correcting even in the absence of government interventions aimed at addressing anti-competitive behavior.[539] Notably, Justice Kennedy's key antitrust decisions and Judge Kavanaugh's antitrust dissents all cite Judge Robert Bork's seminal book *The Antitrust Paradox*[540] in support of their analyses.[541] *The Antitrust Paradox*, which criticized the Supreme Court's broad interpretations of the antitrust laws in the 1960s and its reliance on non-efficiency values in many antitrust cases,[542] was instrumental in the development of the Chicago School of antitrust analysis and has been described as the scholarly work that has exerted the "great[est] influence . . . on the direction of antitrust policy" since the adoption of the Sherman Act in 1890.[543]

While the Chicago School's influence on antitrust law has recently attracted criticism from some commentators seeking to reinvigorate antitrust enforcement,[544] Judge Kavanaugh's opinions suggest that, like Justice Kennedy, he is generally sympathetic to the School's core principles and likely to resist efforts to shift the Court's antitrust jurisprudence. Although the nominee may not alter the direction of the Court's antitrust decisions in light of this apparent similarity between his views and those of Justice Kennedy, his vote may be key in maintaining the Court's current balance in antitrust cases, the most recent of which divided the Court by a 5-4 margin.[545]

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[538] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (holding that vertical price restraints are not per se illegal under Section 1 of the Sherman Act); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (holding that plaintiffs bringing "predatory pricing" claims must prove not only that a defendant priced a product below cost, but also that the defendant had a reasonable prospect of recouping the losses it would incur from below-cost pricing). *See also* Matthew Perlman, *Justice Kennedy's Important Antitrust Opinions*, LAW360 (June 28, 2018), https://www.law360.com/articles/1058541/justice-kennedy-s-important-antitrust-opinions (quoting a commentator describing Justice Kennedy's antitrust opinions as "mainstream conservative, but not . . . particularly aggressive").

[539] *See* Herbert J. Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm* 2 (U. Iowa Legal Studies Research Paper No. 07-19, June 21, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014153. *See generally* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1975).

[540] BORK, *supra* note 539.

[541] *See Leegin*, 551 U.S. at 889; *Brooke Grp.*, 509 U.S. at 221; United States v. Anthem, 855 F.3d 345, 376 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *Whole Foods Mkt.*, 548 F.3d at 1059 (Kavanaugh, J., dissenting).

[542] BORK, *supra* note 539, at 7, 210, 288–91, 386–87.

[543] William E. Kovacic, The Antitrust Paradox *Revisited: Robert Bork and the Transformation of Antitrust Policy*, 36 WAYNE L. REV. 1413, 1417 (1990). *See also* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 258 (1996) (describing *The Antitrust Paradox* as "probably still the most influential book on antitrust policy").

[544] HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed. 2008).

[545] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

## Labor Law

Judge Kavanaugh has been involved in a number of cases involving labor law,[546] another area in which some commentators have argued that the Roberts Court has evinced "pro-business" tendencies.[547] While many of these cases have involved discrete legal issues that do not lend themselves to generalizations about the nominee's business law jurisprudence,[548] two themes emerge from his labor law decisions. First, although Judge Kavanaugh has not disagreed with his D.C. Circuit colleagues on the legal standards governing the review of decisions rendered by labor arbitrators, he has applied those standards in a more deferential fashion than some of his colleagues.[549] Second, perhaps reflecting his broader textualist approach to statutory interpretation,[550] Judge Kavanaugh has been hesitant to find that federal labor and workplace safety statutes provide legal rights and remedies that are not textually explicit.[551]

Under the NLRA, the National Labor Relations Board (NLRB) has the authority to review labor arbitration proceedings in cases where such review is necessary to determine whether an employer committed an "unfair labor practice."[552] The NLRA affords the NLRB discretion over the extent to which it will defer to arbitration decisions, and the NLRB has adopted a standard pursuant to which it defers to such decisions as long as the arbitrator's decision is, in relevant part, not "clearly repugnant" to the NLRA.[553] The NLRB has further explained that an arbitrator's

[546] For a discussion of Judge Kavanaugh's views on employment discrimination law, *see* discussion *infra* in *Civil Rights*.

[547] *See, e.g.*, *Editorial: In Its Latest Pro-Business Ruling, the Roberts Court Undermines Workers' Rights*, ST. LOUIS POST-DISPATCH (May 22, 2018), https://www.stltoday.com/opinion/editorial/editorial-in-its-latest-pro-business-ruling-the-roberts-court/article_c527b31a-c633-548a-94b6-aadb7902f6f7.html; Lawrence Hurley, *Companies Win Big at U.S. Top Court on Worker Class-Action Curbs*, REUTERS (May 21, 2018), https://www.reuters.com/article/us-usa-court-employment/companies-win-big-at-us-top-court-on-worker-class-action-curbs-idUSKCN1IM1GW. *See also* Ruben J. Garcia, *Workplace Law Cases in the Tenth Term of the Roberts Court: Between the Usual Ideological Lines*, 19 EMP. RTS. & EMP. POL'Y 125, 127 (2015) (noting that in a number of its 2014 decisions, the Court "continue[d] its judicial narrowing of the Fair Labor Standards Act and federal labor law").

[548] *See, e.g.*, Midwest Div.-MMC, LLC v. NLRB, 867 F.3d 1288, 1304–05 (D.C. Cir. 2017) (Kavanaugh, J., concurring in part and dissenting in part) (agreeing with the majority that employees were not entitled to union representation while participating in non-compulsory interviews with a peer review committee, but dissenting from the majority's conclusion that the union was entitled to information regarding the committee and its disciplinary process); New York-New York, LLC v. NLRB, 676 F.3d 193, 196 (D.C. Cir. 2012) (affirming the NLRB's determination that a hotel and casino violated the NLRA by prohibiting the employees of an onsite contractor from distributing union-related handbills on its property); Raymond F. Kravis Ctr. for Performing Arts, Inc. v. NLRB, 550 F.3d 1183, 1186 (D.C. Cir. 2008) (affirming the NLRB's determination that a concert hall and theater complex violated the NLRA by, among other things, withdrawing recognition from a union representing stagehand employees); Agri Processor Co. v. NLRB, 514 F.3d 1, 10–11 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (dissenting from a decision affirming the NLRB's determination that persons who are not legally authorized to work in the United States qualify as "employees" entitled to vote in union elections under the NLRA). *See also* Collin O'Connor Udell et al., *Brett Kavanaugh Nominated to U.S. Supreme Court*, JACKSON LEWIS (July 9, 2018), https://www.jacksonlewis.com/publication/brett-kavanaugh-nominated-us-supreme-court (noting that Judge Kavanaugh appears to approach labor law issues "on a case-by-case basis rather than in service of an overarching judicial philosophy").

[549] *See* Verizon New England, Inc. v. NLRB, 826 F.3d 480, 483 (D.C. Cir. 2016); Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union, 589 F.3d 437, 439 (D.C. Cir. 2009).

[550] *See* discussion *supra* in *Statutory Interpretation*.

[551] *See* Johnson v. Interstate Mgmt. Co., 849 F.3d 1093, 1097–98 (D.C. Cir. 2017); Int'l Union, Sec., Police & Fire Prof'ls of Am. v. Faye, 828 F.3d 969, 984–85 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

[552] *See Verizon New England*, 826 F.3d at 486.

[553] *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

decision is not "clearly repugnant" to the NLRA unless it is "palpably wrong, i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the [NLRA]."[554]

In *Verizon New England Inc. v. NLRB*, Judge Kavanaugh, writing for a divided court, applied these standards in reversing an NLRB order overturning an arbitration panel's decision.[555] In that case, an arbitration panel determined that by waiving employees' rights to engage in "picketing" in its collective bargaining agreement with Verizon, a union had waived employees' rights to display pro-union signs in cars parked at Verizon facilities.[556] The NLRB overturned the arbitration panel's decision, concluding that the union's waiver of the right to engage in "picketing" did not amount to waiver of the right to display pro-union signs in cars—a right protected by the NLRA in the absence of waiver.[557] However, in an opinion by Judge Kavanaugh, the D.C. Circuit reversed the NLRB's decision.[558] Over the dissent of Judge Sri Srinivasan,[559] Judge Kavanaugh explained that under the deferential standard of review governing labor arbitration, the NLRB should have upheld the arbitrator's decision because it was not "palpably wrong."[560] Specifically, Judge Kavanaugh reasoned that the arbitration panel's decision was not "palpably wrong" because "[n]o hard-and-fast definition of the term 'picketing' excludes the visible display of pro-union signs in employees' cars rather than in employees' hands, especially when the cars are lined up in the employer's parking lot and thus visible to passers-by in the same way as a picket line."[561]

Judge Kavanaugh similarly deferred to a labor arbitrator's decision in *National Postal Mail Handlers Union v. American Postal Workers Union*.[562] In that case, two unions of postal workers disputed which union was entitled to perform certain work at a U.S. Postal Service facility under a 1979 Postal Service directive.[563] One union brought the matter to arbitration and prevailed, prompting the other union to sue in federal court to overturn the arbitrator's decision.[564] Over the dissent of Chief Judge David B. Sentelle,[565] the nominee affirmed the arbitrator's decision that the dispute was arbitrable, explaining that although the arbitrator had incorrectly interpreted a 1992 agreement between the unions and the Postal Service governing the arbitration of disputes, the court was bound by Supreme Court precedent to affirm his decision as long as he was "even

[554] *Olin Corp.*, 268 N.L.R.B. at 574 (internal quotation marks and citation omitted).

[555] 826 F.3d at 483.

[556] *Id.* at 484.

[557] *Id.* at 485.

[558] *Id.* at 488.

[559] While Judge Srinivasan agreed with the majority's explanation of the legal standards governing review of an arbitrator's interpretation of a collective bargaining agreement, he concluded that the NLRB had reasonably determined that the arbitration panel's interpretation of the term "picketing" was indeed "palpably wrong." *Id.* at 492 (Srinivasan, J., concurring in part and dissenting in part). Judge Srinivasan reasoned that because "picketing" has traditionally been understood as involving some sort of personal confrontation between union members and persons trying to enter an employer's premises, and employees' placement of pro-union signs in cars parked at Verizon facilities did not involve the required personal confrontation, the NLRB reasonably found that the arbitration panel's decision was "palpably wrong." *Id.*

[560] *Id.* at 487–88 (majority opinion).

[561] *Id.* at 488.

[562] 589 F.3d 437, 439 (D.C. Cir. 2009).

[563] *Id.*

[564] *Id.*

[565] Chief Judge Sentelle argued that because the arbitrator had "based his decision entirely on his external legal theories . . . without regard to the express terms of the parties' agreement," that decision should be overturned even in light of the deferential standard of review mandated by Supreme Court precedent. *Id.* at 445 (Sentelle, C.J., dissenting).

arguably construing or applying the contract and acting within the scope of his authority."[566] Because the arbitrator's interpretation of the 1992 agreement "was not outside traditional juridical and interpretive bounds," Judge Kavanaugh concluded that the arbitrator was indeed "arguably construing or applying the contract," even if his interpretation "may have been badly mistaken."[567]

Judge Kavanaugh's labor law decisions also evince hesitance to find that federal labor and workplace safety statutes provide legal rights and remedies that are not textually explicit. For example, in *International Union, Security, Police & Fire Professionals of America v. Faye*, the nominee dissented from a D.C. Circuit decision holding that the Labor-Management Reporting and Disclosure Act (LMRDA) provides unions with an implied cause of action for breach of a fiduciary duty owed to them.[568] In rejecting the court's conclusion that the LMRDA established such a cause of action, Judge Kavanaugh relied principally on the statute's text, which indicates that any "member" of a union may sue a union officer for breach of a fiduciary duty owed to their union.[569] The nominee reasoned that because the statute by its terms created a cause of action only for union "members," it did not also contain an implied cause of action for unions themselves.[570] Judge Kavanaugh rejected the argument that Congress intended to create an implied cause of action for unions in the LMRDA based on the Act's requirement that union members bring lawsuits only after their union refused or failed to do so, reasoning that this provision in the Act referred to a union's refusal or failure to bring lawsuits under state law and not the LMRDA.[571]

Similarly, in *SeaWorld of Florida v. Perez*, a decision mentioned above in the discussion on administrative law,[572] Judge Kavanaugh dissented from a decision affirming the DOL's citation of SeaWorld for violating OSHA by exposing animal trainers to the hazards of drowning or injury when working with killer whales during performances.[573] The decision concerned the scope of OSHA's "General Duty Clause," which imposes a general duty on employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[574] In dissent, Judge Kavanaugh reasoned that the DOL lacked the authority under the General Duty Clause to issue the citation because (1) DOL precedent provided that the Department lacked the authority to proscribe or penalize dangerous activities intrinsic to an industry, and (2) SeaWorld determined that close contact between trainers and whales was an important aspect of its shows

[566] *Id.* at 441 (majority opinion) (quoting E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000)).

[567] *Id.* at 443.

[568] 828 F.3d 969, 984 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

[569] *Id.* at 985.

[570] *Id.* In *Faye*, Judge Kavanaugh also noted that "some broader conceptions of statutory intent take account not just of the text of the statute, but also of legislative history," but concluded that the relevant legislative history contained "*zero* indication that Congress wanted to create a federal cause of action for unions." *Id.*

[571] *Id.* at 986. Similarly, in *Johnson v. Interstate Management Co.*, Judge Kavanaugh held that Section 11(c) of OSHA, which prohibits employers from retaliating against employees for reporting OSHA violations, 29 U.S.C. § 660(c), does not contain an implied cause of action for employees. 849 F.3d 1093, 1098 (D.C. Cir. 2017). Reasoning that, under Supreme Court precedent, a statute's express provision of one method of enforcing a statute suggests that Congress intended to preclude others, Judge Kavanaugh concluded that because Section 11(c) expressly allowed the Secretary of Labor to bring anti-retaliation claims, it did not also contain an implied private cause of action for employees. *Id.*

[572] *See* discussion *supra* in *Administrative Law*.

[573] 748 F.3d 1202, 1216 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

[574] 29 U.S.C. § 654(a)(1).

and thus intrinsic to its business.[575] Judge Kavanaugh also criticized what he characterized as the Department's "irrational[ ] and arbitrar[y]" distinction between close contact among trainers and whales and contact in other forms of sport and entertainment, such as football and NASCAR races, which the Department had denied it had the authority to regulate.[576] The nominee reasoned that, despite the Department's claim that it lacked the authority to regulate such activities, the majority's decision affirming the citation would permit the Department "to regulate sports and entertainment activities in a way that Congress could not conceivably have intended in 1970 when giving the agency general authority to ensure safer workplaces."[577]

In the coming years, the Supreme Court is likely to confront a variety of important labor law cases.[578] Given the close division evident in the Court's recent decisions in the field,[579] it is likely that Judge Kavanaugh, if confirmed, would represent a critical vote in these cases. Whether the nominee's textualist approach to statutory interpretation[580] or skepticism toward administrative authority[581] would affect their ultimate disposition remains to be seen and would likely depend on the specific laws at issue in individual cases.

## Securities Law

Federal securities law is another significant area of business regulation that Judge Kavanaugh would likely be called upon to address if elevated to the Supreme Court. The federal securities laws impose a variety of disclosure and anti-fraud requirements on issuers and sellers of securities in order to promote the accurate pricing of securities and the efficient allocation of capital.[582] Enforcement of the securities laws raises a variety of important questions, including issues concerning the substantive reach of individual securities law provisions[583] and procedural issues involving the authority of administrative agencies and the certification of securities class actions.[584] The Roberts Court has confronted a range of securities law issues, many of which Judge Kavanaugh has not addressed on the D.C. Circuit.[585] However, the Court has also issued a series of opinions[586] concerning one topic on which Judge Kavanaugh has expressed clear views:

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[575] *SeaWorld*, 748 F.3d at 1220 (Kavanaugh, J., dissenting).

[576] *Id.* at 1221.

[577] *Id.* at 1218.

[578] *See* Jeff Stein, *From Arbitration to Discrimination: 3 Ways Trump's Supreme Court Pick Could Transform U.S. Labor Law*, CHI. TRIB. (July 10, 2018), http://www.chicagotribune.com/business/ct-biz-brett-kavanaugh-labor-law-20180710-story.html.

[579] *See, e.g.*, Janus v. Am. Fed. of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[580] *See* discussion *supra* in *Statutory Interpretation*.

[581] *See* discussion *supra* in *Administrative Law*.

[582] *See* NICHOLAS L. GEORGAKOPOULOS, THE LOGIC OF SECURITIES LAW 14–16 (2017); *see generally* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711 (2006); Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 CARDOZO L. REV. 333 (2006).

[583] Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011); Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148 (2008).

[584] Lucia v. SEC, 138 S. Ct. 2044 (2018); Erica P. John Fund, Inc. v. Halliburton, 563 U.S. 804 (2011).

[585] *See, e.g.*, Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013) (addressing the certification of securities class actions); Merck & Co. v. Reynolds, 559 U.S. 633 (2010) (addressing the statute of limitations in Rule 10b-5 cases); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006) (addressing the preemptive effect of the Securities Litigation Uniform Standards Act of 1998).

[586] *See, e.g.*, *Janus Capital*, 564 U.S. 135; *Stoneridge*, 552 U.S. 148.

the scope of anti-fraud liability under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and its corresponding rule.[587]

Section 10(b) of the Exchange Act makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe."[588] SEC Rule 10b-5, which implements Section 10(b), in turn makes it unlawful to, "in connection with the purchase or sale of any security": (1) "employ any device, scheme, or artifice to defraud"; (2) "make any untrue statement of material fact or . . . omit to state a material fact necessary in order to make the statements made . . . not misleading"; or (3) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[589]

In 1994, the Supreme Court held in a 5-4 opinion by Justice Kennedy that private plaintiffs cannot bring Section 10(b) claims against persons who aid and abet Section 10(b) violations but do not themselves personally engage in the conduct prohibited by Section 10(b).[590] Justice Kennedy reasoned that because Section 10(b) by its terms prohibits "only the making of a material misstatement (or omission) or the commission of a manipulative act," private plaintiffs cannot sue those who merely aid and abet such conduct.[591]

The Court expanded on this decision fourteen years later in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, another Justice Kennedy opinion.[592] In that case—which one commentator has described as "easily the most controversial of the Roberts Court's securities decisions"[593]—the Court held by a 5-3 vote[594] that a corporation's vendors and customers who had allegedly facilitated accounting fraud by preparing false documentation and backdated contracts for the corporation were not liable to the corporation's investors under Rule 10b-5 for participating in a "scheme to defraud."[595] The Court reasoned that the corporation's vendors and customers were not liable because the corporation's investors relied only upon the corporation's financial statements, and not on conduct by these "secondary" actors.[596]

Finally, in 2011, the Court held in *Janus Capital Group v. First Derivative Traders* by a 5-4 vote that an investment adviser who had helped an associated mutual fund prepare prospectuses containing false statements had not violated Rule 10b-5(b),[597] which makes it unlawful to "*make* any untrue statement of material fact" in connection with the purchase or sale of a security.[598] The Court concluded that the investment adviser had not violated Rule 10b-5(b) because it was not the

[587] *See* Lorenzo v. SEC, 872 F.3d 578, 596–602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[588] 15 U.S.C. § 78j.

[589] 17 C.F.R. § 240.10b-5.

[590] Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994).

[591] *Id.*

[592] 552 U.S. 148 (2008).

[593] Adam Pritchard, *Securities Law in the Roberts Court*, *in* BUSINESS AND THE ROBERTS COURT 94, 125 (Jonathan H. Adler ed., 2016).

[594] Justice Breyer was recused in *Stoneridge*.

[595] *Stoneridge*, 552 U.S. at 160.

[596] *Id.*

[597] 564 U.S. 135, 142 (2011).

[598] 17 C.F.R. § 240.10b-5(b) (emphasis added).

"maker" of the relevant false statements.[599] The Court explained that the "maker" of a statement within the meaning of Rule 10b-5(b) is "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it," and that the investment adviser was not the "maker" of the statements because it did not have such authority.[600]

Judge Kavanaugh's dissent in *Lorenzo v. SEC* offers insight into his views on the scope of "secondary" liability under the federal securities laws.[601] *Lorenzo* involved an investment banker the SEC charged with sending email messages to investors containing misrepresentations about key features of a securities offering.[602] The SEC found that the banker violated three separate anti-fraud provisions of the federal securities laws by sending the emails: (1) Section 17(a)(1) of the Securities Act of 1933 (Securities Act), which makes it unlawful "for any person in the offer or sale of any securities . . . to employ any device, scheme, or artifice to defraud";[603] (2) Section 10(b) of the Exchange Act;[604] and (3) Rule 10b-5.[605]

While a panel of the D.C. Circuit held that the banker was not the "maker" of the relevant statements and accordingly reversed the SEC's determination that he violated Rule 10b-5(b) based on *Janus Capital Group*, it affirmed the SEC's determination that the banker violated the other relevant anti-fraud provisions.[606] The court rejected the banker's argument that he did not violate the remaining anti-fraud provisions because he was not the "maker" of the misleading statements, reasoning that the text of the remaining provisions did not require that a defendant "make" the misleading statements.[607] Instead, the court concluded that the banker violated the remaining anti-fraud provisions by knowingly sending the misleading statements from his email account to prospective investors.[608]

Judge Kavanaugh authored a pointed dissent from the court's decision, offering two independent disagreements with the majority's reasoning. First, the nominee disagreed with the majority's conclusion that substantial evidence supported the SEC's determination that the banker sent the emails with the requisite intent to deceive, manipulate, or defraud.[609] Judge Kavanaugh argued that while the administrative law judge (ALJ) who initially adjudicated the case had concluded that the banker acted with the required mental state (i.e., mens rea), the ALJ's factual findings—that the banker had not read the emails, which his boss drafted—did not support the ALJ's legal conclusion.[610] In a passage that arguably reflects his broader approaches toward both administrative law and criminal law,[611] Judge Kavanaugh argued that in reviewing the ALJ's decision, the SEC had "[i]n a Houdini-like move, . . . rewrote the [ALJ's] factual findings to make [them] . . . correspond to the legal conclusion that [the banker] was guilty."[612] Reasoning

[599] *Janus Capital*, 564 U.S. at 142.

[600] *Id.*

[601] 872 F.3d 578, 596–602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[602] *Id.* at 580 (majority opinion).

[603] 15 U.S.C. § 77q(a)(1).

[604] *Id.* § 78j.

[605] 17 C.F.R. § 240.10b-5.

[606] *Lorenzo*, 872 F.3d at 589.

[607] *Id.*

[608] *Id.* at 588.

[609] *Id.* at 599 (Kavanaugh, J., dissenting).

[610] *Id.* at 598.

[611] *See* discussions *supra* in *Administrative Law* and *infra* in *Criminal Law and Procedure*.

[612] *Lorenzo*, 872 F.3d at 598 (Kavanaugh, J., dissenting).

that the ALJ's legal conclusions did not heed "bedrock mens rea principles" that are "essential to preserving individual liberty," Judge Kavanaugh concluded that the court should have examined whether the ALJ's factual findings supported those conclusions, rather than deferring to the SEC's creation of "an alternative factual record."[613]

Second, Judge Kavanaugh disagreed with the majority's conclusion that sending misstatements related to a sale of securities qualifies as a violation of the relevant anti-fraud provisions if the defendant was not a "maker" of the misstatements.[614] The nominee argued that this interpretation of the anti-fraud provisions would allow the SEC "to evade the important statutory distinction between primary liability and secondary (aiding and abetting) liability," because it would imply that those who aid and abet a misstatement are themselves primary violators engaged in a scheme to defraud.[615] Noting that the Supreme Court had "pushed back hard against the SEC's attempts to unilaterally rewrite the law" and expand the scope of primary anti-fraud liability in *Central Bank of Denver*, *Stoneridge Investment Partners*, and *Janus Capital Group*, Judge Kavanaugh rejected the conclusion that the banker was liable for participating in a fraudulent scheme by forwarding the misstatements after receiving them from his boss.[616]

Judge Kavanaugh's *Lorenzo* dissent not only evinces a narrow view of the scope of secondary "scheme" liability under the anti-fraud provisions of the Securities Act and the Exchange Act—a view that seems to be consistent with that of Justice Kennedy—it also reflects skepticism concerning the legitimacy of judicial deference to SEC administrative adjudications. Notably, in June, the Supreme Court granted a petition for certiorari in *Lorenzo* on the question of "whether a misstatement claim that does not meet the elements set forth in *Janus* [*Capital Group*] can be repackaged and pursued as a fraudulent scheme claim."[617] While Judge Kavanaugh's view may accordingly be vindicated, he would likely be disqualified from participating in the case if confirmed.[618]

## Conclusion

If confirmed, Judge Kavanaugh would likely have the opportunity to shape the Supreme Court's business-related decisions, as the Court has already granted certiorari to hear cases involving

[613] *Id*. at 598, 600 (Kavanaugh, J., dissenting). In a broader critique of the administrative state, Judge Kavanaugh contended that "deferential review" of administrative adjudications stands "in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment right to trial in civil cases," citing Professor Philip Hamburger's influential book *Is Administrative Law Unlawful? Id.* at 602 (Kavanaugh, J., dissenting) (citing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)). While acknowledging that the Supreme Court has maintained that administrative adjudication is constitutional since its 1932 decision in *Crowell v. Benson*, Judge Kavanaugh argued that *Lorenzo* and cases like it "cast substantial doubt" on *Crowell*'s premise that "the administrative adjudication process will . . . operate with efficiency and fairness to the parties involved." *Lorenzo*, 872 F.3d at 602 (Kavanaugh, J., dissenting).

[614] *Lorenzo*, 872 F.3d at 600 (Kavanaugh, J., dissenting).

[615] *Id.*

[616] *Id.* at 601.

[617] *See* Question Presented, Lorenzo v. SEC, No. 17-1077 (June 18 2018), https://www.supremecourt.gov/docket/docketfiles/html/qp/17-01077qp.pdf.

[618] *See* 28 U.S.C. § 455(b)(3) (providing that Justices "shall" disqualify themselves where they have "expressed an opinion concerning the merits of the particular case in controversy").

arbitration,[619] products liability,[620] federal preemption,[621] class actions,[622] and antitrust law[623] during the October 2018 Term. While the nominee has not participated in cases involving the full range of business law issues that come before the Supreme Court, his decisions concerning antitrust law, labor law, and securities law offer some insight into his views on key aspects of federal economic regulation. Consistent with his general views on the separation of powers[624] and statutory interpretation,[625] Judge Kavanaugh has expressed skepticism toward broad views of the powers of administrative agencies to regulate businesses[626] and evinced hesitance to find that federal statutes regulating economic activity establish rights and remedies that are not textually explicit.[627] The nominee has also adopted a narrower view of federal merger regulation than some of his colleagues and, in the process, expressed a preference for modern approaches to antitrust law over the more flexible approach taken by the Court in the 1960s.[628] Ultimately, this view of antitrust law, and Judge Kavanaugh's view of the scope of the anti-fraud provisions of the federal securities laws, suggest that the nominee's approach to business law matters may be quite similar to that of Justice Kennedy.

[619] *See* Order Granting Certiorari, Helsinn Healthcare S.A. v. Teva Pharm. USA Inc., No. 17-1229 (U.S. June 25, 2018); Order Granting Certiorari, Lamps Plus, Inc. v. Varela, No. 17-988 (U.S. Apr. 30, 2018); Order Granting Certiorari, New Prime Inc. v. Oliveira, No. 17-340 (U.S. Feb. 26, 2018).

[620] *See* Order Granting Certiorari, Air & Liquid Sys. Corp. v. DeVries, No. 17-1104 (U.S. May 14, 2018).

[621] *See* Order Granting Certiorari, Merck Sharp & Dohme Corp. v. Albrecht, No. 17-290 (U.S. June 28, 2018); Order Granting Certiorari, Va. Uranium, Inc. v. Warren, No. 16-1275 (U.S. May 21, 2018).

[622] *See* Order Granting Certiorari, Frank v. Gaos, No. 17-961 (U.S. Apr. 30, 2018).

[623] *See* Order Granting Certiorari, Apple Inc. v. Pepper, No. 17-204 (U.S. June 18, 2018).

[624] *See* discussion *infra* in *Separation of Powers*.

[625] *See* discussion *supra* in *Statutory Interpretation*.

[626] Lorenzo v. SEC, 872 F.3d 578, 596–602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); SeaWorld of Fla. LLC v. Perez, 748 F.3d 1202, 1218–20 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

[627] Johnson v. Interstate Mgmt. Co., 849 F.3d 1093, 1097–98 (D.C. Cir. 2017); Int'l Union, Sec., Police & Fire Prof'ls of Am. v. Faye, 828 F.3d 969, 984–85 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

[628] *See* United States v. Anthem, 855 F.3d 345, 371 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1058 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

# Civil Rights[629]

Justice Kennedy was a critical vote in civil rights cases involving matters including voting rights, affirmative action, housing and employment discrimination, and sexual orientation discrimination.[630] While Judge Kavanaugh, if confirmed to succeed Justice Kennedy, could be influential in shaping the Court's civil rights jurisprudence, the nominee's fairly limited record with respect to civil rights law makes it difficult to assess how he might vote on a broad range of civil rights matters.

Judge Kavanaugh's approach to analyzing *constitutional* civil rights claims is particularly difficult to discern given his limited participation in cases involving equal protection challenges based on the Fifth or Fourteenth Amendments.[631] For example, the nominee's only brush with the issue of affirmative action came in the form of a vote—without a written opinion—in favor of rehearing a panel decision that upheld an affirmative action program against a constitutional challenge raised by a non-minority plaintiff.[632] The panel decision at issue rejected the plaintiff's arguments that a business development program denied him equal footing to compete with minority-owned businesses in violation of the Fifth Amendment.[633] As noted above, however, a vote to rehear a case before the en banc court can be motivated by many factors beyond mere disagreement with the panel decision.[634]

The nominee's most significant cases addressing civil rights matters have involved claims brought under Title VII of the Civil Rights Act of 1964 (Title VII),[635] the Americans with Disabilities Act (ADA),[636] and other employment discrimination statutes. Here, Judge

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[629] CRS Legislative Attorney Christine J. Back authored this section of the report.

[630] *See CRS Kennedy Report*, *supra* note 17.

[631] For example, a Westlaw search using the terms "Kavanaugh" AND "equal protection" yielded twelve published decisions, none of which addressed claims alleging race discrimination, and one of which addressed a religious discrimination claim, *In re* Navy Chaplaincy, 738 F.3d 425 (D.C. Cir. 2013). In that case, a three-judge panel, including Judge Kavanaugh, addressed an equal protection challenge raised by current and former officers in the Navy Chaplain Corps, who alleged that the Navy's promotion policies preferred Catholics and liturgical Christians over non-liturgical Christians. *Id.* at 427. The plaintiffs on appeal challenged the district court's denial of a preliminary injunction to halt the challenged policies. *Id.* at 428. The panel unanimously affirmed the district court's denial of the injunction, concluding that, in light of a facially neutral policy and no showing of discriminatory intent, the plaintiffs had not shown the requisite likelihood of success on the merits for the grant of a preliminary injunction. *Id.* at 430–31.

[632] *See* Rothe Dev. v. United States DOD, No. 15-5176, 2017 U.S. App. LEXIS 728, at *2 (D.C. Cir. Jan. 13, 2017); Rothe Dev., Inc. v. Dep't of Def., 836 F.3d 57, 61–62, 73 (D.C. Cir. 2016).

[633] The plaintiff, a small business that bid on Defense Department contracts, argued that a Small Business Administration program denied him equal protection under the Fifth Amendment because it contained a racial classification that, he alleged, prevented him from competing for defense contracts on an equal footing with minority-owned businesses. *Rothe Dev*., 836 F.3d at 61–62. The panel held that the statutory language governing that program did not contain a racial classification on its face that triggered strict scrutiny, *id.* at 62, and thus applied rational basis review to hold that the government had a legitimate interest (if not compelling in certain circumstances) in counteracting discrimination, and that the statutory scheme was rationally related to that purpose. *Id.* at 73. Judge Kavanaugh would have granted the petition for rehearing en banc to review that panel decision. Order Denying Petition for Rehearing En Banc, *Rothe Dev*., 2017 U.S. App. LEXIS 728, at *3. The Supreme Court subsequently denied the plaintiff's petition for writ of certiorari. Rothe Dev., Inc. v. Dep't of Def., 138 S. Ct. 354 (2017).

[634] *See* discussion *supra* in *Predicting Nominees' Future Decisions on the Court*.

[635] 42 U.S.C. §§ 2000e-2000e-17. *See, e.g.*, Baloch v. Kempthorne, 550 F.3d 1191, 1195–98 (D.C. Cir. 2008) (analyzing Title VII and age discrimination claims alleging a discriminatory change in job responsibilities, and affirming the district court's grant of summary judgment to the government on those claims).

[636] 42 U.S.C. §§ 12101–12213. *See, e.g.*, Adeyemi v. District of Columbia, 525 F.3d 1222, 1227–29 (D.C. Cir. 2008) (analyzing an ADA claim in which the plaintiff alleged the defendant refused to hire him because of his disability, and

Kavanaugh's record is still relatively limited, as the nominee has not addressed a number of issues that have divided the lower courts with respect to statutory civil rights law, such as whether and to what extent Title VII prohibits discrimination based on sexual orientation.[637] Similarly, Judge Kavanaugh has written one decision, discussed below, assessing the legality of a voter identification law under the Voting Rights Act[638] in a fact-intensive analysis that granted preclearance of that law on behalf of a unanimous three-judge panel.[639] This section provides an overview of the limited civil rights cases that Judge Kavanaugh has adjudicated, beginning with statutory civil rights matters and concluding with his one voting rights case.

## Statutory Civil Rights Law

With respect to statutory civil rights claims, a closer look at Judge Kavanaugh's authored opinions provides some noteworthy reference points. Of particular note are two concurrences in which he urged a legal position that would have altered circuit precedent with respect to certain Title VII racial discrimination claims, as well as several dissenting opinions involving federal employers that concerned a potential conflict between an antidiscrimination protection and another statute or countervailing interest, such as national security.

For example, in *Ayissi-Etoh v. Fannie Mae*,[640] a Title VII case, Judge Kavanaugh concurred in the judgment in favor of the plaintiff, who had alleged, among other claims, a racially hostile work environment based on evidence that included the company's vice president allegedly shouting at the plaintiff "to get out of my office nigger."[641] The panel issued a per curiam decision holding that the evidence, in its totality, was sufficient to establish the plaintiff's claims.[642] The nominee wrote separately to "underscore an important point"—that the alleged statement by the vice president to the plaintiff "*by itself* would establish a hostile work environment for purposes of federal anti-discrimination laws."[643] Judge Kavanaugh emphasized that a supervisor made this statement, and "[n]o 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."[644] While other federal courts of appeals have held that similar evidence supports a

affirming the district court's grant of summary judgment to the District).

[637] *Cf., e.g.*, Zarda v. Altitude Express, Inc., 883 F. 3d 100, 111–12 (2d Cir. 2018) (en banc) (holding that discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc) (same); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255–56 (11th Cir. 2017) (holding that binding precedent foreclosed plaintiff's Title VII claim alleging discrimination based on sexual orientation), *cert denied*, 138 S. Ct. 557 (2017).

For example, it appears that Judge Kavanaugh has only participated in one statutory civil rights case concerning sexual orientation. In an unpublished unanimous decision, the panel in that case affirmed an award of summary judgment to the government in connection with a plaintiff's Title VII claim. *See* Walker v. McCarthy, 582 F. App'x 6, 7 (D.C. Cir. 2014). The plaintiff alleged he was subjected to a religiously hostile work environment and religious discrimination based on receiving an office-wide invitation to an event celebrating a colleague's same-sex wedding, and a series of emails related to that event. *See id.*

[638] 52 U.S.C. § 10301 *et seq*.

[639] South Carolina v. United States, 898 F. Supp. 2d 30, 48 (D.D.C. 2012) (preclearing the law for future elections, but not the 2012 election).

[640] 712 F.3d 572, 574 (D.C. Cir. 2013).

[641] *Id.* at 577.

[642] *Id.* at 576–77 (discussing additional evidence such as another supervisor's statement conveying that the plaintiff was being denied a raise because of his race).

[643] *Id.* at 579 (Kavanaugh, J., concurring) (emphasis added).

[644] *Id.* at 580.

racially hostile work environment claim,[645] the nominee's position would notably go further than such precedent by expressly creating a clear rule that a supervisor's one-time use of a particular racial slur can, as a matter of law, establish the Title VII violation.[646]

Judge Kavanaugh concurred in another Title VII race discrimination case, *Ortiz-Diaz v. Department of Housing & Urban Development*.[647] At issue in *Ortiz* was whether the denial of a Latino employee's request for a lateral transfer was actionable under Title VII, where the denial was allegedly based on his race and national origin, but the transfer itself would have been to a position of the same pay and benefits. Ordinarily, such a transfer would not have constituted a Title VII violation under D.C. Circuit precedent because it did not effect a change in the terms, conditions, or privileges of the plaintiff's employment.[648] In a reissued decision,[649] however, the panel held that the transfer denial at issue could be a Title VII violation, as it would have removed the plaintiff from a race-biased supervisor, and offered potential career advancement.[650] Thus, the panel concluded, the evidence created a triable issue that the transfer denial was based on the plaintiff's race.[651] Concurring, Judge Kavanaugh stated that he was "comfortable with the narrowing of our precedents" so that some lateral transfers—rather than none—could be actionable under Title VII.[652] Notably, he added that in a future case, the en banc court "should go further" by establishing that, as a rule, all discriminatory transfers and denials of transfers based on an employee's race "plainly constitute[ ]" discrimination in violation of Title VII.[653] Here, as in *Ortiz-Diaz*, Judge Kavanaugh construed the protections afforded under Title VII more broadly than the interpretation taken by some other federal appellate courts.[654]

While Judge Kavanaugh has construed Title VII in a manner that has been favorable to some claims raised by plaintiffs, he has also ruled against plaintiffs on occasion.[655] In particular, in the context of certain antidiscrimination claims raised against federal employers, the nominee has differed—at times markedly so—from some of his colleagues in finding that certain legal

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[645] *See*, *e.g.*, Tademy v. Union Pac. Corp., 614 F.3d 1132, 1144–46 (10th Cir. 2008) (holding that exposure to racial epithets, in addition to other evidence, created a jury question as to a plaintiff's hostile work environment claim); Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 674–76 (7th Cir. 1993) (stating that "[p]erhaps no single act can more quickly" create an abusive working environment than a supervisor's use of a racial epithet, such as the n-word, and holding that the district court committed no error in concluding that this, and other evidence, created a racially hostile work environment).

[646] *Cf.* Castleberry v. STI Grp., 863 F.3d 259, 264–66 (3d Cir. 2017) (holding that a supervisor's one-time use of the n-word is sufficient to state a plausible hostile work environment claim for the purpose of surviving a motion to dismiss, and discussing decisions from other circuits holding that an extremely isolated act of discrimination can create a hostile work environment).

[647] 867 F.3d 70, 71 (D.C. Cir. 2017).

[648] *Id.* at 74–75.

[649] The majority originally affirmed summary judgment in favor of the defendant, over a dissent, but decided sua sponte to reconsider the case while a petition for rehearing was pending, and vacated its earlier opinion. *Id.* at 71.

[650] *Id.* at 74–77.

[651] *Id.* at 74–77.

[652] *Id.* at 81 (Kavanaugh, J., concurring).

[653] *Id.*

[654] *Cf.*, *e.g.*, EEOC v. AutoZone, Inc., 860 F.3d 564, 568 (7th Cir. 2017) (assuming the evidence created a fact issue that defendant transferred employee because of his race, and holding that lateral transfer did not violate Title VII in the absence of adverse effects).

[655] *See*, *e.g.*, Johnson v. Interstate Mgmt. Co., 849 F.3d 1093, 1099–1100 (D.C. Cir. 2017) (analyzing plaintiff's discrimination claims and concluding that evidence was insufficient to create a triable issue on those claims); Stewart v. St. Elizabeths Hosp., 589 F.3d 1305, 1308–09 (D.C. Cir. 2010) (same); Vatel v. Alliance of Auto Mfrs., 627 F.3d 1245, 1247–49 (D.C. Cir. 2011) (same); Jackson v. Gonzales, 496 F.3d 703, 707–10 (D.C. Cir. 2007) (same).

doctrines or governmental interests bar antidiscrimination claims from proceeding. In *Rattigan v. Holder* (*Rattigan I*),[656] for example, and a subsequent decision issued after the panel granted rehearing of the case (*Rattigan II*),[657] Judge Kavanaugh filed dissenting opinions disagreeing with the majority's decision to allow a plaintiff's Title VII retaliation claim to proceed. In *Rattigan I* and *II*, the plaintiff, a Federal Bureau of Investigation (FBI) agent based in Saudi Arabia, alleged that his supervisor retaliated against him for filing a race and national origin discrimination complaint by referring him to the FBI's Security Division for possible investigation into whether his security clearance should be withdrawn.[658] Central to the disposition of that case—and the basis for disagreement between the majority opinion and Judge Kavanaugh's dissents in *Rattigan I* and *II*—was how to interpret and apply the Supreme Court's 1988 decision in *Department of Navy v. Egan*[659] to an allegedly retaliatory referral.

In *Egan*, the Supreme Court addressed the "narrow question" of whether the Merit Systems Protection Board (MSPB) had statutory authority to review the basis for a security clearance decision, the denial of which resulted in the plaintiff's termination from a laborer's job at a Navy facility.[660] Holding that the MSPB lacked such authority, the Court in *Egan* discussed the statutory text relating to MSPB review and procedures, emphasizing: (1) the President's authority as Commander in Chief in matters of national security and foreign affairs; (2) the broad discretion committed to executive branch agencies to protect classified information and determine access to it; and (3) the lack of expertise agencies like the MSPB have in matters of national security to review a security clearance decision.[661]

The majority in *Rattigan I*—in a matter of "first impression"[662]—held that the FBI's decisionmaking process and clearance decision were not reviewable under *Egan*,[663] but that the plaintiff's retaliation claim could nonetheless proceed because he challenged his supervisor's *referral* as retaliatory, not the clearance decision itself. Concluding that the plaintiff's retaliation claim could possibly be adjudicated without reviewing the agency's security clearance process,[664] the panel instructed the district court on remand to determine whether the plaintiff had presented sufficient evidence for this claim to proceed "without running into *Egan*."[665] That application of *Egan,* the majority stated, "preserv[es] to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."[666]

While the majority viewed *Egan* as a "narrow" ruling cabined to the nonreviewability of the substance of the security clearance process and clearance decision,[667] Judge Kavanaugh

[656] 643 F.3d 975 (D.C. Cir. 2011).

[657] 689 F.3d 764 (D.C. Cir. 2012).

[658] *Rattigan II*, 689 F.3d at 765–66.

[659] 484 U.S. 518 (1988).

[660] *Id.* at 520.

[661] *Id*. at 527–31.

[662] *Rattigan I*, 643 F.3d at 982.

[663] *Id.* at 984.

[664] *Id.* at 986–88.

[665] *Id.* at 989 (acknowledging that while certain Title VII challenges to security referrals could invite the jury to question security clearance decisions, that outcome was "far from inevitable" and stating it would "fall[ ] to the district court to guard against this risk of violating *Egan*").

[666] *Id.* at 984.

[667] *Id.* (stating that a "decision by a non-expert employee to refer a colleague for a potential security investigation is categorically unlike the predictive judgment" made by trained personnel who make security clearance decisions).

interpreted *Egan* more broadly to preclude categorically a court's review of any such referrals.[668] Reading *Egan* as "an insurmountable bar" to the claim,[669] the nominee criticized the majority for "slicing and dicing" the security clearance process in order to sustain the plaintiff's Title VII claim.[670] In Judge Kavanaugh's view, the President's issuance of executive orders requiring employees to report their doubts as to another employee's continued eligibility to access classified information provided a "powerful indication" that those referrals fell within *Egan*'s bar to reviewability.[671] While the nominee noted that he "share[d] the majority's concern about deterring false or wrongful reports that in fact stem from a discriminatory motive," Judge Kavanaugh stated that "there are a host of sanctions that deter" behavior, such as that alleged by the plaintiff, citing Department of Justice (DOJ) regulations.[672] In its subsequent panel decision in *Rattigan II*, the majority further narrowed the type of Title VII claims that could go forward in connection with a security referral to only claims alleging that the reporting individual knowingly made the referral based on false information.[673] Judge Kavanaugh again dissented, stating that the majority's conclusion could not "be squared" with *Egan* because it would still allow courts to review security clearance decisions that, in his view, are unreviewable under that precedent.[674]

In another dissent,[675] Judge Kavanaugh took a similar approach when presented with the issue of whether privileges emanating from the Constitution's Speech or Debate Clause barred discrimination claims from proceeding against a congressional employer. In *Howard v. Office of Chief Administrative Officer of the U.S. House of Representatives*,[676] a majority held that the Speech or Debate Clause did not require dismissal of the plaintiff's race discrimination claims brought pursuant to the Congressional Accountability Act because—based on the alleged facts specific to her claims—it was possible she could prove unlawful discrimination without necessarily inquiring into communications or legislative acts shielded by that Clause.[677] The nominee, however, would have dismissed the claim as barred by the Clause, emphasizing the practical difficulty of challenging a congressional employer's personnel decisions without ultimately requiring it to produce evidence relating to legislative activities that the Clause protects from compelled disclosure.[678] Describing the majority as "[t]rying to thread the needle and avoid dismissal" of the plaintiff's claims,[679] Judge Kavanaugh stated that the majority's approach was

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[668] *Id.* at 989–91 (Kavanaugh, J., dissenting) (interpreting *Egan* as protecting the security clearance process as a whole, and stating that the Court in *Egan* did not suggest courts could review "distinct parts of that process").

[669] *Id.* at 992.

[670] *Id.* at 990.

[671] *Id.* at 991.

[672] *Id.* (citing 71 Fed. Reg. 64,562 and 64,563).

[673] *Rattigan II*, 689 F.3d at 770 (explaining that, under this standard, "the only question is whether the reporting employee actually knew at the time of the reporting that the information he provided was actually false").

[674] *Id.* at 773–76 (Kavanaugh, J., dissenting). Following this decision, and subsequent proceedings in district court and the D.C. Circuit on this Title VII retaliation claim, the plaintiff filed a petition for writ of certiorari, which the Supreme Court denied. *See* Rattigan v. Lynch, 136 S. Ct. 1513 (2016).

[675] Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939, 953–57 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

[676] *Id.* at 941 (majority opinion).

[677] *Id.* at 942–43, 945, 950–52 (holding that, "based on the record before us," the Speech or Debate Clause did not require dismissal of the plaintiff's claims, and that these could proceed, thus surviving the defendant's motion to dismiss, but "subject to the applicable strictures of the Speech or Debate Clause").

[678] *Id.* at 955–56 (Kavanaugh, J., dissenting).

[679] *Id.* at 955.

"inconsistent with Speech or Debate Clause principles" and pointed to, as recourse for resolving allegations of discrimination, the availability of internal administrative procedures.[680]

Meanwhile, in *Miller v. Clinton*,[681] the nominee, in dissent, construed general language in the Basic Authorities Act authorizing the State Department to contract with American workers in foreign locations "without regard" to "statutory provisions" concerning the "performance of contracts and performance of work in the United States" to shield the agency from a federal antidiscrimination lawsuit. In *Miller*, though it was uncontested that the State Department had fired an employee solely based on age (65), the agency argued that language in the Basic Authorities Act[682] exempted it from complying with the antidiscrimination requirements of the Age Discrimination in Employment Act with respect to the plaintiff.[683] The majority opinion rejected that argument, concluding the statute contained no express exemption to the Age Discrimination in Employment Act's broad proscription against discrimination based on age,[684] contrasting the Basic Authorities Act to other instances in which Congress expressly authorized mandatory retirement clauses.[685] The majority also expressed concern that accepting the State Department's argument would require reading the Basic Authorities Act to create exemptions to Title VII and the ADA,[686] emphasizing its skepticism that Congress "would have authorized the State Department to ignore statutory proscriptions against discrimination on the basis of age, disability, race, religion, or sex through the use of ambiguous language."[687]

Judge Kavanaugh dissented,[688] stating that as a matter of statutory interpretation, the case was "not a close call."[689] The "plain language" of the Basic Authorities Act, as he viewed it, gave the State Department discretion to negotiate employment contracts without regard to statutes relating to the performance of work in the United States, and the Age Discrimination in Employment Act, in Judge Kavanaugh's view, was such a covered statute.[690] Thus, he stated, "[t]he statute is not remotely ambiguous or difficult to apply in this case."[691] In response to the majority's concern over the consequences that could result from exempting the State Department from the Age Discrimination in Employment Act and other workplace discrimination statutes, the nominee pointed to antidiscrimination protections provided for under the First and Fifth Amendments of

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[680] *Id.* at 956–57 (adding that "[w]e are informed that numerous congressional employees have availed themselves of that Office of Compliance process and have obtained remedies").

[681] 687 F.3d 1332, 1353 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[682] *Id.* at 1342–43 (majority opinion).

[683] *Id.* at 1335–36.

[684] *Id.* at 1337–40 (reasoning that even if the text in the Basic Authorities Act did contain an exemption from the Age Discrimination in Employment Act, "it is one that must be inferred from text of unusual opacity").

[685] *Id.* at 1339–40 (stating that these statutory provisions demonstrate "that Congress knows how to limit the [Age Discrimination in Employment Act] and other statutes when it wishes to do so" and "makes its intention clear by using language that makes express exceptions").

[686] *Id.* at 1338.

[687] *Id.*; *see also id.* at 1352 (stating that the dissent's reading was not absurd, but the majority was choosing a "less surprising and more natural reading of the statutory text," and noting the analysis boiled down to one dispositive question: "If Congress had intended to authorize the State Department to act without regard to the antidiscrimination laws, would it have done so using a string of forty-five words that has previously only been read to authorize a waiver of the regulatory and statutory provisions that govern federal contracting and procurement? We do not think so.").

[688] *Id.* at 1353–61 (Kavanaugh, J., dissenting).

[689] *Id.* at 1357. *See also id.* at 1356–57 (discussing legislative history as providing further indication that Congress intended to exempt the State Department from certain employment laws when hiring U.S. citizens at foreign locations).

[690] *Id.* at 1355–56.

[691] *Id.* at 1360.

the Constitution, calling the majority's concerns a "red herring" in light of those constitutional protections.[692] Moreover, Judge Kavanaugh further declared that even if he agreed with the majority's concerns with respect to exempting the agency from the Age Discrimination in Employment Act, it was not for the court to "re-draw" the lines of the statute as it might prefer.[693] Rather, he stated, "our job is to apply and enforce the law as it is written."[694]

As a general matter, Judge Kavanaugh's positions in these statutory civil rights cases suggest that his decisions in this area of law are centrally animated by his broader judicial philosophy that embraces legal formalism, textualism and, in the case of claims involving federal employers, the separation of powers.[695] For instance, the nominee appears to prefer the articulation and application of clear rules to govern his analyses of civil rights matters, such as those he urged in *Ayissi-Etoh* and *Ortiz-Diaz* (that would establish per se liability for race discrimination based on certain evidence) and *Rattigan* and *Howard* (that would bar certain discrimination claims altogether).[696] Meanwhile, his dissents in *Rattigan*, *Howard*, and *Miller* could be read to indicate a reluctance to expose the executive or legislative branches to liability under antidiscrimination laws unless binding precedent or statutory language dictate otherwise.[697] Nonetheless, as noted, the statutory civil rights cases in which the nominee has participated are relatively limited, making it difficult to arrive at firm conclusions as to how he might approach other civil rights matters that may arrive at the Court.

## Voting Rights

In the voting rights context, Judge Kavanaugh, sitting by designation, authored one notable decision, *South Carolina v. United States*,[698] on behalf of a unanimous three-judge panel of the U.S. District Court for the District of Columbia. *South Carolina* predated the Supreme Court's

[692] *Id.* at 1359 (stating that the "inapplicability of the [Age Discrimination in Employment Act] and other anti-discrimination legislation to State Department workers abroad does not license the State Department to discriminate against American workers" given protections afforded by the First and Fifth Amendments and Article VI of the Constitution, which bar the federal government from discrimination based on race, sex, and religion). *Cf. id.* at 1338 (majority opinion) (noting that "while the Department and our dissenting colleague assure us that the Constitution would continue to protect government employees," Congress "made clear that it did not regard constitutional protections as sufficient" when it granted statutory antidiscrimination protections to government employees).

[693] *Id.* at 1360 (Kavanaugh, J., dissenting).

[694] *Id.* at 1353 (adding that, "[i]n my judgment, the majority opinion has not correctly performed that task").

[695] *See* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[696] *See* Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (expressing view that racially hostile work environment claim could be established by a supervisor's one-time use of a particular racial slur); Ortiz-Diaz v. Dep't of Hous. & Urban Dev., Office of Inspector Gen., 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (expressing view that race-based lateral transfer or transfer denial would violate Title VII); Rattigan v. Holder (*Rattigan I*), 643 F.3d 975, 989–91 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (interpreting *Egan* as protecting the security clearance process as a whole); Rattigan v. Holder (*Rattigan II*), 689 F.3d 764, 773–76 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (same); Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939, 955–57 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (concluding that Speech or Debate Clause barred antidiscrimination claim from proceeding against congressional employer).

[697] *Rattigan I*, 643 F.3d at 989–91 (Kavanaugh, J., dissenting) (interpreting *Egan* to bar Title VII claim challenging security clearance referral); *Rattigan II*, 689 F.3d at 773–76 (Kavanaugh, J., dissenting) (same); *Howard*, 720 F.3d at 955–57 (Kavanaugh, J., dissenting) (concluding that Speech or Debate Clause barred antidiscrimination claim from proceeding against congressional employer); *Miller*, 687 F.3d at 1353–61 (Kavanaugh, J., dissenting) (interpreting statutory language to bar antidiscrimination claim against State Department).

[698] 898 F. Supp. 2d 30 (D.D.C. 2012).

2013 decision in *Shelby County v. Holder*,[699] which invalidated Section 4(b) of the Voting Rights Act (VRA),[700] a provision containing a coverage formula[701] for determining which states were required to obtain "preclearance" of their proposed voting laws under Section 5 of the VRA[702]—from the DOJ or a three-judge district court panel—before such laws could take effect. Though *Shelby County* rendered the VRA's Section 5 preclearance requirement inoperable, Section 5 was still in effect at the time of *South Carolina*.

At issue in *South Carolina* was whether that state's new voter identification (ID) law, Act R54, was valid under Section 5 of the VRA, which prohibits granting preclearance to state laws that either have the (1) "purpose" or the (2) "effect" of denying or abridging the right to vote on account of race.[703] The DOJ previously denied prior approval of the South Carolina law, and the state sued to challenge that determination and seek a declaration that the law did not have the purpose or effect of denying or abridging the right to vote.[704] Describing the VRA as "among the most significant and effective pieces of legislation in American history,"[705] Judge Kavanaugh, writing for a unanimous panel, ultimately granted preclearance of Act R54 for the election following 2012 under Section 5.[706] The nominee's determination turned significantly on the facts of the case, a specific feature of the law at issue, and the deference he afforded to the state's reasons for and interpretation of the law.

Specifically, R54, which generally required a voter to provide photo ID in order to vote in person,[707] consisted of, as Judge Kavanaugh explained it, "several important components."[708] The first would have expanded the type of photo IDs that could be used to vote,[709] while a second provision would have created a new type of photo voter ID card[710] and DMV photo ID card[711]

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[699] 570 U.S. 529 (2013).

[700] *Id.* at 557. Judge Kavanaugh did not participate in the D.C. Circuit decision that preceded the Supreme Court's decision in *Shelby County*. *See* Shelby Cty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012).

[701] *See* 52 U.S.C. § 10303.

[702] *Id.* § 10304.

[703] *South Carolina*, 898 F. Supp. 2d at 32.

[704] U.S. Dep't of Justice, Civil Rights Division, Office of the Assistant Attorney General, Voting Determination Letter (Dec. 23, 2011), https://www.justice.gov/crt/voting-determination-letter-65 [hereinafter *Voting Determination Letter*].

[705] *South Carolina*, 898 F. Supp. 2d at 32–33.

[706] *Id.* at 48–50 (preclearing R54 only for future elections beginning in 2013, but not as to the 2012 election immediately following the decision). In granting preclearance only as to future elections beginning in 2013, Judge Kavanaugh emphasized there was only a four-week time frame before the 2012 election for implementation of and training on the law. The nominee concluded that such a short timeframe was inadequate, particularly with respect to the reasonable impediment provision, whose smooth functioning was "vital to avoid unlawful racially discriminatory effects" on African-American voters. *Id.* at 50.

[707] *Voting Determination Letter*, *supra* note 704 ("Section 5 of Act R54 would require voters to present one of five forms of photo identification to vote in person.")

[708] *South Carolina*, 898 F. Supp. 2d at 35.

[709] *Id. Cf. Voting Determination Letter*, *supra* note 704 (concluding that over 200,000 registered voters did not possess DMV-issued photo identification that would satisfy the South Carolina law's requirements).

[710] *See South Carolina*, 898 F. Supp. 2d at 33–34 (stating that the photo ID could be obtained by presenting the citizen's current non-photo voter registration card, or verbally confirming date of birth and the last four digits of the Social Security number if already registered to vote, and adding that a citizen could also present a photo ID, utility bill, bank statement, government check, paycheck, or other government document showing the individual's name and address).

[711] *Id.* at 34 (describing the new voter ID law as allowing citizens to obtain for free a DMV photo ID card with presentation of proof, such as a birth certificate or passport, and noting the documents required to obtain a DMV card "are not changed from pre-existing law").

that could be obtained for free. A third provision—critical to the disposition of the case—would have continued to allow voters to cast ballots without a photo ID, provided that the voter produce a non-photo voter registration card and, pursuant to the new law, complete an affidavit at the polling site stating the reason for not obtaining a photo ID.[712] The DOJ denied preclearance in part because that affidavit requirement—mandating that the voter identify "a reasonable impediment" that prevented him or her from obtaining a photo ID—was ambiguous and unclear in its application.[713]

Starting the analysis by evaluating the potential discriminatory effects of R54, Judge Kavanaugh focused on this "reasonable impediment" provision.[714] The nominee explained that as the litigation unfolded, South Carolina officials responsible for interpreting and implementing the law began to solidify and provide more information—"often in real time"—as to how they would apply the provision.[715] Those officials, the nominee stated, "have confirmed repeatedly" that they would accept *any* reason asserted by the voter on the reasonable impediment affidavit, including reasons such as having to work, lacking transportation to the county office, and being unemployed and looking for work.[716] Judge Kavanaugh concluded that this official interpretation of the "reasonable impediment" provision was definitive, and he repeatedly emphasized that the state's expansive interpretation of the provision was central to the court's preclearance of the law.[717] Indeed, the nominee noted the court may *not* have precleared South Carolina's proposed law without confirmation of the state's broad interpretation of the reasonable impediment provision because the law without it "could have discriminatory effects and impose material burdens on African-American voters, who in South Carolina disproportionately lack one of the R54-listed photo IDs" and "would have raised difficult questions under the strict effects test of Section 5."[718] Judge Kavanaugh further advised that, if the state were to alter its interpretation of the reasonable impediment provision, it would have had to obtain preclearance of that change before applying it.[719] The nominee thus concluded that R54 would not have discriminatory retrogressive effect within the meaning of Section 5 because, among other reasons, the state's broad interpretation of the "reasonable impediment" provision would mean that every voter who had a non-photo voter registration card under pre-existing law could still use that card to vote under the new law.[720]

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[712] *Id*.

[713] *See Voting Determination Letter*, *supra* note 704 (explaining that, given the ambiguity of the "reasonable impediment" exemption to presenting a photo ID to vote and uncertainty as to how that exemption might be applied, it could not "conclude that this provision will mitigate" the law's discriminatory effects resulting from requiring photo ID). In its letter the DOJ also discussed data from the State Election Commission reflecting "significant racial disparities" that would result from the South Carolina law requiring photo ID to vote, including that seven counties with the highest percentage of registered voters lacking DMV-issued ID were among the ten counties with the highest percentage of non-white, voting-age persons. *Id.*

[714] *See South Carolina*, 898 F. Supp. 2d at 35–43.

[715] *Id.* at 35–36.

[716] *Id.* at 36.

[717] *Id.* at 37–38, 49. *See also id.* at 52 ("In closing, we underscore that all South Carolina state, county, and local officials must comply with Act R54 as it has been interpreted . . . and as it has been described and adopted in this opinion. Any change in the law as so interpreted would be unlawful, without pre-clearance from the Attorney General of the United States or from this Court. We are fully aware, moreover, that what looks good on paper may fall apart in practice. We expect and anticipate that South Carolina state, county, and local officials will endeavor to prevent such slippage.").

[718] *Id.* at 50.

[719] *Id.* at 51–52.

[720] *Id.* at 39–43 (discussing that the law increases the number of qualifying photo IDs and makes it "far easier" to get a

Separately, Judge Kavanaugh's opinion also concluded that the state did not have a discriminatory purpose in enacting R54. The nominee rejected the argument that the introduction of the law in proximity to the election of the country's first African-American President, among other evidence, was indicative of a discriminatory purpose.[721] South Carolina justified the law on the grounds that it was necessary to deter voter fraud. Judge Kavanaugh concluded that such a purpose was legitimate and could not be deemed pretextual "merely because of an absence of recorded incidents of in-person voter fraud in South Carolina."[722] Pointing to the Supreme Court's 2008 decision in *Crawford v. Marion County Election Board*,[723] the nominee stated that the Court had "specifically recognized" deterring voter fraud and enhancing public confidence in elections as legitimate interests, deeming "those interests valid despite the fact that the 'record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history.'"[724] In addition, though the state legislature "no doubt" was aware that photo ID possession rates varied by race in the state, Judge Kavanaugh noted that the legislators, faced with those data, "did not just plow ahead," but instead provided for the addition "of the sweeping reasonable impediment provision," among other changes.[725] While ongoing legislative action with the knowledge of racially disproportionate impact could be evidence of a law's discriminatory purpose, such facts and circumstances, the nominee concluded, were not present in *South Carolina*.[726]

In another section of the opinion, Judge Kavanaugh also compared the features of R54 to other state voter ID laws that had been recently upheld or invalidated, stating that "if those laws were to be placed on a spectrum of stringency, South Carolina's clearly would fall on the less stringent end."[727] Two voter ID laws that had been precleared by the Justice Department—laws in Georgia and New Hampshire—were more restrictive than South Carolina's, in the nominee's view.[728] Meanwhile, a Texas voter ID law, which had recently been denied preclearance by another three-judge panel, had "stringent" features distinguishable from the requirements of South Carolina's law.[729] This comparison, Judge Kavanaugh stated, supported the panel's conclusion that R54 did not have discriminatory effects or purposes under Section 5.[730]

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photo ID, and that the reasonable impediment ballots would not differ in substance or effect from absentee ballots). With respect to the court's conclusion that the provisional ballot process at issue did not unduly burden the right to vote, Judge Kavanaugh emphasized the manner in which provisional ballots would be counted under R54, and explained that its assessment was "strongly buttressed" by the Supreme Court's treatment and characterization of provisional ballots as curative in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). *South Carolina*, 898 F. Supp. 2d at 41–43.

[721] *South Carolina*, 898 F. Supp. 2d at 45–46.

[722] *Id.* at 43–44. *Cf. Voting Determination Letter, supra* note 704 (explaining that while states have a legitimate interest in preventing voter fraud, South Carolina's submission of materials did not include evidence of fraud not already addressed by the state's existing requirement or that could be deterred by requiring voters to present only photo ID at the polls).

[723] 553 U.S. 181 (2008).

[724] *South Carolina*, 898 F. Supp. 2d at 43–44 (discussing and quoting *Crawford*, 553 U.S. at 194, 196–97).

[725] *Id.* at 44–45.

[726] *Id.* at 44.

[727] *Id.* at 46–48.

[728] *Id.* at 47.

[729] *Id.* at 47–48 (emphasizing, among other aspects, that the Texas law lacked "any kind of reasonable impediment or affidavit provision" to accommodate voters who had not obtained the requisite photo ID, and noting that, unlike South Carolina, numerous counties lacked a place for voters to obtain qualifying photo IDs).

[730] *Id.* at 48.

Set against the backdrop of more recent legal challenges to voter laws—a legal area that continues to evolve following the Supreme Court's *Shelby County* decision[731]—Judge Kavanaugh's opinion in *South Carolina* does not necessarily appear to be an outlier, nor a ruling in conflict with other courts that have adjudicated voter ID disputes. In one recent challenge to a voter ID law in North Carolina, for example, the Fourth Circuit invalidated that state's law under Section 2 (not Section 5) of the VRA and the Equal Protection Clause of the 14th Amendment.[732] The panel concluded that the law was enacted with discriminatory intent based on evidence, including that the state legislature analyzed data on voting mechanisms disproportionately used by African-American voters and then selectively introduced provisions to eliminate or reduce those very mechanisms, thereby "target[ing] African Americans with almost surgical precision."[733] Such legislative action was not presented in *South Carolina*.[734] Meanwhile, in an ongoing legal challenge to a Wisconsin law requiring photo ID to vote, the Seventh Circuit stayed a district court's preliminary injunction that would have required the state to allow registered voters to cast a ballot with an affidavit that "reasonable effort would not produce a photo ID," and would have prohibited officials from disputing any reason provided by the voter,[735] similar to the provision in *South Carolina*.[736] That litigation, brought pursuant to Section 2 of the VRA and the Equal Protection Clause of the 14th Amendment,[737] is ongoing.[738]

## Conclusion

The limited number of judicial opinions written by Judge Kavanaugh in the area of civil rights provides a correspondingly limited basis for drawing definitive conclusions about his judicial approach to these legal issues. *South Carolina*, the only voting rights decision in which the nominee participated, was itself a fact-bound determination that provides little insight into his judicial philosophy regarding voting rights cases generally. As discussed, the nominee's few opinions in statutory civil rights cases appears to be less of a product of his views on civil rights matters, and more a result of his general judicial philosophy. What is clear, nonetheless, is that Judge Kavanaugh, if confirmed, could be consequential in addressing civil rights questions that are likely to come before the Supreme Court on a range of areas in the foreseeable future. These

[731] *See generally* CRS Report R44675, *Recent State Election Law Challenges: In Brief*, by L. Paige Whitaker.

[732] N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016). For further discussion, see CRS Legal Sidebar WSLG1814, *Supreme Court Lets Stand Appellate Ruling Invalidating North Carolina Election Law, Including Photo ID Requirement*, by L. Paige Whitaker.

[733] *NAACP*, 831 F.3d at 214, 216–18, 227–30.

[734] *See South Carolina*, 898 F. Supp. 2d at 44–45 (stating that state legislators, when presented with data indicating a racial gap in photo ID possession rates, "made several important changes to the bill," including adding the "sweeping reasonable impediment provision").

[735] Frank v. Walker, Nos. 16-3003 & 16-3052, 2016 U.S. App. LEXIS 14917, at *2 (7th Cir. Aug. 10, 2016), *reh'g denied*, 835 F.3d 649, 651–52 (7th Cir. 2016).

[736] The district court below had approvingly cited the "reasonable impediment" provision in *South Carolina* when ordering the state to add such an exemption. *See* Frank v. Walker, 196 F. Supp. 3d 893, 915–16 (E.D. Wis. 2016).

[737] *Id.* at 897.

[738] *See* Frank v. Walker, No. 11-1128 (E.D. Wis.).

include percolating and ongoing legal disputes relating to affirmative action in higher education[739] and statutory civil rights protections based on sexual orientation or transgender status.[740]

[739] For example, commentatators have speculated that a lawsuit challenging Harvard University's affirmative action policy in admissions could be the next affirmative action case to come before the Supreme Court. *See, e.g.*, Anemona Hartocollis, *Asian-Americans Suing Harvard Say Admissions Files Show Discrimination*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/harvard-asian-admission.html ("Critics have seen the lawsuit against Harvard, which seems intended to go to the Supreme Court, as an attempt to reignite that battle.").

[740] There is a petition for writ of certiorari pending before the Court on the question whether Title VII's prohibition against discrimination based on sex includes discrimination based on transgender status or gender identity. *See* Petition for Writ of Certiorari, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018).

# Criminal Law and Procedure[741]

Although Justice Kennedy may have exerted less influence over criminal law and procedure doctrine than other areas of the law, he did cast decisive votes in numerous criminal procedure cases.[742] In particular, in cases implicating the Eighth Amendment's prohibition on cruel and unusual punishments, Justice Kennedy's voting record shaped much of recent Supreme Court doctrine.[743] If confirmed, Judge Kavanaugh could therefore have a considerable impact on the Court's jurisprudence in this broad area of law. The nominee has written relatively little on criminal law and procedure, however, which makes it difficult to assess how he might influence the doctrine. The D.C. Circuit decides fewer criminal cases than other federal circuit courts.[744] As a result, Judge Kavanaugh has written notable separate opinions on some areas of criminal law and procedure (e.g., Fourth Amendment search and seizure, the constitutional aspects of criminal sentencing, and substantive criminal law), but not others (e.g., cruel and unusual punishments under the Eighth Amendment, Fifth Amendment *Miranda* rights, and the Sixth Amendment right to counsel). Even on those issues that Judge Kavanaugh has addressed in multiple separate opinions—such as the Fourth Amendment—the record is too limited to support definitive conclusions about his judicial approach in such cases.[745]

The limited set of Judge Kavanaugh's writings on criminal law and procedure that does exist, however, reveals discrete strains of strongly held views, rather than one overarching philosophy susceptible to summary as "pro-defendant" or "pro-government." On Fourth Amendment issues, he has espoused a circumscribed view of the constitutional protection against unreasonable searches and seizures—arguably more circumscribed than that of Justice Kennedy, who himself generally (but not always) favored the government position in search and seizure cases.[746] On constitutional sentencing issues, by contrast, Judge Kavanaugh has shown skepticism of advisory sentencing schemes that make use of facts not encompassed by the offense of conviction to increase a defendant's advisory sentencing range. On substantive criminal law, he has strenuously voiced the opinion, also favorable to criminal defendants, that courts generally must read mental state requirements into criminal law statutes that do not establish such requirements expressly. Accordingly, this section addresses these various aspects of Judge Kavanaugh's criminal law jurisprudence.

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[741] CRS Legislative Attorney Ben Harrington authored this section of the report.

[742] *See CRS Kennedy Report*, *supra* note 17, at 17, 34–49; *see, e.g.*, Currier v. Virginia, 138 S. Ct. 2144 (2018) (Kennedy, J., joining five-Justice majority holding that the Double Jeopardy Clause does not bar a second prosecution where defendant agreed to severance of overlapping counts); Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (Kennedy, J., writing opinion for five-Justice majority holding that Sixth Amendment jury trial right requires trial court to consider clear statement by juror that he relied on racial stereotypes or animus in voting to convict).

[743] *See CRS Kennedy Report*, *supra* note 17, at 19–20.

[744] Lisa T. McElroy, *The Nomination of Three New Judges to the D.C. Circuit: To Support and Defend the Constitution*, 102 GEO. L.J. ONLINE 1, 5 n.25 (2013) ("[T]he D.C. Circuit hears far fewer criminal cases than other circuits, and these cases are more likely to be decided without dissent, even without written opinion."); Fraser et al., *supra* note 59, at 141 ("The D.C. Circuit hears fewer commercial and criminal cases than do other circuit courts. Part of this can be explained through basic geography and demographics. The D.C. Circuit is simply far smaller and has far fewer people living in it compared to any other circuit.").

[745] *See* Orin Kerr, *Judge Kavanaugh on the Fourth Amendment*, LAWFARE (July 21, 2018), https://www.lawfareblog.com/judge-kavanaugh-fourth-amendment ("Kavanaugh's Fourth Amendment record is modest.").

[746] *See* Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) (Kennedy, J., dissenting); Utah v. Strieff, 136 S. Ct. 2056 (2016); Navarette v. California, 134 S. Ct. 1683 (2014); Maryland v. King, 569 U.S. 435 (2013); Herring v. United States, 555 U.S. 135 (2009); *but see* City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015); Missouri v. McNeely,

## Fourth Amendment

In his separate opinions on the Fourth Amendment, Judge Kavanaugh has generally taken a more restrictive view than most of his D.C. Circuit colleagues on the reach of the constitutional right to be free of unreasonable searches and seizures. In *Klayman v. Obama*, for instance, he concluded that the National Security Agency's (NSA's) metadata collection program under Section 215 of the USA Patriot Act[747] was "entirely consistent with the Fourth Amendment."[748] A majority of the D.C. Circuit appeared to agree that the program was constitutional: a three-judge panel decided without opinion to stay a preliminary injunction against the program,[749] and no judge dissented from the denial of a petition for a rehearing en banc.[750] But Judge Kavanaugh, in a brief opinion concurring in the denial of the en banc petition, which no other judge joined, concluded that the collection did not constitute a search under Supreme Court precedent and that the national security needs underlying the program rendered it reasonable in any event.[751] Moreover, the opinion reached beyond the threshold search analysis that would have sufficed to uphold the metadata collection program to express the additional view that national security needs outweighed the privacy interests implicated by the program.[752]

Judge Kavanaugh has authored other notable separate opinions on Fourth Amendment issues. He dissented from a panel decision in *National Federation of Federal Employees-IAM v. Vilsack*, holding that a U.S. Forest Service policy of conducting random drug testing on employees who worked with at-risk youth violated the Fourth Amendment.[753] Judge Kavanaugh concluded that the drug testing program was "eminently sensible" and therefore reasonable under the Fourth Amendment even in the absence of individualized suspicion of drug use.[754] In another case, Judge Kavanaugh wrote a dissent from an en banc opinion, concluding that during a *Terry* stop—an investigatory stop premised on reasonable suspicion of criminal activity but made without probable cause—police may manipulate or unzip the suspect's outer clothing to facilitate identification by a witness.[755]

In at least two Fourth Amendment cases—*Wesby v. District of Columbia*[756] and *United States v. Jones*[757]—the Supreme Court ultimately adopted an analysis substantially similar to that set forth in dissenting opinions by Judge Kavanaugh. In *Wesby*, Judge Kavanaugh sharply criticized a

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569 U.S. 141 (2013).

[747] Pub. L. No. 107-56, § 501, 115 Stat. 272, 287 (2001) (codified as amended at 50 U.S.C. § 1861(a)(1)).

[748] 805 F.3d 1148, 1148 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

[749] Klayman v. Obama, No. 15-5307, 2015 U.S. App. LEXIS 22535, at *1 (D.C. Cir. Nov. 16, 2015).

[750] *Klayman*, 805 F.3d at 1148 (Kavanaugh, J., concurring in denial of rehearing en banc).

[751] *Id.* at 1148–49.

[752] *Id.* at 1149.

[753] 681 F.3d 483, 499 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[754] *Id.* at 502.

[755] United States v. Askew, 529 F.3d 1119, 1156 (D.C. Cir. 2008) (en banc) (Kavanaugh, J., dissenting) ("In our judgment, the police may reasonably maneuver a suspect's outer clothing, such as removing a suspect's hat or sunglasses or unzipping a suspect's outer jacket, when doing so could help facilitate a witness's identification at a show-up during a *Terry* stop."). Judge Kavanaugh reached the same conclusion in an opinion that he authored for a two-judge panel majority in the same case, which the full circuit court overruled en banc. *See* United States v. Askew, 482 F.3d 532, 543 (D.C. Cir. 2007) (holding that "the police during a *Terry* stop may unzip an individual's outer jacket for identification purposes (that is, so a witness can see the suspect's clothing")).

[756] 816 F.3d 96, 102 (D.C. Cir. 2016) (denying government petition for rehearing en banc).

[757] 625 F.3d 766 (D.C. Cir. 2010) (denying government petition for rehearing en banc).

panel decision that affirmed a $1 million false arrest judgment against D.C. police officers who had arrested partygoers for trespassing in a vacant house.[758] Judge Kavanaugh concluded that the panel decision contravened Supreme Court doctrine barring such damages liability unless police officers are "plainly incompetent" and "knowingly violate" the law.[759] In particular, Judge Kavanaugh criticized the panel for failing to appreciate that police officers often must base arrest decisions on "credibility assessments [made] on the spot, sometimes in difficult circumstances."[760] The Supreme Court later reversed the panel decision, agreeing with Judge Kavanaugh's conclusions that the arrests were lawful and that, even if the arrests had not been lawful, the officers had not knowingly violated the partygoers' clearly established Fourth Amendment rights.[761]

In *Jones*, Judge Kavanaugh's dissent from the denial of rehearing en banc endorsed the conclusion that the FBI's use of a GPS device without a warrant to track a suspect's vehicle for four weeks did not impinge upon the suspect's reasonable expectation of privacy.[762] Specifically, Judge Kavanaugh joined a dissent by Chief Judge Sentelle that rejected the panel decision's aggregation or "mosaic" theory, pursuant to which a suspect may have a reasonable expectation of privacy in the totality of his public movements over a prolonged period even though he has no reasonable expectation of privacy in his location in public at any particular moment.[763] Rejecting this theory, Chief Judge Sentelle (joined by Judge Kavanaugh and two other judges) concluded that "[t]he sum of an infinite number of zero-value parts is also zero."[764] But Judge Kavanaugh, in his own dissent, also argued that the FBI's act of installing the GPS device on the suspect's vehicle without a warrant may have constituted an impermissible physical invasion of a constitutionally protected space and violated the Fourth Amendment for that reason.[765] In other words, even though Judge Kavanaugh did not think that the warrantless GPS tracking violated the Fourth Amendment on a reasonable expectation of privacy theory, he suggested (without reaching a definitive conclusion) that the warrantless installation of the device may have violated the Fourth Amendment on a property-based theory of Fourth Amendment interpretation.[766] A majority of the Supreme Court ultimately followed the latter analytical approach, holding that the attachment of the device to the vehicle was a Fourth Amendment search because the FBI physically intruded upon the suspect's private property (his car) for an investigative purpose.[767]

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[758] *Wesby*, 816 F.3d at 102 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("In my view, the panel opinion in this case contravenes . . . emphatic Supreme Court directives.").

[759] *Id.* at 102.

[760] *Id.* at 106.

[761] District of Columbia v. Wesby, 138 S. Ct. 577, 582 (2018).

[762] 625 F.3d at 769 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[763] United States v. Maynard, 615 F.3d 544, 561–62 (D.C. Cir. 2010) ("The whole of one's movements over the course of a month . . . reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life . . . ."), *aff'd in part sub nom.* United States v. Jones, 565 U.S. 400 (2012).

[764] *Jones*, 625 F.3d at 769 (Sentelle, C.J., dissenting from denial of rehearing en banc).

[765] *Id.* at 771 ("Whether the police's mere touching or manipulating of the outside of one's car is a 'physical encroachment within a constitutionally protected area' requires fuller deliberation. In any event, it is an important and close question . . . .").

[766] *Id.* at 770.

[767] United States v. Jones, 565 U.S. 400, 404 (2012) ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a [Fourth Amendment] 'search.' . . . The Government physically occupied private property for the purpose of obtaining information.").

Judge Kavanaugh's dissent in *Jones* may indicate that he, like Justice Kennedy and an apparent minority of other Justices, favors a predominately property-based approach to determining what constitutes a "search" under the Fourth Amendment. The distinction between such a property-based approach, on the one hand, and an approach that recognizes Fourth Amendment privacy interests even over materials in which an individual does not have property rights, on the other hand, may be significant to the Supreme Court's developing doctrine on law enforcement access to information generated by digital-age technologies.[768]

In the 2018 case *Carpenter v. United States*, a five-Justice majority deviated from the property-based approach in holding that cell phone users have a reasonable expectation of privacy in the record of their physical movements contained in the historical cell phone location information maintained by their wireless carriers.[769] The case broke new ground by holding that, at least in some circumstances, the Fourth Amendment protects sensitive information held by an individual's third-party service provider.[770] Dissenting opinions by Justices Kennedy, Thomas, Alito, and Gorsuch all argued to varying degrees that cell phone users' lack of property interests in location information held by third parties undermined their assertion of Fourth Amendment interests in the information.[771] *Carpenter* likely will generate substantial follow-on jurisprudence about its applicability to other types of sensitive information commonly held by third-party technology companies, such as IP addresses, browsing history, or biometric data.[772]

Although Judge Kavanaugh's *Jones* dissent suggests that he may favor the minority approach toward Fourth Amendment rights as being largely coterminous with property interests—a view that, if it were to gain the support of a majority of Justices, would tend to limit *Carpenter*'s eventual reach—Judge Kavanaugh's *Jones* dissent was relatively brief and may well have been influenced by Supreme Court precedent as it existed in 2012.[773]

In at least one instance, Judge Kavanaugh has made remarks off the bench that echo the more circumscribed view of Fourth Amendment protections that emerges from his jurisprudence. In a 2017 speech at the American Enterprise Institute that generally praised the jurisprudence of Chief Justice Rehnquist,[774] Judge Kavanaugh noted Chief Justice Rehnquist's view that the Fourth

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[768] *Compare* Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) ("We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of [cell site location information], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection."), *with id.* at 2224 (Kennedy, J., dissenting) ("[T]he Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other.").

[769] *Id.* at 2217 (majority opinion).

[770] *Id.* at 2220 ("Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection.").

[771] *See id.* at 2224 (Kennedy, J., dissenting), *see also id.* at 2235 (Thomas, J., dissenting), *id.* at 2247 (Alito, J., dissenting), *id.* at 2264 (Gorsuch, J., dissenting).

[772] *See id.* at 2234–35 (Kennedy, J., dissenting) ("[T]he Court's decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails to provide clear guidance to law enforcement and courts on key issues . . . . [N]othing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history." (internal quotation marks and citations omitted)).

[773] *See* United States v. Jones, 625 F.3d 766, 769–70 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from denial of rehearing en banc) (concluding that GPS tracking did not violate the suspect's reasonable expectation of privacy under *United States v. Knotts*, 460 U.S. 276 (1983)).

[774] Kavanaugh, *From the Bench*, *supra* note 24, at 6 ("For a total of 33 years, William Rehnquist righted the ship of

Amendment exclusionary rule "was beyond the four corners of the Fourth Amendment's text and imposed tremendous costs on society."[775] Judge Kavanaugh did not argue overtly for overruling the exclusionary rule, which he described as "firmly entrenched in American law."[776] He nonetheless posited that Chief Justice Rehnquist successfully led the Supreme Court in "creat[ing] many needed exceptions to the exclusionary rule," including "most notabl[y]" the good faith exception to the exclusionary rule established in *United States v. Leon*.[777] Judge Kavanaugh also highlighted a series of Rehnquist opinions that expanded the special needs doctrine, which allows some searches without probable cause or individualized suspicion if special needs "beyond the normal need for law enforcement . . . make the warrant and probable cause requirement impracticable."[778] These points from the 2017 speech resonate in Judge Kavanaugh's Fourth Amendment opinions, where he has (1) argued that the NSA metadata collection program and the U.S. Forest Service randomized drug testing policy were permissible as special needs searches,[779] and (2) rejected challenges to the permissibility of certain law enforcement activity.[780]

## Constitutional Issues in Criminal Sentencing

In sentencing cases, Judge Kavanaugh has suggested that he considers it unfair for a court to increase a defendant's advisory sentencing guidelines range based on acquitted conduct or conduct falling outside the elements of the offense of conviction.[781] Nonetheless, Judge Kavanaugh has acknowledged that this sentencing practice does not violate the Fifth or Sixth Amendment under current Supreme Court precedent and that it would "require a significant revamp of criminal sentencing jurisprudence" to hold to the contrary.[782] His opinions do not make clear how he would rule on the constitutional question in the absence of controlling Supreme Court case law.[783] Some passages seem to suggest (but not clearly or uniformly) that he interprets

constitutional jurisprudence.").

[775] *Id.* at 10.

[776] *Id.*

[777] *Id.*; *see* United States v. Leon, 468 U.S. 897 (1984).

[778] Kavanaugh, *From the Bench*, *supra* note 24, at 10.

[779] Klayman v. Obama, 805 F.3d 1148, 1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc); Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483, 499 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[780] *See, e.g.*, Wesby v. District of Columbia, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc); United States v. Askew, 529 F.3d 1119, 1156 (D.C. Cir. 2008) (en banc) (Kavanaugh, J., dissenting).

[781] United States v. Bell, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("I share Judge Millett's overarching concern about the use of acquitted conduct at sentencing, as I have written before."); United States v. Settles, 530 F.3d 920, 923–24 (D.C. Cir. 2008) ("[W]e understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence; and we know that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence."); United States v. Henry, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) ("The oddity of [Supreme Court criminal sentencing jurisprudence] is perhaps best highlighted by the fact that courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received . . . .").

[782] *Bell*, 808 F.3d at 927 (Kavanaugh, J., concurring in denial of rehearing en banc).

[783] *See Henry*, 472 F.3d at 920–22 (Kavanaugh, J., concurring) (describing "two starkly different conceptions of how the Fifth and Sixth Amendments apply to criminal sentencing" and concluding that "current federal sentencing practices may be in tension with the Constitution" under only one of the two conceptions).

the Sixth Amendment jury trial right to prohibit judicial determination of "key sentencing facts" even under sentencing guidelines that are advisory rather than mandatory in nature.[784]

Judge Kavanaugh's opinions make clear that he disagrees with the consideration of acquitted or uncharged conduct at sentencing, and he has encouraged federal district judges to exercise their discretion in declining to rely on such conduct when imposing sentences.[785] To the extent that Judge Kavanaugh would view the Constitution to require such a result, it would be in tension with how Justice Kennedy tended to view sentencing issues, as he generally voted with a minority of Justices who deferred to legislative judgments about proper sentencing considerations and rejected Sixth Amendment challenges to the use of judicial fact-finding to increase binding sentencing thresholds.[786]

## Other Criminal Procedure Issues

Judge Kavanaugh has authored few separate opinions or non-judicial publications about other major areas of constitutional criminal procedure, such as the warnings prior to custodial interrogations required under *Miranda v. Arizona*[787] or the right to counsel under the Sixth Amendment. While he has not participated in any meaningful cases addressing custodial interrogations, in his 2017 speech to the American Enterprise Institute, Judge Kavanaugh praised Chief Justice Rehnquist for his opinions limiting *Miranda*'s application, suggesting that the nominee may take a restrictive view of that case.[788] On the Sixth Amendment right to counsel,

[784] *See Bell*, 808 F.3d at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) (reviewing the Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296 (2004), that judicial consideration of uncharged or acquitted conduct to calculate binding sentencing ranges violates the Sixth Amendment, but opining that the Court "backed away from" this holding when it upheld judicial consideration of uncharged conduct under advisory sentencing guidelines in *United States v. Booker*, 543 U.S. 220, 267 (2005)); *In re* Sealed Case, 527 F.3d 188, 199 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (opining that the risk of sentencing disparities under the post-*Booker* advisory sentencing guidelines regime is "cause for serious concern" and suggesting that "Congress could decide to make the Guidelines mandatory again, with the jury finding key sentencing facts so as to avoid the Sixth Amendment problem"); *Settles*, 530 F.3d at 923–24; *but see Henry*, 472 F.3d at 921 (Kavanaugh, J., concurring) (highlighting the "apparent anomaly" of an interpretation of the Sixth Amendment that disallows judicial fact-finding in mandatory sentencing regimes but allows "purely discretionary sentencing schemes whereby judges 'exercise broad discretion in imposing a sentence within a statutory range'" (quoting *Booker*, 543 U.S. at 233)).

[785] *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc) (encouraging federal district judges to use "their power in individual cases to disclaim reliance on acquitted or uncharged conduct"); *Settles*, 530 F.3d at 924 ("[E]ven though district judges are not *required* to discount acquitted conduct, [Supreme Court precedent] may *allow* district judges to discount acquitted conduct in particular cases—that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate."); *see also Henry*, 472 F.3d at 920 (Kavanaugh, J., concurring); Brett M. Kavanaugh, Circuit Judge, U.S. Court of Appeals for the D.C. Cir., Remarks at the U.S. Sentencing Comm'n Public Hearing 42–43 (July 9, 2009), https://www.ussc.gov/sites/default/files/Public_Hearing_Transcript_0.pdf ("One personal point: Whether they are mandatory or advisory, I think acquitted conduct should be barred from the [G]uidelines calculation. I don't consider myself a particular softy on sentencing issues, but it really bothers me that acquitted conduct is counted in the Guidelines calculation.").

[786] *See* Alleyne v. United States, 570 U.S. 99, 124 (2013) (Roberts, C.J., dissenting, joined by Kennedy, J.); United States v. Booker, 543 U.S. 220, 326 (2005) (Breyer, J., dissenting in part, joined by Kennedy, J.); Blakely v. Washington, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting) ("With no apparent sense of irony that the effect of today's decision is the destruction of a sentencing scheme devised by democratically elected legislators, the majority shuts down alternative, nonjudicial, sources of ideas and experience."); Apprendi v. New Jersey, 530 U.S. 466, 523 (2000) (O'Connor, J., dissenting, joined by Kennedy, J.).

[787] 384 U.S. 436 (1966).

[788] *See* Kavanaugh, *From the Bench*, *supra* note 24, at 11 (noting that Chief Justice "Rehnquist was for years the most vehement critic of *Miranda*, and he wrote numerous opinions limiting its application," and arguing that "[t]hose precedents and cases authored by [Chief Justice] Rehnquist have ensured that *Miranda* is applied in ([Chief Justice] Rehnquist would say) a more commonsensical way that is closer to the proper constitutional meaning and that avoids

Judge Kavanaugh took a more expansive view of the rights of criminal defendants in what appears to be his only significant opinion on the subject. Specifically, in *United States v. Nwoye*, over the dissent of Judge Sentelle, he wrote a majority opinion holding that an attorney's failure to present expert testimony about Battered Woman Syndrome to support the duress defense of a criminal defendant who had been abused by her co-conspirator boyfriend was prejudicial to her case and supported her claim of ineffective assistance of counsel.[789]

In the few opinions he has written in criminal cases concerning the right to due process, Judge Kavanaugh has sided with the government position and concluded that challenged procedures do not violate due process.[790] For example, in dissent in *United States v. Martinez-Cruz*, he concluded that it does not violate due process to assign the defendant the burden of proof "when challenging the constitutionality of a prior conviction that is being used to enhance or determine the current sentence."[791] Judge Kavanaugh criticized the panel majority, which held that the government must bear the burden in some circumstances to persuade the sentencing court that the prior conviction was valid, for "carv[ing] out novel exceptions to the minimum burden of proof baseline" under the Due Process Clause.[792]

In two recent cases that produced divided panel decisions, Judge Kavanaugh authored opinions concluding that waivers of the right to appeal contained in guilty plea agreements were enforceable against criminal defendants despite flaws in the plea hearings.[793] In rejecting the defendants' objections to enforcement of the appeal waivers, Judge Kavanaugh emphasized that such waivers play an important role in the efficient resolution of criminal cases.[794] Justice Alito

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the extremes of the Warren Court holdings.").

[789] 824 F.3d 1129, 1140–41 (D.C. Cir. 2016).

[790] Kincaid v. District of Columbia, 854 F.3d 721, 724, 728 (D.C. Cir. 2017) (holding that the District of Columbia's post-and-forfeit procedure—which allows a person arrested for a misdemeanor to pay a fine to resolve the charge without admitting guilt or incurring a conviction—does not violate arrestees' due process rights under the Fifth Amendment); United States v. Martinez-Cruz, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); *cf.* Kiyemba v. Obama, 561 F.3d 509, 517–18 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (reasoning that federal courts considering Fifth Amendment due process challenges to the transfer of wartime detainees from Guantanamo Bay to foreign countries must defer to executive branch determinations that the transfers likely will not result in torture).

[791] *Martinez-Cruz*, 736 F.3d at 1006 (Kavanaugh, J., dissenting).

[792] *Id.* at 1008. Judge Kavanaugh's record does not substantially indicate his views on the due process void-for-vagueness doctrine, which requires that a criminal statute "give ordinary people fair notice of the conduct it punishes," and which the Supreme Court applied in 2015 to strike down the residual clause of the "violent felony" definition in the Armed Career Criminal Act. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1210–11 (2018) (applying *Johnson* to strike down the residual crime-of-violence definition in 18 U.S.C. § 16(b) as unconstitutionally vague). Judge Kavanaugh joined one majority opinion holding, as had other circuits under the Supreme Court precedent that existed before *Dimaya*, that the crime-of-violence definition in 18 U.S.C. § 924(c) was not unconstitutionally vague under *Johnson*. *See* United States v. Eshtu, 863 F.3d 946, 953 (D.C. Cir. 2017) (Kavanaugh, J., joining majority opinion); *cf. id.* at 958 (Millett, J., concurring in judgment) (reasoning that the vagueness issue was "far closer than the [majority] opinion indicates," but agreeing that the statute was not vague). Judge Kavanaugh also held for a unanimous panel that the District of Columbia's post-and-forfeiture procedure was not an unconstitutionally vague penalty scheme even though it granted police discretion to offer suspects the opportunity to pay a fine in lieu of a misdemeanor prosecution. *Kincaid*, 854 F.3d at 730.

[793] United States v. Brown, 892 F.3d 385, 410 (D.C. Cir. 2018) (Kavanaugh, J., dissenting); United States v. Lee, 888 F.3d 503, 506–07 (D.C. Cir. 2018).

[794] *Brown*, 892 F.3d at 410 (Kavanaugh, J., dissenting) ("As this Court has explained: 'An appeal waiver serves the important function of resolving a criminal case swiftly and finally,' and we 'ordinarily dismiss an appeal falling within the scope of such a waiver.'" (quoting United States v. Hunt, 843 F.3d 1022, 1027 (D.C. Cir. 2016))); *Lee*, 888 F.3d at 506 ("One of the benefits the Government sometimes bargains for [in a plea deal] is the defendant's waiver of the right to appeal the sentence. When the defendant knowingly, intelligently, and voluntarily waives the right to appeal but later can still appeal because of a technical violation at the plea hearing, the Government loses that benefit, and the

raised a somewhat similar point in a dissent last term (joined by Justices Kennedy and Thomas) in *Class v. United States*,[795] where the majority held that a guilty plea does not "by itself bar[] a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal."[796] Justice Alito criticized the majority for making a "muddle" of the doctrine on the appellate consequences of guilty pleas, calling it "critically important" to the proper functioning of the criminal justice system that those consequences be clearly understood.[797]

## Substantive Criminal Law

Judge Kavanaugh has argued in multiple separate opinions that courts must prevent unjust criminal punishment by interpreting criminal statutes to require high levels of proof of the defendant's mens rea (i.e., intent).[798] Perhaps the most notable of these opinions came in an en banc case concerning the mens rea presumption,[799] a canon of statutory interpretation pursuant to which criminal statutes that do not contain an express mental state requirement are interpreted to require purpose or knowledge for each offense element.[800] In *United States v. Burwell*, the en banc majority upheld a district court determination that a defendant convicted of robbery was subject to a mandatory consecutive 30-year sentence for using an automatic weapon to commit a robbery, even though the government had not been required to prove that the defendant knew that the weapon was automatic.[801] Judge Kavanaugh argued in a lengthy dissent that the majority should have applied the mens rea presumption to interpret the relevant statute (which did not contain an express mens rea element) to require the government to prove that the defendant knew the weapon was automatic.[802] In another case, Judge Kavanaugh suggested in a concurring opinion that a conviction for making false statements to federal officials under 18 U.S.C. § 1001 should require "proof that the defendant knew his conduct was a crime," so as to mitigate the "risk of abuse and injustice" posed by prosecutions under the statute.[803] Judge Kavanaugh's other

defendant obtains a windfall.").

[795] 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting) ("Roughly 95% of felony cases in the federal and state courts are resolved by guilty pleas. . . . In this case, the parties have asked us to identify the claims that a defendant can raise on appeal after entering an unconditional guilty plea. Regrettably, the Court provides no clear answer.").

[796] *Id.* at 803 (majority opinion).

[797] *Id.* at 807.

[798] United States v. Williams, 836 F.3d 1, 19 (D.C. Cir. 2016) (Kavanaugh, J., concurring); United States v. Burwell, 690 F.3d 500, 532 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (discussing the "critical link between human liberty and mens rea requirements"); United States v. Moore, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

[799] *Burwell*, 690 F.3d at 504–05.

[800] *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) ("The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.' This rule of construction reflects the basic principle that 'wrongdoing must be conscious to be criminal.'" (quoting Morissette v. United States, 342 U.S. 246, 250, 252 (1952))).

[801] *Burwell*, 690 F.3d at 504; *id*. at 528 (Kavanaugh, J., dissenting) ("The majority opinion holds that a person who committed a robbery while carrying an automatic gun—but who genuinely thought the gun was semi-automatic—is still subject to the 30-year mandatory minimum sentence. . . . In my view, that extraordinary result contravenes the traditional presumption of mens rea long applied by the Supreme Court.").

[802] *Id.* at 553 ("I would hold that the Government had to prove that [the defendant] knew his firearm was automatic.").

[803] United States v. Moore, 612 F.3d 698, 702, 704 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

opinions and publications have likewise stressed the "critical importance of accurate instructions to the jury on mens rea requirements."[804]

## Cruel and Unusual Punishments Under the Eighth Amendment

Judge Kavanaugh does not appear to have authored an opinion in an Eighth Amendment case during his time on the D.C. Circuit. Nominated to replace a Justice who often cast decisive votes in Eighth Amendment cases,[805] Judge Kavanaugh's judicial record reveals little about his views regarding the scope of the constitutional ban on cruel and unusual punishments or his views on related issues like the death penalty or conditions of confinement. His 2017 speech to the American Enterprise Institute contains a brief discussion of the Supreme Court's case law regarding the constitutionality of capital punishment.[806] That brief discussion can reasonably be interpreted as praising Chief Justice Rehnquist for taking the position that the Supreme Court overstepped its judicial function in the 1972 case *Furman v. Georgia*, which imposed a moratorium on capital punishment,[807] and for his role in the jurisprudence that began upholding many revised capital punishment statutes four years later.[808] The nominee suggested that Chief Justice Rehnquist's approach to death penalty cases aligned with the Supreme Court's "proper and limited role in the constitutional scheme."[809] Questioning during the confirmation hearing may facilitate a better understanding of Judge Kavanaugh's views on Eighth Amendment issues.[810]

## Conclusion

If confirmed, Judge Kavanaugh would join the Supreme Court at a significant moment for the future of its criminal procedure jurisprudence. Aspects of the Court's criminal procedure doctrine appear to be in the midst of transformation, while other aspects face potential reconsideration. *Carpenter v. United States*, decided last term, could prove to be a watershed precedent in the extension of Fourth Amendment protections to sensitive information held by third-party technology companies, but the decision's reach will depend on how the Court applies it in future cases.[811] Next term, the Court is poised to reconsider the long-standing "separate sovereign"

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[804] United States v. Williams, 836 F.3d 1, 19 (D.C. Cir. 2016) (Kavanaugh, J., concurring); Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 25, at 2131 n.55 (emphasizing applicability of mens rea presumption to firearms offenses).

[805] *CRS Kennedy Report*, *supra* note 17, at 19–20.

[806] Kavanaugh, *From the Bench*, *supra* note 24, at 11–12.

[807] 408 U.S. 238, 239–40 (1972).

[808] Kavanaugh, *From the Bench*, *supra* note 24, at 11–12 ("To this day, the death penalty remains constitutional. Many judges and justices no doubt have policy or moral concerns about the death penalty. But [Chief Justice] Rehnquist's call for the Court to remember its proper and limited role in the constitutional scheme has so far proved enduring in the death penalty context."); *see* Gregg v. Georgia, 428 U.S. 153 (1976) (holding that Georgia statutory system for imposing the death penalty did not violate the Eighth Amendment).

[809] *Id.*

[810] *See, e.g.*, *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, S. Hrg. 111-1044, at 168–69, 111th Congress (2010) [hereinafter *Kagan Confirmation Hearing*] (asking nominee to "state [her] position on the death penalty"); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, S. Hrg. 111-503, at 144–47, 111th Congress (2009) [hereinafter *Sotomayor Confirmation Hearing*] (similar).

[811] *See* 138 S. Ct. 2206, 2220 ("Our decision today is a narrow one. We do not express a view on matters not before us: real-time [cell site location information] or 'tower dumps' (a download of information on all the devices that connected

exception to the Fifth Amendment Double Jeopardy Clause, pursuant to which a state prosecution does not bar a subsequent federal prosecution for the same offense (and vice versa).[812] The Court will also hear important Eighth Amendment cases next term, including two cases that concern the extent to which the prohibition on cruel and unusual punishments limits the execution of prisoners with mental or physical disabilities.[813] From Judge Kavanaugh's record in Fourth Amendment cases, it seems likely that his views align with those of an apparent minority of Justices on the current Court that generally resists expanding Fourth Amendment protections beyond the scope of recognized property interests. His record offers limited insight, however, into his approach to other major issues of criminal law and procedure.

to a particular cell site during a particular interval). . . . Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security."); *see also* Derek Hawkins, *The Cybersecurity 202: How Trump's Supreme Court Pick Could Influence Digital Privacy*, WASH POST (July 5, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/07/05/the-cybersecurity-202-how-trump-s-supreme-court-pick-could-influence-digital-privacy/5b3bac811b326b3348addcd6.

[812] *See* Gamble v. United States, 138 S. Ct. 2707 (2018) (granting certiorari).

[813] *See* Bucklew v. Precythe, 138 S. Ct. 1706 (2018) (granting certiorari on, among other issues, the question whether a prisoner suffering from blood-filled tumors on his head and neck "met his burden . . . to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution"); Madison v. Alabama, 138 S. Ct. 1172 (2018) (granting certiorari on, among other things, the question whether the State may "execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense"); *see also* Timbs v. Indiana, 138 S. Ct. 2650 (2018) (granting certiorari on whether the Eighth Amendment prohibition of excessive fines applies to the states).

# Environmental Law[814]

Over the last decade the Supreme Court has been closely divided on various aspects of environmental law—that is, the broad range of laws that addresses human impacts on the natural environment.[815] As was the case in other areas of law, the deciding vote in several important environmental law cases tended to be Justice Kennedy.[816] As a consequence, Judge Kavanaugh, if elevated to the High Court to replace Justice Kennedy, could serve as a critical vote on such matters going forward.[817]

During his tenure on the D.C. Circuit, Judge Kavanaugh has authored opinions and participated in dozens of environmental cases.[818] His opinions have addressed a wide range of environmental issues including climate change, air quality, water quality, nuclear energy and waste, chemical bans, endangered species, migratory birds, and other issues arising under federal environmental statutes.[819] The nominee's record on environmental law is relatively robust, as a large volume of the D.C. Circuit's docket tends to be environmental law cases, in part, because several major environmental statutes require challenges to certain types of agency actions to be brought exclusively in that court.[820] Often, environmental cases address the scope of agency authority under an environmental statute or the legality of a specific agency action.[821] Environmental law statutes and cases can also prompt broader questions of administrative law, such as standing to sue and standards for judicial review.[822] Accordingly, this section begins by discussing Judge Kavanaugh's record on environmental justiciability issues, before addressing the nominee's views on substantive aspects of environmental law.

## Standing to Sue in Environmental Cases

The outcome of an environmental case often depends on the court's resolution of threshold procedural issues, such as whether a plaintiff or petitioner has the right to bring a lawsuit in the

[814] CRS Legislative Attorney Linda Tsang authored this section of the report.

[815] *See* Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 263 (2010) (discussing the difficulties in defining environmental law and concluding that a "balanced" definition should reflect the consideration of human impacts on the natural environment).

[816] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (5-4 decision) (holding that the Clean Air Act gave the EPA authority to regulate greenhouse gas (GHG) emissions from new motor vehicles); Rapanos v. United States, 547 U.S. 715, 759–87 (2006) (plurality opinion) (Kennedy, J., concurring in the judgment). For a discussion of Justice Kennedy's environmental law opinions, see *CRS Kennedy Report*, *supra* note 17, at 20–21.

[817] *See CRS Kennedy Report*, *supra* note 17, at 20–21.

[818] For example, a search of the Westlaw databases for environmental law cases involving Judge Kavanaugh yields forty-two results.

[819] *E.g.*, Mexichem Fluor, Inc. v. EPA, 866 F.3d 451 (D.C. Cir. 2017) (addressing the EPA's authority to regulate ozone-depleting substances under Clean Air Act Section 612); Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (reviewing the revocation of certain provisions in a mining company's Clean Water Act permit); Otay Mesa Prop., L.P. v. Dept. of Interior, 646 F.3d 914 (D.C. Cir. 2011) (reviewing designation of private property as critical habitat under the Endangered Species Act); *In re* Aiken Cty., 645 F.3d 428 (D.C. Cir. 2011) (granting a writ of mandamus requiring the Nuclear Regulatory Commission to perform statutorily mandated licensing processes for nuclear waste storage in Yucca Mountain); Howmet Corp. v. EPA, 614 F.3d 544 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (reviewing waste materials regulated under the Resource Conservation and Recovery Act); Am. Bird Conservancy, Inc. v. FCC, 516 F.3d 1027 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (reviewing takings issues under the Migratory Bird Treaty Act); Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n, 509 F.3d 562 (D.C. Cir. 2007) (reviewing a license granted to a nuclear energy facility).

[820] *See, e.g.*, 42 U.S.C. § 300j-7(a) (petitions for review of EPA actions pertaining to the establishment of national primary drinking water regulations); *id*. § 6976 (petitions for review of EPA regulatory actions under the Resource

first place.[823] To proceed to the merits of a lawsuit, a plaintiff or petitioner will need to establish standing, a procedural threshold that has, at times, impeded environmental litigation.[824] To establish standing under Article III of the Constitution, a plaintiff or petitioner must have suffered or will imminently suffer an injury-in-fact caused by the defendant or respondent and can be redressed by the court.[825] Judge Kavanaugh has authored opinions in various cases that addressed whether a plaintiff or petitioner had the right to bring a lawsuit challenging an environmental regulation or federal agency action.[826]

As noted in the discussion on his administrative law rulings,[827] some of Judge Kavanaugh's opinions reflect a willingness to conclude that regulated entities such as business industry groups have standing to challenge environmental regulations based on alleged economic harm.[828] For example, in 2012 case, *Grocery Manufacturers Ass'n v. EPA*, Judge Kavanaugh dissented from the majority opinion that held that petroleum industry and food industry associations lacked standing to challenge the EPA's Clean Air Act waivers that allowed the sale of a specific corn-based ethanol biofuel because their claims of damages were too conjectural.[829] In his dissent, Judge Kavanaugh argued that the food industry petitioners had standing to challenge the waiver because the demand for ethanol to produce the biofuel would increase prices for corn used in food products, demonstrating injury-in-fact and causation for Article III standing.[830] Likewise, the petroleum industry petitioners had, in Judge Kavanaugh's view, standing because the waiver would cause its members to incur "considerable" economic costs to refine, sell, transport, or store the ethanol-based fuel.[831]

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Conservation and Recovery Act (RCRA)); *id*. § 7607(b)(1) (petitions for review of various EPA actions under the Clean Air Act).

[821] *See* discussion *infra* of Judge Kavanaugh's authored opinions in environmental cases that address the scope of an agency's authority.

[822] *See* discussion *supra* in *Administrative Law*.

[823] As a threshold matter, a plaintiff or petitioner challenging federal agency action in court must have a legal right (i.e., standing) to a judicial determination of the issues raised in its complaint. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968).

[824] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (requiring that a plaintiff, an environmental advocacy group, demonstrate that it suffered a concrete and particularized and actual or imminent injury that was caused by the challenged action and is redressable by a favorable court decision in order to have standing).

[825] *Id.* The doctrine of constitutional standing derives from Article III of the Constitution, which limits the exercise of the federal judicial power to deciding "cases" and "controversies." U.S. CONST. art. III, § 2. *See* discussion *supra* in *Administrative Law*.

[826] *E.g.*, Carpenters Indus. Council v. Zinke, 854 F.3d 1, 3 (D.C. Cir. 2017) (determining that lumber companies' trade association had standing to challenge the Fish and Wildlife Service's designation of 9.5 million acres of land as critical habitat under the Endangered Species Act).

[827] *See* discussion *supra* in *Administrative Law*.

[828] *E.g.*, Honeywell Intern., Inc. v. EPA, 705 F.3d 470 (D.C. Cir. 2013) (holding that the industry petitioner had standing to challenge the EPA's approval of inter-pollutant transfers under the Clean Air Act's cap-and-trade program for hydrochlorofluorocarbons because the petitioner's decrease in market share and pollutant allowances was a "concrete and particularized injury").

[829] Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 173–79 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[830] *Id.* at 182–88. For prudential standing, Judge Kavanaugh concluded that the food industry petitioners were within the "zone of interests" of two complementary statutory provisions—(1) the Clean Air Act, which permits the EPA to grant waivers that allow for the introduction of renewable fuels such as ethanol fuel; and (2) the Energy Independence and Security Act of 2017, which requires the EPA to consider the effect of renewable fuel usage on, among other things, food prices (including corn prices). *Id. See also* discussion *supra* in *Administrative Law*.

[831] *Id.* at 188–90 (Kavanaugh, J., dissenting). Judge Kavanaugh also held that the petroleum industry petitioners were within the "zone of interests" for prudential standing because they were a directly regulated party. *Id. See also* discussion *supra* in *Administrative Law* (discussing standing issues raised in *Grocery Manufacturers Ass'n v. EPA*).

Judge Kavanaugh expressed similar views on the extent that economic harm may support Article III standing in the 2015 case, *Energy Future Coalition v. EPA*.[832] Judge Kavanaugh found that petitioners that produced ethanol biofuel had standing to challenge the EPA's regulation that allows only "commercially available" fuels to be used to test emissions of new vehicles.[833] The petitioners argued that the EPA's actions to limit test fuels to only "commercially available" fuels effectively prohibited the use of E30, a fuel containing 30% ethanol.[834] In claiming that the biofuel producers lacked standing, the EPA argued that the biofuel producers were not harmed because the test fuel regulation was directed at vehicle manufacturers and not biofuel producers.[835] In rejecting the EPA's arguments, Judge Kavanaugh concluded in his opinion for the panel that the EPA's "direct regulatory impediment" prevented the petitioners' ethanol product from being used as test fuel, qualifying as an injury-in-fact to support their standing to challenge the EPA's regulation.[836] The nominee also determined that the petitioners demonstrated causation and redressability because the EPA's regulation denied the petitioners "an opportunity to compete in the marketplace" and removing the "commercial available" requirement would allow their products to be used as a test fuel.[837]

Among his opinions related to environmental law, Judge Kavanaugh has seldom addressed the standing of public interest or nongovernmental organizations (NGOs),[838] an issue at the heart of several of the Supreme Court's environmental standing cases.[839] Some commentators have argued that, in at least non-environmental contexts, Judge Kavanaugh imposes a high bar for public interest groups to show "harm" from a government action to satisfy standing requirements.[840]

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[832] 793 F.3d 141 (D.C. Cir. 2015).

[833] *Id.* at 144–46.

[834] *Id.*

[835] *Id.*

[836] *Id.*

[837] *Id.* at 144–45. Judge Kavanaugh also found the petitioners met the prudential standing requirements. *Id.* at 185. The nominee held that the petitioners, as ethanol producers, were within the "zone of interests" protected by the Clean Air Act, relying on D.C. Circuit precedent that held that a fuel additive manufacturer fell within the zone of interests to challenge the EPA's regulation governing vehicle emissions testing under the Clean Air Act. *Id.* at 145 (citing Ethyl Corp. v. EPA, 306 F.3d 1144, 1148 (D.C. Cir. 2002)). *See also* discussion *supra* in *Administrative Law* (discussing standing issues).

[838] *See, e.g.*, Nat. Res. Def. Council v. EPA, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (determining that the environmental petitioner had standing to challenge the EPA's adoption of an affirmative defense in a civil suit for air pollutant emissions violations); Cmtys. for a Better Env't v. EPA, 748 F.3d 333, 337–38 (D.C. Cir. 2014) (denying standing to environmental and wildlife NGOs to challenge the EPA's decision to not set secondary air quality standards for carbon monoxide because the petitioners failed to demonstrate that the EPA's decision would cause harm to members of the NGOs); Niagara Pub. Power All. v. FERC, 558 F.3d 564, 568 (D.C. Cir. 2009) (denying standing to a community group seeking to challenge the New York Power Authority's (NYPA) "off-license" agreements that would provide financial benefits to other community groups if FERC approved NYPA's relicensing application); Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n, 509 F.3d 562, 567 (D.C. Cir. 2007) (determining that a public citizen group with residents near a uranium enrichment facility had standing to challenge the Nuclear Regulatory Commission's grant of a license to the facility); Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 876 (D.C. Cir. 2006) (declining to evaluate the animal welfare NGO-plaintiff's standing because property owner-plaintiff had standing to challenge the Fish and Wildlife Service's decision to list the mute swan as a species not protected by the Migratory Bird Treaty Act).

[839] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 522–26 (2007) (concluding that the state had standing to challenge the EPA's refusal to regulate GHGs from motor vehicles); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (requiring that an environmental advocacy group, demonstrate that it suffered a concrete and particularized and actual or imminent injury that was caused by the challenged action and is redressable by a favorable court decision in order to have standing).

[840] *See* David LaRoss & Lee Logan, *'Standing Hawk' Kavanaugh Seen Limiting Plaintiffs' Access To Court*, INSIDEEPA.COM (July 11, 2018), https://insideepa.com/daily-news/standing-hawk-kavanaugh-seen-limiting-plaintiffs-

Even assuming this observation to be correct,[841] it is unclear, however, if this perceived trend is apparent in the context of environmental litigation. For example, in *Natural Resources Defense Council v. EPA*, Judge Kavanaugh concluded that the environmental NGO-petitioner had standing to challenge the EPA's adoption of an affirmative defense that would limit civil penalties in a suit alleging air pollutant emissions violations because its members would suffer harm from higher emissions that could be prevented or alleviated by a ruling to vacate the defense.[842] Nonetheless, the limited number of cases on standing in the environmental context makes it difficult to discern any broad tendencies of Judge Kavanaugh on the subject.

## Substantive Environmental Law

In cases involving substantive review of federal agency action, Judge Kavanaugh has expressed broad skepticism when an agency interprets an environmental statute that would enlarge the scope of its authority, most notably in the climate change context. Near the beginning of the nominee's tenure on the D.C. Circuit,[843] the Supreme Court issued its 2007 decision, *Massachusetts v. EPA*, which held in a 5-4 ruling that the agency had the authority under the Clean Air Act to regulate greenhouse gas (GHG) emissions to address climate change.[844] Subsequently, the EPA's GHG regulations were subject to various challenges in the D.C. Circuit where Judge Kavanaugh, most often in separate opinions, expressed his views on the scope of the EPA's authority to address climate change.

For example, in his dissent from the court's refusal to rehear en banc the 2012 decision in *Coalition for Responsible Regulation v. EPA*, Judge Kavanaugh argued that the EPA "exceeded its statutory authority" in regulating GHGs, including carbon dioxide ($CO_2$), under the Clean Air Act's Prevention of Significant Deterioration (PSD) permitting program.[845] In *Coalition for Responsible Regulation*, the three-judge panel of the D.C. Circuit upheld the EPA's "tailoring" rule that raised and "tailored" the statutory emissions thresholds to avoid the "absurd result" of subjecting numerous smaller sources to the PSD permitting program for the first time because of their GHG emissions.[846] However, Judge Kavanaugh in dissent interpreted the EPA's authority more narrowly, grounding his views on the doctrine of separation of powers. He reasoned that the EPA's "strange" and broad interpretation of the term "any air pollutant" to include GHGs was "legally impermissible" because a more narrow interpretation would have avoided the "absurd results" that necessitated the EPA's tailoring rule to raise the statutory emissions threshold.[847] In

access-court (noting that some environmental groups view Judge Kavanaugh as a "standing hawk" who would "rais[e] the bar for public-interest groups to show 'harm' from a government action"). *See also* Pub. Citizen v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1294 (D.C. Cir. 2007) (concluding that a citizen group lacked standing to challenge the motor vehicle safety standards because the "remote and speculative claims of possible future harm to its members" were insufficient to demonstrate injury in fact from the agency's standards).

[841] *But see* discussion *supra* in *Administrative Law*. (noting the "nominee has not articulated particularly stringent views on establishing standing under Article III to bring suit in federal court").

[842] Nat. Res. Def. Council v. EPA, 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[843] Judge Kavanaugh was appointed to the D.C. Circuit in 2006. *See* discussion *supra* in *Introduction*.

[844] 549 U.S. 497, 528–29 (2007). For further discussion on *Massachusetts v. EPA*, see CRS Report R44807, *U.S. Climate Change Regulation and Litigation: Selected Legal Issues*, by Linda Tsang.

[845] Coal. for Responsible Regulation, Inc., v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997 *1, *63 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[846] Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *rev'd sub nom.* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014). *See also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

[847] *Coal. for Responsible Regulation*, 2012 U.S. App. LEXIS 25997 at *66–70, *86 (Kavanaugh, J., dissenting from

Judge Kavanaugh's view, the EPA's interpretation of the Clean Air Act would "greatly" expand its authority and serve as precedent for other agencies to "adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness."[848] Judge Kavanaugh cautioned that "undue deference or abdication to an agency carries its own systemic costs. If a court mistakenly allows an agency's transgression of statutory limits, then we green-light a significant shift of power from the Legislative Branch to the Executive Branch."[849] In going "well beyond what Congress authorized," the EPA's interpretation, in Judge Kavanaugh's opinion, threatened the "bedrock underpinnings of our system of separation of powers."[850]

His dissent in *Coalition for Responsible Regulation v. EPA* was one of several cases where Judge Kavanaugh invoked separation-of-powers principles in reviewing the EPA's authority to regulate GHGs to address climate change. In these cases, he acknowledged that climate change is an "urgent," "important," and "pressing policy issue,"[851] but argued that the EPA must act within the statutory bounds set by Congress or judicial precedent in the agency's attempts to address climate change. For instance, the nominee issued a concurring opinion in a 2013 case, *Center for Biological Diversity v. EPA*, which vacated the EPA's rule postponing for three years the regulation of biogenic $CO_2$ sources—that is, sources whose emissions directly result from the combustion or decomposition of biologically based materials[852]—from the Clean Air Act permitting programs.[853] Judge Kavanaugh concurred that the rule should be vacated because the EPA lacked statutory authority to distinguish biogenic $CO_2$ from other forms of $CO_2$ for purposes of the Clean Air Act permitting programs even though the agency may have "very good [policy] reasons" to do so.[854] Although the EPA's "task of dealing with global warming is urgent and important at the national and international level," Judge Kavanaugh cautioned that "[a]llowing an agency to substitute its own policy choices for Congress's policy choices in this manner would undermine core separation of powers principles."[855] Bound by the earlier D.C. Circuit majority ruling in *Coalition for Responsible Regulation*, from which he had dissented, the nominee

denial of rehearing en banc). Judge Kavanaugh argued that the EPA should have interpreted the term "any air pollutant" to refer only to the six air pollutants that are regulated by the EPA in setting and enforcing the National Ambient Air Quality Standards air pollutants based on the context of the PSD permitting programs and to avoid absurd consequences. *Id.* at *66–*76.

[848] *Id.* at *69–*70.

[849] *Id.* at *90–*91.

[850] *Id.* at *89, *92–93.

[851] *See* Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 460–61 (D.C. Cir. 2017) ("Under the Constitution, congressional inaction does not license an agency to take matters into its own hands, even to solve a pressing policy issue such as climate change."); Ctr. for Biological Diversity v. EPA, 722 F.3d 401, 415 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("The task of dealing with global warming is urgent and important at the national and international level."); *Coal. for Responsible Regulation, Inc.*, 2012 U.S. App. LEXIS 25997, at * 88 ("The task of dealing with global warming is urgent and important.").

[852] The EPA defined biogenic $CO_2$ emissions as emissions that directly result from the "combustion or decomposition of biologically based materials other than fossil fuels and mineral sources of carbon." Deferral for $CO_2$ Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs, 76 Fed. Reg. 43,490, 43,493 (July 20, 2011) [hereinafter *Biogenic $CO_2$ Deferral Rule*].

[853] Ctr. for Biological Diversity v. EPA, 722 F.3d 401, 412 (D.C. Cir. 2013) (Kavanaugh, J., concurring). In the *Biogenic $CO_2$ Deferral Rule*, the EPA postponed regulating biogenic $CO_2$ sources for three years under the Clean Air Act permitting program to examine the science associated with biogenic $CO_2$ emissions from stationary sources. *Biogenic $CO_2$ Deferral Rule*, 76 Fed. Reg. at 43,492–96.

[854] *Ctr. for Biological Diversity*, 722 F.3d at 413.

[855] *Id.* at 414.

concluded that "EPA has no such statutory discretion here. Under the statute as this Court has interpreted it, the EPA must regulate carbon dioxide" under the Clean Air Act permitting programs and had no authority to delay regulating biogenic $CO_2$.[856]

In concurring with the majority to vacate the EPA's biogenic $CO_2$ deferral rule in *Center for Biological Diversity*, Judge Kavanaugh expressed his "mixed feelings" about this case because of the broader concerns he raised in his dissent in *Coalition for Responsible Regulation*—that is, that "contrary to this Circuit's precedent, [the Clean Air Act] does not cover [$CO_2$], whether biogenic or not."[857] The Supreme Court in 2014 validated some of his concerns when it reviewed the earlier case. In *Utility Air Regulatory Group v. EPA*, a 5-4 opinion authored by Justice Scalia, the Court relied in part on Judge Kavanaugh's dissent to hold that the Clean Air Act did not authorize the EPA to require stationary sources to obtain Clean Air Act permits solely based on GHG emissions.[858]

Judge Kavanaugh has also voiced concerns regarding the EPA's statutory authority to address climate change in more recent litigation. In 2016, Judge Kavanaugh sat on an en banc panel in the case challenging the Obama Administration's Clean Power Plan (CPP), which limits GHG emissions from existing power plants under the Clean Air Act.[859] During the oral argument, Judge Kavanaugh suggested that the EPA overstepped its authority with a rule that is "fundamentally transforming an industry," stating that "[g]lobal warming isn't a blank check" for the President to regulate GHG emissions.[860] While sympathizing with "the frustration with Congress" in addressing climate change, he emphasized that "under our system of separation of powers, . . . Congress is supposed to make the decision" and is best tasked to devise a "balanced" and "well-rounded" policy approach to regulate GHG emissions from power plants.[861] The D.C. Circuit has not issued a decision in the CPP litigation because the court continues to hold the case in abeyance while the EPA proposes to repeal the CPP or issue a replacement rule.[862]

Outside the climate change context, Judge Kavanaugh has likewise scrutinized federal agency efforts to interpret a statute that enlarges the scope of an agency's authority without clear congressional authorization. In *EME Homer City Generation, L.P. v. EPA*,[863] Judge Kavanaugh wrote the majority decision in a 2012 case that challenged the EPA's rule requiring control of interstate transport of air pollution that impedes neighboring states from meeting air quality standards.[864] Over the dissent of Judge Judith W. Rogers, Judge Kavanaugh's majority opinion

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[856] *Id.* at 413.

[857] *Id.* at 415.

[858] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2439–46 (2014). The majority of the Court concluded that the term "any air pollutant" under the PSD applicability provisions should be interpreted more narrowly to exclude GHGs. *Id.* For further discussion of the *Utility Air Regulatory Group* decision, see CRS Report R44807, *U.S. Climate Change Regulation and Litigation: Selected Legal Issues*, by Linda Tsang.

[859] For discussion of the Clean Power Plan, see CRS Report R44480, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA*, by Linda Tsang and CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by James E. McCarthy et al.

[860] Transcript of Oral Argument at 47, 100, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Sept. 27, 2016).

[861] *Id.* at 53–54.

[862] For discussion of the proposed repeal of the Clean Power Plan and the pause in litigation, see CRS Legal Sidebar WSLG1797, *Update: D.C. Circuit Pauses the Clean Power Plan Litigation*, by Linda Tsang, and CRS Legal Sidebar LSB10016, *EPA Proposes to Repeal the Clean Power Plan*, by Linda Tsang.

[863] 696 F.3d 7 (D.C. Cir. 2012), *rev'd sub nom.* EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014).

[864] Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011).

concluded that the EPA's method to allocate emission reductions among upwind states that contribute to downwind air pollution had "transgressed statutory boundaries."[865] He claimed it was "inconceivable" that Congress intended the EPA to "transform the narrow good neighbor provision into a 'broad and unusual authority'" under the Clean Air Act.[866] He stressed that "'Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.'"[867] In 2013, in Judge Kavanaugh's only majority decision to be reversed by the Supreme Court, Justice Ruth Bader Ginsburg, in a 6-2 ruling, held that Congress delegated authority to the EPA to fill the "gap left open" to determine how to allocate emission reduction requirements among neighboring upwind states.[868] In comparing the case to *Chevron U.S.A. Inc. v. National Resources Defense Council*, the Court deferred to the EPA's allocation method as "reasonable," "permissible, workable, and equitable."[869]

In his environmental cases challenging an agency's statutory interpretation, Judge Kavanaugh, in line with his textualist views, often determined that an agency's interpretation lacked support from the plain language of the statute.[870] This approach obviated the need to address the extent to which judges should defer to an agency's interpretation of silent or ambiguous statutory language under the *Chevron* doctrine.[871] As Judge Kavanaugh remarked in dissent in *Sierra Club v. EPA*, "the plain meaning of the text controls; courts should not strain to find ambiguity in clarity; courts must ensure that agencies comply with the plain statutory text and not bypass *Chevron* step 1."[872]

This analytical approach was illustrated in his 2017 majority opinion in *Mexichem Fluor, Inc. v. EPA*.[873] There, the D.C. Circuit vacated part of a rule that would have prohibited manufacturers from using hydrofluorocarbons (HFCs), a class of GHGs, as substitutes for ozone-depleting substances (ODSs) that are commonly used in refrigerators and air conditioners.[874] In a 2-1 decision written by Judge Kavanaugh, the majority held that the EPA's "novel" interpretation of the Clean Air Act was "inconsistent" with the plain statutory text and exceeded its statutory authority because Congress did not intend for the EPA to regulate non-ODSs that contribute to climate change under a statutory provision with a "focus" on ODSs.[875] Similar to previous opinions he authored on the EPA's authority to regulate GHGs under the Clean Air Act, Judge

[865] *EME Homer City*, 696 F.3d at 12.

[866] *Id.* at 28 (quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

[867] *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[868] *EME Homer City Generation*, 134 S. Ct. at 1601–05.

[869] *Id.* at 1609–10.

[870] For further discussion of Judge Kavanaugh's textualist views, see discussion *supra* in *Statutory Interpretation*.

[871] For further discussion of *Chevron* deference, see discussion *supra* in *Administrative Law*.

[872] 536 F.3d 673, 680–81 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). In this case, the majority of the D.C. Circuit panel held that the EPA violated the plain meaning of the Clean Air Act by prohibiting state and local authorities from imposing additional monitoring requirements in operating permits to ensure compliance. *Id.* at 677–79. Although Judge Kavanaugh agreed "completely with the majority opinion about bedrock principles of statutory interpretation," he interpreted the plain meaning of the Clean Air Act to permit the EPA to impose restrictions on the state's ability to impose additional monitoring requirements. *Id.* at 680–82 (Kavanaugh, J., dissenting).

[873] 866 F.3d 451 (D.C. Cir. 2017).

[874] *Id.* at 454. For discussions of this case, see CRS Legal Sidebar LSB10154, *D.C. Circuit Rejects EPA's Efforts to Ban Hydrofluorocarbons: Part 1*, by Linda Tsang and CRS Legal Sidebar LSB10155, *D.C. Circuit Rejects EPA's Efforts to Ban Hydrofluorocarbons: Part 2*, by Linda Tsang. Environmental groups have filed a petition for certiorari seeking Supreme Court review of Judge Kavanaugh's majority decision. Petitions for Certiorari, Nat. Resources Def. Council v. Mexichem Fluor, Inc., No. 18-2 (S. Ct. June 25, 2018).

[875] *Mexichem Fluor, Inc.*, 866 F.3d at 454–59.

Kavanaugh reiterated that "Congress's failure to enact general climate change legislation does not authorize the EPA to act. Under the Constitution, congressional inaction does not license an agency to take matters into its own hands, even to solve a pressing policy issue such as climate change."[876] He concluded that the EPA's "strained reading" of the statutory terms "contravenes the statute and thus fails at *Chevron* step 1. And even if we reach *Chevron* step 2, the EPA's interpretation is unreasonable."[877]

The reasonableness of the EPA's statutory interpretation was the focus of several of Judge Kavanaugh's dissents to cases that challenged the agency's exclusion of cost considerations under the Clean Air Act. In 2014, he dissented in part from the majority ruling in *White Stallion Energy Center v. EPA*, which upheld the EPA's decision to not consider cost when determining whether it is "appropriate and necessary" to regulate mercury emissions from power plants under the Clean Air Act.[878] In his dissent, Judge Kavanaugh argued that it was "unreasonable" for the EPA to exclude consideration of costs because "the key statutory term is 'appropriate'—the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors, health and safety benefits on the one hand and costs on the other."[879] He explained:

> whether one calls it an impermissible interpretation of the term 'appropriate' at *Chevron* step one, or an unreasonable interpretation or application of the term 'appropriate' at *Chevron* step two, or an unreasonable exercise of agency discretion under *State Farm*,[[880]] the key point is the same: It is entirely unreasonable for EPA to exclude consideration of costs in determining whether it is 'appropriate' to regulate electric utilities . . . .[881]

On appeal, the Supreme Court in *Michigan v. EPA* reversed the D.C. Circuit's majority decision in a 5-4 opinion authored by Justice Scalia that quoted from Judge Kavanaugh's dissent.[882] The Court held that the EPA's refusal to consider costs (including the cost of compliance) before deciding whether it was "appropriate and necessary" to regulate was unreasonable.[883]

Similarly, in 2016, Judge Kavanaugh's dissent in *Mingo Logan Coal Co. v. EPA* criticized the agency for failing to account for cost and economic impacts in determining whether to revoke previously approved and permitted waste sites for mountain-surface mining operations.[884] The EPA had revoked specific mining waste discharge sites that were approved four years prior in a Clean Water Act permit because new information led the EPA to conclude that the discharges would have an "unacceptable adverse effect" on water supplies and aquatic life.[885] In dissent,

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[876] *Id.* at 460–61.

[877] *Id.* at 459.

[878] 748 F.3d 1222, 1229 (D.C. Cir. 2014) (per curiam) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom.* Michigan v. EPA, 135 S. Ct. 2699 (2015).

[879] *Id.*

[880] In *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court explained that an agency decision is arbitrary if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 463 U.S. 29, 43 (1983). For further discussion of a court's analysis under *State Farm*, see discussion *supra* in *Administrative Law*.

[881] *White Stallion*, 748 F. 3d at 1261 (Kavanaugh, J., concurring in part and dissenting in part).

[882] 135 S. Ct. 2699, 2707 (2015).

[883] *Id.* at 2710–11.

[884] Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 713, 726 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

[885] *Id.* at 717.

Judge Kavanaugh argued that the EPA should have examined the cost of its actions because the term "unacceptable" was "capacious and necessarily encompasses consideration of costs. Like the word 'appropriate' at issue in *Michigan v. EPA*, the words 'acceptable' and 'unacceptable' are commonly understood to necessitate a balancing of costs and benefits."[886] In criticizing the agency's "utterly one-sided analysis" of the "benefits to animals of revoking the permit," Judge Kavanaugh argued that the EPA failed to consider the costs to "humans—coal miners, [] shareholders, local businesses" resulting from revoking the previously approved and permitted discharge sites.[887] Echoing his dissent in *White Stallion Energy Center*, he explained that "whether EPA's interpretation . . . is analyzed under *Chevron* step one or *Chevron* step two or *State Farm*, the conclusion is the same: In order to act reasonably, the EPA must consider costs before exercising its [Clean Water Act] authority to veto or revoke a permit."[888]

In environmental cases reviewing agencies' interpretations of their own regulations, Judge Kavanaugh has broadly expressed skepticism regarding the extent to which judges should defer to agencies' interpretations of their own environmental regulations. For example, Judge Kavanaugh issued a dissent in 2010's *Howmet Corp. v. EPA*, which challenged the EPA's interpretation of its Resource Conservation and Recovery Act (RCRA) regulations that a particular chemical was "spent material" after it had been used in an industrial cleaning process and transported to be reused by a different company.[889] The majority decision held that the regulation in question was ambiguous and deferred to the agency's interpretation that the "spent material" was subject to RCRA.[890] Kavanaugh disagreed, arguing that "EPA's current interpretation is flatly inconsistent with the text of its 1985 regulations." He concluded that the EPA "enlarge[d] its regulatory authority" "by distorting the terms of the 1985 [RCRA] regulations" in "seeking to expand the definition of 'spent material'."[891]

In reviewing Judge Kavanaugh's significant body of environmental jurisprudence, most commentators note that Judge Kavanaugh tends to narrowly construe an agency's authority or sharply question an agency's statutory interpretation as a means to preserve the separation of powers among the three branches of government.[892] Some commentary has maintained that his judicial approach would limit federal agencies' ability to regulate activities that would negatively impact the environment.[893] However, Judge Kavanaugh's scrutiny of agency's actions has led him to uphold agency actions or side with environmental groups when he feels Congress has granted the agency discretion to do so.[894] For example, in 2-1 opinion in *American Trucking Ass'ns, Inc. v.*

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[886] *Id.* at 712.

[887] *Id.* at 732.

[888] *Id.* at 735.

[889] Howmet Corp. v. EPA, 614 F.3d 544, 547–49 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).

[890] *Id.* at 550–51.

[891] *Id.* at 555.

[892] *See* Dino Grandoni, *How Brett Kavanaugh Could Rein in Environmental Rules on the Supreme Court*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/07/11/the-energy-202-how-brett-kavanaugh-could-rein-in-environmental-rules-on-the-supreme-court/5b44e6481b326b3348adde19; Ellen M. Gilmer, *Kavanaugh's Record: Climate Regs, Pipelines, LNG and More*, E&E NEWS (July 10, 2018), https://www.eenews.net/stories/1060088635; Brad Plumer, *How Brett Kavanaugh Could Reshape Environmental Law From the Supreme Court*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/10/climate/kavanaugh-environment-supreme-court.html.

[893] *See id. See also* David G. Savage, *Judge Kavanaugh Could Give Conservatives the Vote They Need to Rein in EPA Rules on Climate Change*, L.A. TIMES (July 23, 2018), http://www.latimes.com/politics/la-na-pol-kavanaugh-environment-20180723-story.html.

[894] *See, e.g.*, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015) (denying petition for writ of mandamus to

*EPA*, Judge Kavanaugh upheld the EPA's approval of California's rule limiting emissions from in-use non-road engines under the Clean Air Act's "expansive" statutory language.[895] But overall, his general formalist approach toward separation-of-power issues and his commitment to textualism have often led him to limit an agency's authority to address environmental concerns.[896]

## Conclusion

Much of the debate over Judge Kavanaugh and environmental law is in the eye of the beholder. For example, some legal commentary has raised fears about what the nominee, if confirmed, may mean for environmental law, suggesting that the nominee would be skeptical of an agency's attempts to broaden its authority under existing environmental statutes to address new types of environmental concerns, such as climate change, that Congress may not have contemplated when the statutes were originally enacted.[897] In contrast, other commentators have viewed the nominee's skepticism toward the authority of administrative agencies like the EPA as a blessing, arguing that Judge Kavanaugh, if confirmed, "will help reverse the trend" of "federal overreach" by "ensuring that all branches of our government act within their constitutionally assigned roles."[898] Regardless of the merits of this debate, there are limits to any predictions that can be made regarding what the latest nomination to the High Court would mean for environmental law. After all, although his jurisprudence provides a robust picture of his environmental views, Judge Kavanaugh, during his tenure on the D.C. Circuit, has not addressed a number of issues in environmental law that could arise if he were elevated to the Supreme Court.[899]

If confirmed, Judge Kavanaugh could soon consider several potentially important environmental cases,[900] including an Endangered Species Act (ESA) case that is scheduled for oral argument before the Supreme Court on October 1, 2018. In *Weyerhaeuser Co. v. U.S. Fish and Wildlife*

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review proposed Clean Power Plan); Nat'l Res. Def. Council v. EPA, 749 F.3d 1055 (D.C. Cir. 2014) (vacating the EPA's rule allowing cement manufacturers to plead "unavoidable" malfunctions as an affirmative defense civil suits as exceeding its authority); Nat'l Ass'n of Mfrs. v. EPA, 750 F.3d 921 (D.C. Cir. 2014) (upholding the EPA's tightened air quality standard for particulate matter against industry challenges, explaining that the Clean Air Act "gives EPA substantial discretion in setting" such air standards); Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014) (holding that the EPA and the Army Corps of Engineers acted within their statutory authority in issuing guidance for coordinating their consideration of certain Clean Water Act mining permits).

[895] Am. Trucking Ass'ns, Inc. v. EPA, 600 F.3d 624, 627–28 (D.C. Cir. 2010).

[896] See *supra* notes 845-91 and accompanying text.

[897] *See* Robinson Meyer, *Brett Kavanaugh: 'The Earth Is Warming,'* THE ATLANTIC (July 11, 2018), https://www.theatlantic.com/science/archive/2018/07/what-would-kavanaugh-mean-for-the-environment/564830/; Maryanne Lavelle, *What Brett Kavanaugh on Supreme Court Could Mean for Climate Regulations*, INSIDE CLIMATE NEWS (July 11, 2018), https://insideclimatenews.org/news/10072018/brett-kavanaugh-supreme-court-trump-nominee-climate-change-policy-environmental-law.

[898] Letter from Patrick Morrisey, Att'y Gen. W. Va., et al., to Mitchell McConnell, Senator, U.S. Congress, et al. (July 12, 2018), https://www.whitehouse.gov/wp-content/uploads/2018/07/Letter-from-Attorneys-General.pdf. *See also* Geoff Mulvihill, *Top Court Nominee Has Long Knocked Back Environmental Rules*, ASSOCIATED PRESS (Aug. 5, 2018) (quoting John Malcolm, vice president of the Heritage Foundation's Institute for Constitutional Government, that Judge Kavanaugh's "'rulings in cases involving the EPA say far more about the aggressive nature of the EPA in terms of trying to stretch beyond its breaking point its mandate from Congress'").

[899] *See generally* Aagaard, *supra* note 815, at 259–80 (analyzing the broad scope of legal issues that may arise under environmental statutes).

[900] In addition, the Supreme Court granted the petition for certiorari for *Sturgeon v. Frost*, involving whether the National Park Service has authority to regulate state, tribal, and private waterways located within the Yukon-Charley Rivers National Preserve in Alaska as "public lands." Petition Granted, Sturgeon v. Frost, No. 17-949 (S. Ct. July 18, 2018). *See also* Va. Uranium, Inc. v. Warren, No. 16-1275 (S. Ct. May 21, 2018) (granting petition for certiorari on whether the federal Atomic Energy Act preempts a Virginia ban on mining uranium on non-federal lands).

*Service*, the Court is to address, among other things, whether the ESA prohibits the government from designating private land as "unoccupied"[901] critical habitat essential for the conservation of the endangered dusky gopher frog based solely on the multiple uninhabited breeding sites on the land.[902] Judge Kavanaugh has previously addressed the designation of private lands as critical habitat for the endangered San Diego fairy shrimp in the 2011 case, *Otay Mesa Prop., L.P. v. Department of the Interior*.[903] Private property owners challenged the Fish and Wildlife Service's (FWS's) designation of the plaintiffs' property as "occupied"[904] critical habitat under the ESA based on observing four fairy shrimp in a tire rut on a dirt road on the plaintiffs' property.[905] In his opinion for the panel, Judge Kavanaugh concluded that a single observation of a species with no subsequent observations of the species four years later did not provide sufficient evidence that the area was "occupied" habitat for the fairy shrimp.[906] He explained that the "thin" record could not support FWS's designation, "even acknowledging the deference due to the agency's expertise."[907] Although the *Otay Mesa* case concerned "occupied" habitat as opposed to the "unoccupied" habit at issue in *Weyerhauser*, Judge Kavanaugh's opinion suggests that he may view FWS's record with some skepticism.[908] The Supreme Court's ruling in the *Weyerhaeuser* case could provide some key guidance and potential limits on FWS's authority to designate as critical habitat areas that are not actually occupied by the listed species.

[901] Under the ESA, "unoccupied" habitat is defined as "specific areas outside the geographical area occupied by the species at the time it is listed [as a threatened or endangered species], upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

[902] Petition for Writ of Certiorari, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., No. 17-71 (S. Ct. July 11, 2017); Petition Granted, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., No. 17-71 (S. Ct. Jan. 22, 2018).

[903] 646 F.3d 914 (D.C. Cir. 2011).

[904] Under the ESA, "occupied" habitat is defined as "specific areas . . . occupied by the species, at the time it is listed [as a threatened or endangered species], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

[905] *Otay Mesa*, 646 F.3d at 916.

[906] *Id.* at 917–18.

[907] *Id.* at 918.

[908] *See* Alan Kovski, *Endangered Frog Case Tees Up Regulatory Limits Dear to Kavanaugh*, BLOOMBERG LAW ENVIRONMENT & ENERGY REPORT (July 21, 2018), https://www.bna.com/endangered-frog-case-n73014477295 (discussing the *Weyerhauser Co.* and *Otay Mesa* cases and the level of deference a court should afford an agency).

# Federalism[909]

The past twenty-five years have witnessed what some commentators have described as a "federalism revolution" in the Supreme Court's jurisprudence[910]—a "revolution" in which Justice Kennedy was a key participant.[911] This shift in the Court's federalism case law began with the Rehnquist Court, which issued a series of significant opinions resuscitating the Court's role in policing limitations on federal power. Specifically, the Rehnquist Court issued opinions (1) restricting the scope of Congress's powers under the Commerce Clause,[912] (2) reviving the Tenth Amendment as a limit on Congress's authority,[913] and (3) expanding the scope of state sovereign immunity.[914]

This "federalism revolution" has not ended with the Roberts Court,[915] which has extended a number of the Rehnquist Court's federalism decisions.[916] The Roberts Court's 2012 decision in *National Federation of Independent Businesses* (*NFIB*) *v. Sebelius*, which involved a constitutional challenge to the ACA, was perhaps its most notable federalism case.[917] While the *NFIB* Court ultimately concluded that the ACA's "individual mandate"—which required individuals to maintain a minimum level of health insurance or pay a penalty—was a permissible exercise of Congress's taxing power, a majority of the Justices concluded that the mandate

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[909] CRS Legislative Attorney Jay B. Sykes authored this section of the report.

[910] *See generally* Robert K. Christensen & Charles R. Wise, *Dead or Alive? The Federalism Revolution and Its Meaning for Public Administration*, 69 PUB. ADMIN. REV. 920 (Sept.–Oct. 2009); Christina E. Coleman, *The Future of the Federalism Revolution:* Gonzales v. Raich *and the Legacy of the Rehnquist Court*, 37 LOYOLA U. CHI. L. REV. 803 (2006); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001).

[911] *See CRS Kennedy Report*, *supra* note 17, at 21–22; Daniel Becker, *Justice Kennedy: Foot Soldier of the Federalism Revolution*, WAKE FOREST J.L. & POL'Y (July 2, 2018), https://wfulawpolicyjournal.com/2018/07/02/justice-kennedy-foot-soldier-of-the-federalismrevolution/.

[912] *See* United States v. Morrison, 529 U.S. 598, 619 (2000) (holding that the civil damages provision of the Violence Against Women Act exceeded the scope of Congress's Commerce Clause authority); United States v. Lopez, 514 U.S. 549, 558–61 (1995) (holding that the Gun-Free School Zones Act exceeded the scope of Congress's Commerce Clause authority).

[913] *See* Printz v. United States, 521 U.S. 898, 933 (1997) (holding that a provision in the Brady Handgun Violence Prevention Act that required state and local law enforcement personnel to perform background checks before issuing permits for firearms unconstitutionally commandeered the authority of state and local governments); New York v. United States, 505 U.S. 144, 162 (1992) (holding that a federal statute requiring states to either adopt a federal regulatory program or take title to radioactive waste unconstitutionally commandeered the authority of state governments).

[914] *See* Fed. Maritime Comm'n v. S.C. Ports Auth., 535 U.S. 743, 769 (2002) (holding that state sovereign immunity bars federal administrative agencies from adjudicating a private party's lawsuit against a non-consenting state); Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that Congress may not use its Article I powers to abrogate state sovereign immunity from lawsuits in their own courts); Seminole Tribe v. Florida, 517 U.S. 44, 65 (1996) (holding that Congress may not use its Article I powers to abrogate state sovereign immunity from lawsuits in federal court). *See also* City of Boerne v. Flores, 521 U.S. 507 (1997) (adopting a "congruence and proportionality" test for evaluating the scope of Congress's authority under Section 5 of the Fourteenth Amendment, and holding that the Religious Freedom Restoration Act exceeded Congress's Section 5 authority under that standard).

[915] *See* Ilya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS: THE JOURNAL OF FEDERALISM 441, 455 (2016) (arguing that the Roberts Court has presided over important extensions of the "federalism revolution" that began with the Rehnquist Court).

[916] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018) (Tenth Amendment); Shelby Cty. v. Holder, 570 U.S. 529 (2013); Nat'l Fed. of Indep. Bus. (*NFIB*) v. Sebelius, 567 U.S. 519 (2012); Coleman v. Court of Appeals of Md., 566 U.S. 30 (2012); Bond v. United States, 564 U.S. 211 (2011). *But see* United States v. Kebodeaux, 570 U.S. 387 (2013); United States v. Comstock, 560 U.S. 126 (2010).

[917] *See NFIB*, 567 U.S. at 558.

exceeded the scope of Congress's Commerce Clause authority because it compelled individuals to engage in commerce rather than regulating pre-existing commercial activity.[918] Perhaps more importantly, the *NFIB* Court extended the Rehnquist Court's Tenth Amendment cases—which held that Congress may not coerce state and local governments into implementing federal regulatory programs—to strike down a provision of the ACA that granted the Secretary of Health and Human Services (HHS) the authority to withhold all Medicaid payments from states that did not participate in an expansion of Medicaid, marking the first time the Court invalidated a condition attached to federal spending as unconstitutionally coercive.[919] Justice Kennedy was a key participant in this "federalism revolution," authoring[920] or joining[921] nearly all of the Court's key decisions. Justice Kennedy's successor will accordingly play a critical role in shaping the Court's federalism jurisprudence.[922]

Judge Kavanaugh's record on the D.C. Circuit contains limited information about his views on the various federalism issues that have confronted the Supreme Court. The nominee has not authored or joined any significant opinions concerning the Tenth Amendment or state sovereign immunity. Judge Kavanaugh's most prominent federalism case, *Seven-Sky v. Holder*, involved a pre-*NFIB* Commerce Clause challenge to the ACA.[923] In that case, Judge Kavanaugh ultimately declined to consider the merits of the case after concluding that the court lacked jurisdiction to hear the dispute.[924]

In *Seven-Sky*, plaintiffs brought a constitutional challenge to the ACA's individual mandate, arguing that the mandate exceeded the scope of Congress's authority under the Commerce Clause.[925] A majority of a three-judge D.C. Circuit panel upheld the mandate, concluding that it did not exceed the scope of Congress's power under the Commerce Clause because it addressed a national problem that had "substantial effects" on interstate commerce.[926] However, Judge Kavanaugh dissented from the court's decision,[927] concluding that the court lacked jurisdiction to decide the merits of the challenge because of the Anti-Injunction Act, which denies courts jurisdiction over pre-enforcement lawsuits challenging "the assessment or collection of any tax."[928] The nominee reasoned that although Congress had labeled the exaction imposed on individuals who failed to comply with the individual mandate a "penalty" and not a "tax," the Anti-Injunction Act nevertheless deprived the court of jurisdiction because the ACA provided for the penalty to be assessed and collected "in the same manner as taxes."[929] The nominee concluded

[918] *Id.*; *id.* at 657 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting).

[919] *Id.* at 585 (majority opinion).

[920] Alden v. Maine, 527 U.S. 706 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

[921] *Shelby Cty.*, 570 U.S. 529 (Kennedy, J., joining majority opinion); Fed. Maritime Comm'n v. S.C. Ports Auth., 535 U.S. 743 (2002) (Kennedy, J., joining majority opinion); United States v. Morrison, 529 U.S. 598 (2000) (Kennedy, J., joining majority opinion); Printz v. United States, 521 U.S. 898 (1997) (Kennedy, J., joining majority opinion); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Kennedy, J., joining majority opinion); United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., joining majority opinion); New York v. United States, 505 U.S. 144 (1992) (Kennedy, J., joining majority opinion).

[922] *See CRS Kennedy Report*, *supra* note 17, at 21–22.

[923] *See* 661 F.3d 1, 21 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits).

[924] *Id.* at 23.

[925] *Id.* at 14 (majority opinion).

[926] *Id.* at 19–20.

[927] *Id.* at 21 (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits).

[928] 29 U.S.C. § 7421(a).

[929] 26 U.S.C. §§ 5000A(g)(1), 6671(a).

that, because the penalty could not be assessed and collected "in the same manner as taxes" unless the Anti-Injunction Act applied to the penalty in the same manner that it applied to "taxes," the Act deprived the court of jurisdiction over the plaintiffs' pre-enforcement lawsuit challenging the penalty, just as it would deprive the court of jurisdiction over a pre-enforcement lawsuit challenging a tax.[930]

Although Judge Kavanaugh declined to take a position on whether the individual mandate was constitutional based on Congress's powers under the Commerce Clause, he noted in his dissent that the question was "extremely difficult and rife with significant and potentially unforeseen implications for the Nation and the Judiciary"—a consideration that he viewed as militating in favor of avoiding a "premature" decision on the issue.[931] Judge Kavanaugh also argued that the importance of the constitutional questions presented by the case counseled in favor of proceeding cautiously. In developing this argument, he noted that the government's defense of the mandate as falling within Congress's Commerce Clause powers "carrie[d] broad implications" for the scope of those powers.[932] Specifically, Judge Kavanaugh reasoned that under the government's view of the Commerce Clause, Congress could not only impose criminal penalties on individuals who failed to purchase health insurance, but also require that individuals purchase a range of other financial products, including retirement accounts, disaster insurance, and life insurance.[933] While Judge Kavanaugh acknowledged that Congress's Commerce Clause authority may be effectively cabined by the political process, he concluded that such political checks did not "absolve the Judiciary of its duty to safeguard the constitutional structure and individual liberty" by policing the limits of federal power.[934]

At the same time, Judge Kavanaugh argued that the court should be equally cautious about prematurely rejecting the government's defense of the mandate, noting that "[s]triking down a federal law as beyond Congress's Commerce Clause authority is a rare, extraordinary, and momentous act for a federal court."[935] The nominee also reasoned that, because the individual mandate marked "a shift in how the Federal Government goes about furnishing a social safety net for those who are old, poor, sick, or disabled and need help"—specifically, by providing such benefits via privatized social services and a mandatory-purchase requirement rather than a traditional "tax-and-government-benefit" program—courts "should be very careful before interfering with the elected Branches' determination to update how the National Government provides such assistance."[936] Finally, Judge Kavanaugh concluded that because Congress may respond to the constitutional challenges to the individual mandate by altering the ACA's language to provide that the mandate's penalty was in fact a "tax" (thus bringing the mandate within Congress's taxing power), or by eliminating the penalty altogether, the court should not strain to sidestep the Anti-Injunction Act and prematurely decide a difficult constitutional question.[937]

Although Judge Kavanaugh declined to address squarely the merits of the Commerce Clause question presented in *Seven-Sky*, he delivered a speech in 2017 on Chief Justice Rehnquist's

[930] *Seven-Sky*, 661 U.S. at 22 (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits).

[931] *Id.* at 51.

[932] *Id.* at 51–52.

[933] *Id.*

[934] *Id.* at 52.

[935] *Id.*

[936] *Id.* at 53.

[937] *Id.* at 48–51.

legacy that offers some clues about his general views on the Commerce Clause.[938] In the speech, the nominee voiced general agreement with the Rehnquist Court's Commerce Clause decisions, outlining Chief Justice Rehnquist's reasoning in *Lopez* and *Morrison* and describing those cases as "critically important in putting the brakes on the Commerce Clause and in preventing Congress from assuming a general police power."[939]

Accordingly, there is a limited record from which to gauge Judge Kavanaugh's views on federalism issues. Because the nominee has not adjudicated or commented on subjects like state sovereign immunity or the Tenth Amendment's limitations on Congress's authority, it is difficult to draw firm conclusions about his views on those topics. However, Judge Kavanaugh has indicated general agreement with the Commerce Clause decisions that served as the vanguard of the "federalism revolution" of the Rehnquist and Roberts Courts, and has expressed support for the position that the judiciary has an "important role" in policing the boundaries of federal authority.[940]

[938] *See* Kavanaugh, *From the Bench*, *supra* note 24.

[939] *Id.* at 15.

[940] *Seven-Sky*, 661 F.3d at 52 (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits).

# Freedom of Religion[941]

If confirmed to the Supreme Court, Judge Kavanaugh could play a significant role in the Court's decisions concerning freedom of religion, an area of law encompassing the Constitution's Religion Clauses—the Free Exercise Clause and the Establishment Clause[942]—as well as statutes like the Religious Freedom Restoration Act (RFRA).[943] After all, Justice Kennedy, who the nominee may succeed, provided deciding votes and drafted the majority opinions in a number of significant cases concerning religious liberty.[944] While serving on the D.C. Circuit, Judge Kavanaugh has authored or joined relatively few opinions on religious liberty.[945] Nonetheless, three significant opinions he has written, along with his comments outside of the courtroom, suggest that Judge Kavanaugh's views on religious liberty are fairly similar to those of Justice Kennedy.

## Establishment Clause

Judge Kavanaugh's writings on religious freedom issues have most frequently concerned the Establishment Clause. One significant threshold issue in Establishment Clause cases is whether the plaintiffs can show that they have standing to bring their suit.[946] The concept of standing ensures that federal courts hear only cases that qualify as "cases" or "controversies" under Article III of the Constitution,[947] by requiring plaintiffs to demonstrate "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[948]

The Supreme Court, however, sometimes appears to treat standing differently in the context of the Establishment Clause, allowing certain suits to proceed even where the injury alleged would not

[941] CRS Legislative Attorney Valerie C. Brannon authored this section of the report.

[942] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[943] 42 U.S.C. §§ 2000bb–2000bb-4. In a 1990 case, the Supreme Court clarified the applicable standard in challenges under the Free Exercise Clause, effectively barring religious objections from serving as the basis for exemptions from "neutral laws" of "general applicability." Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) (explaining that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). Congress responded to the Court's ruling by enacting the Religious Freedom Restoration Act of 1993, which created a heightened standard of review, similar to the pre-*Smith* Free Exercise case law, to evaluate governmental actions burdening the exercise of religion. *See* Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4) (requiring generally applicable governmental actions that impose a substantial burden on a person's religious exercise to have a compelling government interest and use the least restrictive means to achieve that interest). In a 1997 decision authored by Justice Kennedy, the Court held RFRA's application to state and local government actions to be unconstitutional. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[944] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Kennedy, J., concurring); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Lee v. Weisman, 505 U.S. 577 (1992). For more information on Justice Kennedy's freedom of religion jurisprudence, see *CRS Kennedy Report*, *supra* note 17, at 22.

[945] *CRS Kavanaugh Opinions Report*, *supra* note 5 (cataloguing Judge Kavanaugh's authored opinions and identifying only four cases concerning freedom of religion).

[946] *See, e.g.*, Mary Alexander Myers, Note, *Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders of Establishment Clause Jurisprudence*, 65 VAND. L. REV. 979, 993–94 (2012); William P. Marshall & Gene R. Nichol, *Not a* Winn-*Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 215–16 (2011).

[947] U.S. CONST. art. III, § 2.

[948] Allen v. Wright, 468 U.S. 737, 751 (1984).

suffice to create standing to raise other types of legal challenges.[949] In recent years, the Court has narrowed the scope of one of the primary cases that seemed to carve out a special Establishment Clause exception to ordinary standing principles.[950] However, the Court has not repudiated this older case law, and, more broadly, the Court has continued to hear Establishment Clause challenges to religious displays on government property[951] and prayers at government-sponsored events,[952] notwithstanding the fact that, as some have argued, the plaintiffs' injuries in these cases—viewing a display or listening to a prayer—seem akin to the type of "generalized grievance"[953] that generally would not qualify as a constitutionally sufficient injury for purposes of standing.[954]

Judge Kavanaugh has authored two significant opinions ruling on whether litigants have standing to raise Establishment Clause claims. First, the nominee rejected an Establishment Clause claim on standing grounds in *In re Navy Chaplaincy*.[955] In that case, a group of Protestant Navy chaplains argued that the Navy had discriminated "in favor of Catholic chaplains in certain aspects of its retirement system."[956] Writing the majority opinion, Judge Kavanaugh held that the plaintiffs lacked standing because they had not demonstrated an injury-in-fact, where "they themselves did not suffer employment discrimination on account of their religion."[957] He rejected the claim—one that was accepted by Judge Rogers' dissent[958]—that "being subjected to the 'message' of religious preference conveyed by the Navy's allegedly preferential retirement program for Catholic chaplains" created standing.[959] In contrast to cases where the Supreme Court found that being subject to a religious message caused a cognizable injury—"the religious display and prayer cases"—in this case, the government was not "actively and directly communicating a religious message through religious words or religious symbols."[960] In Judge Kavanaugh's view, "[w]hen plaintiffs are not themselves affected by a government *action* except

[949] *See, e.g.*, Alexander Myers, *supra* note 946, at 993–94; Kyle Duncan, *Misunderstanding Freedom from Religion: Two Cents on Madison's Three Pence*, 9 NEV. L.J. 32, 33 (2008).

[950] The Court held in 1968 that the plaintiffs in *Flast v. Cohen*, who "assert[ed] only the status of federal taxpayers" in order to raise an Establishment Clause challenge to "the constitutionality of a federal spending program," had established standing—even though a litigant's status as a taxpayer ordinarily does not suffice to demonstrate a constitutionally sufficient injury. 392 U.S. 83, 102–03 (1968). *Cf., e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 130 (2011) (rejecting Establishment Clause claim premised on taxpayer standing); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 605 (2007) ("The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here.").

[951] *See, e.g.*, McCreary Cty. v. ACLU, 545 U.S. 844, 851–52 (2005); Lynch v. Donnelly, 465 U.S. 668, 671 (1984).

[952] *See, e .g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1816 (2014) (legislative prayer); Lee v. Weisman, 505 U.S. 577, 581 (1992) (prayers at graduation ceremonies); Marsh v. Chambers, 463 U.S. 783, 785 (1983) (legislative prayer).

[953] *E.g.*, Hollingsworth v. Perry, 570 U.S. 693, 715 (2013).

[954] *E.g.*, Alexander Myers, *supra* note 946, at 994. *See also, e.g.*, *Hein*, 551 U.S. at 619–34 (Scalia, J., concurring in the judgment) (arguing that the "Wallet Injury" and "Psychic Injury" recognized by the Court in some Establishment Clause cases are inconsistent with constitutional standing requirements).

[955] 534 F.3d 756, 764 (D.C. Cir. 2008).

[956] *Id.* at 759.

[957] *Id.* at 760.

[958] *Id.* at 770–71 (Rogers, J., dissenting).

[959] *Id.* at 763 (majority opinion).

[960] *Id.* at 764.

through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim."[961]

By contrast, in *Newdow v. Roberts*, Judge Kavanaugh concluded that a litigant *had* established standing under these religious display and prayer cases.[962] The plaintiffs in *Newdow* argued that certain aspects of the presidential inaugural ceremony violated the Establishment Clause.[963] Specifically, the plaintiffs challenged the prayers at the beginning of the ceremony and the use of the phrase "so help me God" in the presidential oath of office.[964] A majority of the court rejected the suit on standing grounds.[965]

Judge Kavanaugh concurred in the judgment of the court, contending that while the plaintiffs had standing, their claims failed on the merits.[966] First, the nominee concluded that the plaintiffs' allegations that they would "witness . . . government-sponsored religious expression to which they object . . . suffice under the Supreme Court's precedents to demonstrate plaintiffs' concrete and particularized injury."[967] He noted that in its cases involving "government-sponsored religious display[s] or speech[es]," the Court had not "expressly" addressed standing.[968] "But," in his view, "the Supreme Court's consistent adjudication of religious display and speech cases over a span of decades suggests that the Court has thought it obvious that the plaintiffs in those matters had standing."[969]

Judge Kavanaugh disagreed with the majority's analysis of the "causation and redressability elements of standing."[970] In relevant part, the nominee noted that while it was "theoretically possible that Congress or the President could completely change the nature of the Inaugural ceremonies before the next Inauguration," that was, in his view, unlikely.[971] For this point, Judge Kavanaugh cited *Lee v. Weisman*, a Supreme Court opinion written by Justice Kennedy that considered the constitutionality of prayers at a public school graduation ceremony.[972] The Supreme Court concluded in *Lee* that the case presented "a live and justiciable controversy" because one of the plaintiffs was a high school student and it appeared "likely, if not certain, that an invocation and benediction will be conducted at her high school graduation."[973] Judge Kavanaugh concluded that just as it was likely that "the high school's next graduation prayer likely would resemble past graduation prayers," so was it likely that the "next Inaugural ceremony likely will resemble past Inaugurals."[974]

Because Judge Kavanaugh concluded that the plaintiffs had standing in *Newdow*, he went on to consider the merits of their claim, offering some insight into his substantive views on the

[961] *Id.* at 764–65.

[962] 603 F.3d 1002, 1014 (D.C. Cir. 2010) (Kavanaugh, J, concurring).

[963] *Id.* at 1006 (majority opinion).

[964] *Id.*

[965] *Id.* at 1010.

[966] *Id.* at 1013 (Kavanaugh, J., concurring).

[967] *Id.* at 1014.

[968] *Id.*

[969] *Id.*

[970] *Id.* at 1015.

[971] *Id.* at 1015–16.

[972] 505 U.S. 577, 584 (1992).

[973] *Id.*

[974] *Newdow*, 603 F.3d at 1016 (Kavanaugh, J., concurring).

Establishment Clause. Judge Kavanaugh paused at the outset to note the importance of the sincerely held beliefs on both sides of the issue,[975] noting that the plaintiffs, "as atheists," "have no lesser rights or status as Americans or under the United States Constitution than Protestants, Jews, Mormons, Muslims, Hindus, Buddhists, Catholics, or members of any religious group."[976] Nonetheless, the nominee stated that he would have held that the inaugural prayers and the use of the words "so help me God" in the presidential oath did not violate the Establishment Clause.[977] Judge Kavanaugh noted that both the prayers and the oath were "deeply rooted" in "history and tradition."[978] His analysis invoked the Supreme Court's decision in *Marsh v. Chambers*, which upheld a state legislature's practice of opening its sessions with a prayer after noting that such a practice "is deeply embedded in the history and tradition of this country."[979] This emphasis on history and tradition would later be echoed in Justice Kennedy's opinion for the Court in *Town of Greece v. Galloway*, which similarly upheld prayers before a town's monthly board meetings.[980]

While acknowledging that Supreme Court precedent prohibits public prayers that amount to proselytization,[981] Judge Kavanaugh did not believe that these cases necessarily prohibited sectarian prayers, which he defined as "prayers associated only with particular faiths, or references to deities, persons, precepts, or words associated only with particular faiths."[982] The nominee cited the following standard from the Tenth Circuit as "instructive": "the kind of [ ] prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that *aggressively advocates* a specific religious creed, or that derogates another religious faith or doctrine."[983] Ultimately, he held that the inaugural prayers' "many references to God, Lord, and the like" "are considered non-sectarian for these purposes,"[984] and that the prayers' "limited" "sectarian references" did not impermissibly proselytize.[985]

Judge Kavanaugh's opinion in *Newdow* took place against the backdrop of considerable legal debate that has occurred over the past half century regarding the meaning of the Establishment Clause. For example, the Establishment Clause is often characterized as establishing "a wall of separation between church and State"[986]—although the appropriateness of this characterization has long been contested.[987] The Supreme Court does not always embrace a separationist view of

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[975] *Id.* at 1016 ("[W]e cannot resolve this case by discounting the sense of anguish and outrage plaintiffs and some other Americans feel at listening to a government-sponsored religious prayer. . . . [A]t the same time, we likewise cannot dismiss the desire of others in America to publicly ask for God's blessing on certain government activities and to publicly seek God's guidance for certain government officials."). Justice Kennedy also took the approach in several cases of generally describing at the onset of his opinion the competing interests of the parties. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018); Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

[976] *Newdow*, 603 F.3d at 1016 (Kavanaugh, J., concurring).

[977] *Id.* at 1022.

[978] *Id.* at 1018–19.

[979] 463 U.S. 783, 787 (1983).

[980] 134 S. Ct. 1811, 1819 (2014).

[981] Marsh v. Chambers, 463 U.S. 783, 794 (1983).

[982] *Newdow*, 603 F.3d at 1020 (Kavanaugh, J., concurring).

[983] *Id.* at 1021 (quoting Snyder v. Murray City Corp., 159 F.3d 1227, 1234 (10th Cir. 1998)) (alterations in original) (internal quotation marks omitted).

[984] *Id.* at 1020–21.

[985] *Id.* at 1021.

[986] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[987] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("[T]he metaphor . . . is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."); Illinois *ex rel.* McCollum v. Bd.

the Establishment Clause,[988] as suggested by its cases approving of certain government-sponsored religious practices due to their historical pedigree.[989] Justice Kennedy, for his part, warned that the Court's statements about government neutrality toward religion should "not give the impression of a formalism that does not exist."[990] Instead, he argued that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."[991]

In his work off the court, Judge Kavanaugh has similarly questioned the "wall" metaphor, along with the related principle that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[992] In a speech discussing the influence of Chief Justice Rehnquist, Judge Kavanaugh stated that the Chief Justice had "persuasively criticized the wall metaphor as 'based on bad history' and 'useless as a guide to judging.'"[993] In another speech, the nominee praised as "well said" the following statement from former Attorney General Ed Meese: "[T]o have argued . . . that the [First Amendment] demands a strict neutrality between religion and irreligion would have struck the founding generation as bizarre. The purpose was to prohibit religious tyranny, not to undermine religion generally."[994] Judge Kavanaugh's writings on and off the bench thus suggest that he, like Justice Kennedy, while not wholly unsympathetic to those who raise challenges under the Establishment Clause, would largely oppose a strict separationist view of the Clause.

## Free Exercise Clause and RFRA

Judge Kavanaugh has not authored any notable opinions on the Free Exercise Clause,[995] but he did write a significant dissenting opinion on RFRA: *Priests for Life v. HHS*.[996] As background, RFRA provides that the federal government may not "substantially burden a person's exercise of

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of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech."). *See also* Van Orden v. Perry, 545 U.S. 677, 709 n.4 (2005) (Stevens, J., dissenting) (noting the debate).

[988] *See generally, e.g.*, Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 60 (2017).

[989] *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1819–20 (2014); *Lynch*, 465 U.S. at 675–78. *See also, e.g.*, McCreary Cty. v. ACLU, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting).

[990] Cty. of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

[991] *Id.*; *see also id.* (arguing that "install[ing] federal courts as jealous guardians of an absolute 'wall of separation'" would send a constitutionally impermissible message of government hostility toward religion).

[992] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947). *Accord, e.g.*, *McCreary Cty.*, 545 U.S. at 860; Gillette v. United States, 401 U.S. 437, 449 (1971).

[993] Kavanaugh, *From the Bench*, *supra* note 24, at 12 (quoting Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J. dissenting)).

[994] Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 3 (Feb. 1., 2018) (alterations in original) (quoting Edwin Meese, III, Attorney General, Speech Before the American Bar Association, at 6 (July 9, 1985), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf)) (internal quotation marks omitted).

[995] *Cf.* Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008) (Kavanaugh, J., joining majority opinion rejecting prisoner's claim that DNA collection practices violate his free exercise rights because prisoner "alleges no religious observance that the DNA Act impedes, or acts in violation of his religious beliefs that it pressures him to perform," and "religious exercise necessarily involves an action or practice").

[996] 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc). *See also* Mahoney v. Doe, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (Kavanaugh, J., joining opinion rejecting RFRA claim where plaintiff was prohibited from chalking the sidewalk in front of the White House, because plaintiff had alternative means to convey his religious message); Daniel Chapter One v. FTC, 405 App'x 505, 506 (D.C. Cir. 2010) (Kavanaugh, J., joining opinion rejecting RFRA claim because "'scientism' is not a religion"); St. John's United Church of Christ v. FAA, 550 F.3d 1168, 1169 (D.C. Cir. 2008) (Kavanaugh, J., joining opinion rejecting RFRA claim for lack of standing).

religion" unless it demonstrates that its action "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[997] RFRA has become central to a number of controversies involving the ACA, most notably the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*.[998] In that case, three closely held corporations challenged the ACA's requirement that they provide their employees with health insurance covering certain contraceptive methods.[999] The Supreme Court concluded that the mandate, as applied to these closely held corporations, violated RFRA.[1000] The Court explained that these companies "sincerely believe[d] that providing the insurance coverage demanded" was immoral because it had the "effect of enabling or facilitating the commission of an immoral act by another," and it was not for the Court "to say that their religious beliefs are mistaken or insubstantial."[1001] Because the regulatory scheme imposed "an enormous" penalty if the corporations chose not to comply with the contraceptive mandate, the Court held that it imposed a substantial burden on their beliefs.[1002] The Court further concluded that, assuming the government had demonstrated a compelling interest, the government had not shown that the mandate was the least restrictive means of achieving that interest.[1003]

Following *Hobby Lobby*, in *Priests for Life*, a group of nonprofit organizations that were opposed on religious grounds to providing their employees with certain types of contraceptives again challenged the ACA's contraceptive requirement.[1004] The regulatory scheme allowed religious nonprofit organizations to opt out of this requirement by submitting certain documents to insurers to exclude contraception from the health insurance coverage they provided.[1005] Under this scheme, if employers opted out, insurers were required "to offer separate coverage for contraceptive services directly to insured women."[1006] The plaintiffs argued that the opt-out procedure itself burdened their religious beliefs by triggering the substitution of alternative coverage that would provide contraceptives,[1007] thus "facilitating contraceptive coverage."[1008] A three-judge panel of the D.C. Circuit rejected the plaintiffs' RFRA claim, concluding that the opt-out requirements did not impose a substantial burden on the challengers' religious exercise.[1009]

[997] 42 U.S.C. § 2000bb-1.

[998] 134 S. Ct. 2751, 2759 (2014).

[999] *See id.* at 2762. Specifically, the statute required certain "minimum essential" benefits; the implementing agency, HHS, interpreted this to include coverage for certain contraceptive methods. *Id.*

[1000] *Id.* at 2785.

[1001] *Id.* at 2778–79.

[1002] *Id.* at 2779.

[1003] *Id.* at 2780.

[1004] *See* Priests for Life v. HHS, 772 F.3d 229 (D.C. Cir. 2014), *vacated*, Zubik v. Burwell, 136 S. Ct. 1556 (2016) (per curiam).

[1005] *See id.* at 236.

[1006] *Id.*

[1007] *Id.* at 237.

[1008] *Id.* at 235.

[1009] *Id.* at 237. The panel characterized the opt-out procedure as a "bit of paperwork . . . more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state," and noted that the opt-out shifted the burden to provide contraceptive services from employers to insurers. *Id.* The court concluded, in the alternative, that even if the opt-out procedure did substantially burden the plaintiffs' religious exercise, it would uphold the requirement under RFRA as the least restrictive means to serve compelling governmental interests. *Id.*

The plaintiffs sought en banc review of this decision, but the D.C. Circuit rejected their petition.[1010] In a dissent from the denial of the petition, Judge Kavanaugh opined that the plaintiffs "should ultimately prevail on their RFRA claim, but not to the full extent that they seek."[1011] First, the nominee concluded that the plaintiffs demonstrated a substantial burden: "When the Government forces someone to take an action contrary to his or her sincere religious belief (here, submitting the form) or else suffer a financial penalty (which here is huge), the Government has substantially burdened the individual's exercise of religion."[1012] In finding a substantial burden, Judge Kavanaugh relied heavily on *Hobby Lobby*.[1013] He accepted the plaintiffs' view that the opt-out procedure "makes them complicit in facilitating contraception or abortion," burdening their religious beliefs.[1014] In his view, it was not the court's "call to make," because in *Hobby Lobby*, the Supreme Court established that "judges in RFRA cases may question only the sincerity of a plaintiff's religious belief, not the correctness or reasonableness of that religious belief."[1015]

Judge Kavanaugh next concluded that the various opinions in *Hobby Lobby* "strongly suggest[] that the Government has a compelling interest in facilitating access to contraception for the employees of these religious organizations."[1016] Although the majority opinion in *Hobby Lobby* avoided the issue, the nominee noted that Justice Kennedy and the four dissenting Justices *had* suggested that the government's interest was compelling—and he said that this conclusion was "not difficult to comprehend," noting the "significant social and economic costs" that result from unintended pregnancies.[1017] Finally, the nominee decided that the opt-out requirements violated RFRA because they were not "the Government's least restrictive means of furthering its interest in facilitating access to contraception for the organizations' employees."[1018] But this last conclusion was based on the fact that the government *could* require the organizations to submit a different, "less restrictive notice" that prior Supreme Court cases suggested "should be good enough to satisfy the Government's interest."[1019] In this vein, this aspect of Judge Kavanaugh's *Priests for Life* dissent largely mirrored Justice Kennedy's approach in *Hobby Lobby.*[1020]

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[1010] Order Denying Petition for Rehearing En Banc, Priests for Life v. HHS, 808 F.3d 1 (D.C. Cir. 2015).

[1011] *Id.* at 14 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[1012] *Id.* at 21.

[1013] *Id.* at 17.

[1014] *Id.*

[1015] *Id.*; *but see id.* at 3–4 (Pillard, J., concurring in denial of rehearing en banc) (concluding that *Hobby Lobby* does not require a court "to credit Priests for Life's legally inaccurate assertions about the *operation of the regulation* they challenge," because the relevant dispute "is legal, not religious").

[1016] *Id.* at 23 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[1017] *Id.* at 22.

[1018] *Id.* at 23.

[1019] *Id.* Specifically, in *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014), and in *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022, 1022 (2014), the Court said in short, per curiam opinions that, to qualify for an injunction prohibiting HHS from enforcing the contraceptive mandate against them, two nonprofit organization merely had to submit a form notifying the *government* (rather than the relevant insurer) that they qualified for the exemption.

[1020] In his concurring opinion in *Hobby Lobby*, Justice Kennedy stated that while the government had a compelling interest "in the health of female employees," it had not shown that its regulatory scheme was the least restrictive means to further that interest. 134 S. Ct. 2751, 2785–86 (2014) (Kennedy, J., concurring). Justice Kennedy cited the opt-out framework available to employees of nonprofit religious organizations (the one at issue in *Priests for Life*) to show that a "direct mandate" was unnecessary. *Id.* at 2786.

The plaintiffs in *Priest for Life* sought review in the Supreme Court. The Court granted their petition for certiorari, consolidating it with similar cases from other federal courts of appeal under the caption *Zubik v. Burwell*, but ultimately vacated the opinion of the D.C. Circuit without reaching the merits of the claim.[1021] After oral argument, the Court "requested supplemental briefing from the parties addressing 'whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners.'"[1022] Both parties "confirm[ed] that such an option [was] feasible," and the Court remanded the combined cases to the lower courts to afford the parties "an opportunity to arrive at an approach going forward that accommodates" the positions of both sides.[1023] Some commentators speculated that the Court, which was then "functioning with eight Justices, was having difficulty composing a majority in support of a definite decision on the legal questions."[1024] *Zubik* may suggest, therefore, that the Court is closely divided with respect to religious liberty issues, demonstrating that a new Justice could be influential on these matters as the Court considers whether to hear other cases on religious liberty in the near future.[1025]

[1021] 136 S. Ct. 1557 (2016) (per curiam).

[1022] *Id.* at 1559–60 (quoting Order Requesting Supplemental Briefs, Zubick v. Burwell, No. 14-1418 (U.S. Mar. 29, 2016)).

[1023] *Id.* at 1560.

[1024] *See, e.g.*, Lyle Denniston, *Opinion Analysis: A Compromise, with Real Impact, on Birth Control*, SCOTUSBLOG (May 16, 2016, 11:46 AM), http://www.scotusblog.com/2016/05/opinion-analysis-a-compromise-with-real-impact-on-birth-control.

[1025] Two linked petitions for certiorari currently pending before the Court present Establishment Clause challenges to monuments on public property. *See* Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195 (4th Cir. 2017), *petitions for cert. filed*, No. 17-1717 (U.S. June 25, 2018), and No. 18-18 (U.S. June 29, 2018). Another pending petition implicating religious liberty issues is the case of a football coach who is arguing that he had a right under the Free Speech Clause of the First Amendment to pray on the field before a football game. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *petition for cert. filed*, No. 18-12 (U.S. June 25, 2018).

# Freedom of Speech[1026]

First Amendment cases, particularly those involving the freedom of speech, have featured prominently on the Roberts Court.[1027] In recent years, a majority of the Court has looked with increasing skepticism on laws or government actions that restrict political speech or commercial speech,[1028] compel speech either directly or through mandatory subsidization of private speech,[1029] or regulate speech based on its content.[1030] Justice Kennedy played a pivotal role in many of these cases, including by authoring the Court's 2010 opinion in *Citizens United v. Federal Election Commission* (*FEC*), which invalidated a federal ban on certain corporate political expenditures.[1031] In addition, in his last term, Justice Kennedy joined five-member majorities to invalidate compulsory public-sector union agency fees[1032] and hold that a state's disclosure requirements for certain pregnancy centers were likely unconstitutional.[1033] However, he has also recognized limitations on the First Amendment's reach, particularly in the context of a government employee's speech on an employment matter.[1034]

For his part, Judge Kavanaugh has a relatively robust free speech record, having encountered several strands of First Amendment law as an appellate judge,[1035] and his opinions in these cases

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[1026] CRS Legislative Attorney Victoria L. Killion authored this section of the report.

[1027] *See* CRS Report R44778, *Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court* 80, coordinated by Andrew Nolan and Caitlain Devereaux Lewis, coordinated by Andrew Nolan and Caitlain Devereaux Lewis ("The Supreme Court has issued a number of notable opinions over the past decade respecting the First Amendment and freedom of speech, with some legal scholars and practitioners going so far as to describe the Roberts Court as the 'strongest First Amendment Supreme Court in our history.'" (quoting BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 11 (2015))) (additional citations and footnotes omitted).

[1028] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1440–62 (2014) (striking down aggregate limits on individual contributions to political candidates and committees); Citizens United v. FEC, 558 U.S. 310, 318–21, 365 (2010) (striking down law prohibiting corporations and unions from using their general treasury funds, which are not restricted to certain donors, to make certain election-related expenditures); Sorrell v. IMS Health Inc., 564 U.S. 552, 557–59 (2011) (invalidating state law prohibiting, among other things, pharmaceutical companies from using pharmacy records showing physicians' prescribing practices to market or promote a prescription drug).

[1029] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371, 2376 (2018) [hereinafter *NIFLA*] (holding that state's disclosure requirement compelling pregnancy centers that oppose abortion to notify clients about the availability of state programs that offer access to abortion is likely unconstitutional); Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (holding that procedure allowing public-sector unions to "extract agency fees from nonconsenting employees" in their bargaining units violates the First Amendment).

[1030] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (stating that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"); *cf.* Minn. Voters All. v. Mansky,138 S. Ct. 1876, 1885–86, 1888 (2018) (striking down Minnesota law that prohibited "wearing a 'political badge, political button, or other political insignia'" inside a polling place even under the "forgiving" First Amendment standard for speech regulations in nonpublic forums allowing for some content-based restrictions, because of the vague usage and inconsistent governmental interpretations of the term "political").

[1031] 558 U.S. at 319 (holding that the "Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether").

[1032] *Janus*, 138 S. Ct. at 2486.

[1033] *NIFLA*, 138 S. Ct. at 2378; *see also NIFLA*, 138 S. Ct. at 2378–79 (Kennedy, J., concurring) (writing separately to state his concerns about the "apparent viewpoint discrimination" in the "design and structure" of the law); *CRS Kennedy Report*, *supra* note 17, at 23–24 (discussing *Citizens United*, *Janus*, and other key opinions that Justice Kennedy authored or joined).

[1034] *See* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (holding that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities").

[1035] In addition to the free speech areas discussed in this section, Judge Kavanaugh has authored opinions in cases

provide some limited insight into how he might approach free speech cases on the Court.[1036] Some of Judge Kavanaugh's cases required him to decide whether the reasoning undergirding a key First Amendment precedent applied to a new factual scenario.[1037] In other cases, Judge Kavanaugh offered alternative analytical frameworks to tackle First Amendment issues confronting lower courts,[1038] including on evolving areas of First Amendment law such as commercial speech regulations.[1039] This section of the report addresses Judge Kavanaugh's freedom-of-speech jurisprudence, beginning with his decisions on campaign finance law before turning to his opinions on the regulation of various types of media and commercial speech. The section concludes by noting where the nominee has recognized key limitations on the First Amendment's reach.

## Political Speech, Political Spending, and Speaker-Based Distinctions

As a circuit court judge, Judge Kavanaugh has witnessed the evolution of the Supreme Court's campaign finance jurisprudence and has applied several of its key decisions in this area in cases concerning political spending. Although these cases largely involved the application of binding Supreme Court precedent, some required the judge to reconcile what he viewed as potential

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involving defamation, the First Amendment's petition clause, and First Amendment retaliation. *See, e.g.*, Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1331–32, 1338–39 (D.C. Cir. 2015) (affirming dismissal of defamation complaint brought by son of Palestinian leader Mahmoud Abbas, reasoning that the allegedly defamatory questions in the defendant's publication—such as, "Are the sons of the Palestinian president growing rich off their father's system?"—were not factual representations and thus could not constitute false statements as required to allege a defamation claim under the relevant state law); *see also id.* at 1339 ("After all, just imagine the severe infringement on free speech that would ensue in the alternative universe envisioned by Abbas. Is the Mayor a thief? Is the quarterback a cheater? . . . Questions like that appear all the time in news reports and on blogs, in tweets and on cable shows. And all such questions could be actionable under Abbas's novel defamation theory."); Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 87, 90, 92 (D.C. Cir. 2015) (applying *Noerr-Pennington* doctrine, under which an employer's conduct that constitutes a direct petition to government, but would otherwise violate the NLRA, is shielded from liability by the First Amendment," holding that "the act of summoning the police to enforce state trespass law is a direct petition to government subject to protection," and remanding for a determination as to whether casino's request to have union demonstrators arrested for trespassing constituted a "sham" petition ineligible for *Noerr-Pennington* protection); Moore v. Hartman, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (arguing that because the Supreme Court had described the circuit's precedent on whether the lack of probable cause was an element of a retaliatory prosecution claim as unclear, the government officials who prosecuted the plaintiff "cannot be said to have violated 'clearly established' First Amendment law," and therefore were entitled to sovereign immunity). There are, however, some broad areas of free speech law on which Judge Kavanaugh has not authored an opinion, such as speech involving sexually explicit or obscene material. *See CRS Kavanaugh Opinions Report, supra* note 5 (listing opinions written by Judge Kavanaugh).

[1036] *See generally* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[1037] *Compare* Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 153 (D.D.C. 2010) (concluding that the challengers' free speech claims "conflict with the Supreme Court's decision in *McConnell [v. FEC]*," and remarking that as a lower court, the district court did not "possess the authority to clarify or refine *McConnell*" in the way the challengers sought), *aff'd*, 561 U.S. 1040 (2010), *with* Emily's List v. FEC, 581 F.3d 1, 14 (D.C. Cir. 2009) (declining "to simply transport *McConnell*'s holding [affirming statutory limits on contributions to political parties] from the political party context to the non-profit setting" and identifying cases like *Buckley v. Valeo* as "the most pertinent Supreme Court precedents"); *see also* U.S. Telecom. Ass'n v. FCC, 855 F.3d 381, 428 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (extending the logic of Supreme Court cases concerning the First Amendment rights of cable television operators to ISPs).

[1038] *See, e.g.*, Bryant v. Gates, 532 F.3d 888, 898 (D.C. Cir. 2008) (Kavanaugh, J., concurring) (stating that "there is a far easier way to analyze this kind of case under the Supreme Court's precedents").

[1039] *See* Am. Meat Inst. v. Dep't of Agric., 760 F.3d 18, 30–35 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment).

incongruities in the law or to consider how the underlying First Amendment principles squared with the federal government's interests in preserving the integrity of the democratic process. Perhaps most notably, Judge Kavanaugh has openly endorsed the view—consistent with long-established Supreme Court precedent[1040]—that political spending represents speech and that limits on such speech deserve strict scrutiny under the First Amendment.[1041] During a 2016 event at the American Enterprise Institute, Judge Kavanaugh remarked that "political speech is at the core of the First Amendment, and to make your voice heard, you need to raise money to be able to communicate to others in any kind of effective way."[1042]

The first notable case on political speech for which Judge Kavanaugh authored an opinion arose in 2009 in *Emily's List v. FEC*.[1043] That case, which preceded *Citizen's United*, was brought by a nonprofit group seeking to make both contributions to and expenditures in support of "pro-choice Democratic women candidates," and involved a First Amendment challenge to FEC regulations that required "covered non-profits [to] pay for a large percentage of election-related activities out of their hard-money accounts," which were "capped at $5000 annually for individual contributors."[1044] Judge Kavanaugh authored the panel opinion in the case.[1045] He began by reviewing "several overarching principles of relevance" from the Supreme Court's First Amendment cases involving campaign finance laws: (1) that campaign contributions and expenditures are "speech" within the meaning of the First Amendment; (2) that "equalization"—or restricting the speech of some speakers "so that others might have an equal voice or influence in the electoral process"—is not a permissible basis for the government to restrict speech; (3) that the government has a strong interest in combating corruption and the appearance of corruption; (4) that based on that anti-corruption interest, the Court has allowed greater regulation of *contributions* to candidates or political parties than of *expenditures* by citizens and groups on electioneering activities such as advertisements, get-out-the-vote efforts, and voter registration drives; and (5) that the Court—at least up until that point—had been "somewhat more tolerant of regulation of for-profit corporations and labor unions."[1046]

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[1040] *See* Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (per curiam) (upholding certain limitations on contributions to candidates, but invalidating other limits on independent expenditures, overall campaign expenditures, and expenditures from a candidate's own personal funds as placing "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression").

[1041] *See* Kavanaugh, *AEI Interview*, *supra* note 202, at 44:10–44:52 (agreeing with a panelist's statement that "money spent during campaigns does represent speech and therefore deserves First Amendment protection or at least strict scrutiny of any limits on that spending").

[1042] *Id.*

[1043] 581 F.3d 1 (D.C. Cir. 2009).

[1044] *Id.* at 4–5.

[1045] *Id.* at 4–25; *cf. id.* at 25–40 (Brown, J., concurring in part).

[1046] *Id.* at 5–8 (majority opinion). *Emily's List* was decided before the Supreme Court issued its opinion in *Citizens United v. FEC*, overruling *Austin v. Mich. State Chamber of Commerce*, which had upheld certain prohibitions on corporate and union political expenditures on the ground that "they restrain the 'corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Emily's List*, 581 F.3d at 7–8 (quoting *Austin*, 494 U.S. 652, 660 (1990)). In *Emily's List*, Judge Kavanaugh noted the pendency of the *Citizens United* case, but reasoned that it did not bear on the constitutionality of the regulations at issue in *Emily's List*. 581 F.3d at 8 n.6. Judge Kavanaugh later joined the rest of his colleagues on the circuit in a unanimous en banc decision applying *Citizens United* to hold that statutory contribution limits cannot be constitutionally applied to individuals seeking to donate to an unincorporated nonprofit association that intended to make only independent expenditures to support or oppose candidates (i.e., not at the request of or in cooperation with the candidate or its agent). SpeechNow.org v. FEC, 599 F.3d 686, 693–95, 698 (D.C. Cir. 2010) (en banc).

Judge Kavanaugh analyzed the applicability of these First Amendment principles and holdings to EMILY's List, which sought to make *both contributions and expenditures*.[1047] He held that although limits on a nonprofit's *direct contributions* to federal candidates and parties are constitutional under relevant Supreme Court precedent, limits on their *expenditures* are not.[1048] In other words, Judge Kavanaugh concluded, nonprofits "are entitled to make their expenditures . . . out of a soft-money or general treasury account that is not subject to source and amount limits."[1049] In so doing, the nominee distinguished the Supreme Court's decision in *McConnell v. FEC*, which had upheld statutory limits on soft-money contributions to and expenditures by *political parties*, reasoning that the anti-corruption justification for those limits did not apply in the case of nonprofits.[1050] He explained that if the different treatment under the First Amendment of political parties and nonprofits seemed "incongruous," it was up to Congress to eliminate the "asymmetry" by raising or removing limits on contributions to political parties or candidates.[1051]

Elsewhere, Judge Kavanaugh has upheld restrictions on campaign spending. A year after *Emily's List* and two months after the Court's decision in *Citizens United*, in *Republican National Committee (RNC) v. FEC*, Judge Kavanaugh rejected the RNC's challenge to the statutory "soft-money ban" that prohibited it from raising and spending unlimited contributions to support state candidates, state parties' redistricting efforts, and various "grassroots lobbying efforts."[1052] Writing on behalf of a three-judge district court panel, Judge Kavanaugh reasoned that *McConnell*, which had upheld the soft-money ban notwithstanding its applicability to state election activities, foreclosed the RNC's challenge.[1053] Unlike in *Emily's List*—which, as previously noted, concerned a nonprofit—Judge Kavanaugh found *McConnell*'s anti-corruption justification sufficiently applicable to the RNC.[1054] The nominee noted the law's differential treatment of outside groups versus candidates and political parties, but stated that "the RNC's concern about this disparity" is "an argument for the Supreme Court or Congress."[1055]

The following year, in *Bluman v. FEC*, Judge Kavanaugh—once again on behalf of a three-judge district court panel—rejected a First Amendment challenge to a statute barring political contributions by foreign nationals temporarily living in the United States.[1056] In doing so, Judge Kavanaugh cited the U.S. government's compelling interest in "limiting the participation of

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[1047] *Emily's List*, 581 F.3d at 12.

[1048] *Id.*

[1049] *Id.*

[1050] *Id.* at 13–14, 18; *see also id.* at 14 ("Unlike the political parties examined in *McConnell*, there is no record evidence that non-profit entities have sold access to federal candidates and officeholders in exchange for large contributions. . . . More fundamentally, non-profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do.").

[1051] *Id.* at 19.

[1052] 698 F. Supp. 2d 150, 155 (D.D.C. 2010), *aff'd*, 561 U.S. 1040 (2010).

[1053] *Id.* at 157 (noting that the *Citizens United* Court did not disturb this holding from *McConnell*).

[1054] The RNC had argued that *McConnell* is distinguishable because in that case, the Court had evidence that national parties sold "preferential access to federal officeholders and candidates in exchange for soft-money contributions," whereas in *RNC v. FEC*, the RNC had "pledged to end its role as an intermediary for such transactions." *Id.* at 158 (emphasis removed). While noting the "considerable logic and force" of this argument, *id.*, Judge Kavanaugh reasoned that the *McConnell* Court had also relied on the "close relationship between federal officeholders and the national parties," in concluding that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used," *id.* at 159 (quoting McConnell v. FEC, 540 U.S. 114, 154–55 (2003)).

[1055] *Id.* at 160 n.5.

[1056] 800 F. Supp. 2d 281–83, 292 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."[1057] He noted, however, that the court's holding addressed only political *contributions* and *certain expenditures* by foreign nationals, not their right to engage in "*issue advocacy* and speaking out on issues of public policy," and that its decision "should not be read to support such bans."[1058]

As noted, Judge Kavanaugh has publicly endorsed the view that political spending is a form of political speech,[1059] which suggests that, if confirmed, he may be an unlikely vote to walk back the First Amendment lines that the Court has drawn to date[1060] in order to allow the government greater leeway to regulate political contributions and expenditures. If anything, Judge Kavanaugh has seemed to voice some discomfort at certain aspects of the scope and nature of government regulation in this area, particularly with respect to how the law still treats certain speakers differently in the campaign finance realm (e.g., political candidates and parties versus outside groups).[1061] His view that the consideration of whether to level the field for these speakers is one for Congress or the Supreme Court[1062] raises the question of what position the nominee would take if elevated to the Court.

## Free Speech and the Modern Communications Marketplace

While stressing the importance of *historical* context in some First Amendment cases,[1063] Judge Kavanaugh has looked to *more recent* developments when evaluating the constitutionality of telecommunications and Internet regulations, citing the significance of a speaker's "market power" under the Supreme Court's "landmark decisions" in *Turner Broadcasting I* and *Turner Broadcasting II*—both authored by Justice Kennedy.[1064]

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[1057] *Id.* at 288.

[1058] *Id.* at 292 (emphasis added). *See* Robert Barnes, *Russian Firm Indicted in Special Counsel Probe Cites Kavanaugh Decision to Argue That Charge Should Be Dismissed*, WASH. POST (July 20, 2018), https://www.washingtonpost.com/politics/courts_law/russian-firm-indicted-in-special-counsel-probe-cites-kavanaugh-decision-to-argue-that-charges-should-be-dismissed/2018/07/19/0faace34-8aba-11e8-a345-a1bf7847b375_story.html (predicting that the "*Bluman* ruling is likely to receive outsize attention in Kavanaugh's confirmation hearings because it is now being cited in an active case about Russian interference in the 2016 campaign").

[1059] *See* Kavanaugh, *AEI Interview*, *supra* note 202, at 44:10–44:52 (describing the ability to "raise money" to "make [one's] voice heard" as lying "at the core of the First Amendment").

[1060] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 58-59 (1976) (per curiam) (upholding certain limitations on contributions to candidates, but invalidating other limits on independent expenditures, overall campaign expenditures, and expenditures from a candidate's own personal funds as placing "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression").

[1061] *See* Kavanaugh, *AEI Interview*, *supra* note 202, at 42:22–43:33 ("There's clearly a structure that has been set up as a result of the jurisprudence where the political parties and candidates can't raise large sums of money and outside groups can.").

[1062] *See id.* ("[T]he parties have much less power to raise money now than outside groups . . . . [It is] not a surprise that outside groups therefore have a much more prominent role in our political system today than they did when parties could raise a lot of money. . . . [D]ifferent groups of Justices would resolve that disparity in different ways."); Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 160 n.5 (D.D.C. 2010) (stating that argument regarding the disparity between political parties and outside groups is "for the Supreme Court or Congress" to resolve), *aff'd*, 561 U.S. 1040 (2010).

[1063] *See, e.g.*, Am. Meat Inst. v. Dep't of Agric., 760 F.3d 18, 30–32 (D.C. Cir. 2014) (en banc) (noting historical pedigree of country-of-origin labeling information).

[1064] U.S. Telecomms. Ass'n v. FCC, 855 F.3d 381, 427 (D.C. Cir. 2017); *see also* Turner Broad. Sys., Inc. v. FCC (*Turner Broadcasting I*), 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. FCC (*Turner Broadcasting II*), 520 U.S. 180 (1997).

In *Turner Broadcasting I*, the Court considered whether the so-called "must-carry provisions" in a 1992 law that "require[d] cable television systems to devote a portion of their channels to the transmission of local broadcast television stations" violated the First Amendment.[1065] In his opinion for the Court, Justice Kennedy reasoned that the First Amendment protects cable programmers and operators, who "engage in and transmit speech," and that the must-carry provisions regulate speech by "reduc[ing] the number of channels over which cable operators exercise unfettered control" and "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining."[1066] Reviewing the must-carry provisions under "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech,"[1067] Justice Kennedy reasoned that the must-carry provisions were "justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power pose[d] to the viability of broadcast television."[1068] However, the Court remanded the case for additional fact-finding to determine whether the provisions burdened more speech than necessary to address the threat Congress perceived to broadcast television.[1069] Three years later, following remand, the case again reached the Court in *Turner Broadcasting II*,[1070] where Justice Kennedy's majority opinion concluded that the must-carry provisions "do not burden substantially more speech than necessary to further [Congress's] interests," and therefore, did not violate the First Amendment.[1071]

Thirteen years later, a D.C. Circuit panel that included Judge Kavanaugh considered the applicability of the *Turner Broadcasting* cases in *Cablevision Systems Corp. v. FCC*.[1072] In that case, two cable companies challenged an FCC decision to temporarily extend a statutory "exclusivity provision" barring exclusive contracts between "multichannel video programming distributors" such as cable operators and cable-affiliated programming networks.[1073] Two members of the panel rejected the companies' First Amendment argument, in large part based on the D.C. Circuit's 1996 decision in *Time Warner Entertainment Co. v. FCC*, which relied on *Turner Broadcasting* to uphold the underlying exclusivity statute against a similar First Amendment challenge.[1074]

Judge Kavanaugh dissented, reasoning that the *Turner Broadcasting* and *Time Warner* courts had upheld restrictions on the "editorial and speech rights of cable operators and programmers . . .

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[1065] *Turner Broadcasting I*, 512 U.S. at 626, 630.

[1066] *Id.* at 637.

[1067] *Id.* at 662.

[1068] *Id.* at 661.

[1069] *Id.* at 664–68 (plurality opinion). Justice Kennedy noted Congress's determination that increased vertical integration and horizontal concentration in the cable industry made it more difficult for local broadcast stations to secure carriage on cable systems and threatened "the economic viability of free local broadcast television and its ability to originate quality local programming." *Id.* at 634 (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(16), 106 Stat. 1460, 1462).

[1070] *Turner Broadcasting II*, 520 U.S. 180 (1997).

[1071] *Id.* at 185.

[1072] 597 F.3d 1306, 1307 (D.C. Cir. 2010).

[1073] *Id.*

[1074] *Id.* at 1311; Time Warner Entm't Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996). In *Time Warner*, the D.C. Circuit had held that, like the must-carry provision at issue in the *Turner Broadcasting* cases, the exclusivity provision was "likewise justified by . . . the bottleneck monopoly power exercised by cable operators, and the unique power that vertically integrated companies have in the cable market." *Time Warner Entm't Co.*, 93 F.3d at 978 (internal quotation marks omitted).

only because of the 'bottleneck monopoly power exercised by cable operators.'"[1075] In Judge Kavanaugh's view, the relevant market had "changed dramatically" since "those mid-1990s cases" to the point where cable operators "no longer possess bottleneck monopoly power."[1076] In particular, Judge Kavanaugh noted the range of video programming options available to consumers, not only through traditional cable networks, but also through cell phone companies and the Internet.[1077] The legal import of all these developments, Judge Kavanaugh concluded, is that "the FCC's exclusivity ban . . . is no longer necessary to further competition—and no longer satisfies the intermediate scrutiny standard set forth by the Supreme Court for content-neutral restrictions on editorial and speech rights."[1078] Judge Kavanaugh reasoned that in addition to the lack of market power to justify the restriction, the exclusivity rule raised special First Amendment concerns because it did not regulate evenhandedly, applying to cable operators like Cablevision but not "similarly situated video programming distributors and video programming networks" like DIRECTV, DISH, Verizon, or AT&T.[1079]

Of potential significance, Judge Kavanaugh proceeded to "offer a few additional observations" about the First Amendment's applicability in the telecommunications sphere; among the various points raised in this section of the opinion, Judge Kavanaugh reasoned that Congress and regulatory agencies have more leeway to adjust to the "realities of a changing market" in "ordinary economic regulation cases," such as those involving "energy, labor relations, the environment, or securities transactions."[1080] In contrast, he posited, the First Amendment requires "a more 'laissez-faire' [regulatory] regime" when the restriction concerns "communication markets."[1081] Judge Kavanaugh further reasoned that the First Amendment may permit the government to regulate in a content-neutral manner in a noncompetitive market, but "when a market is competitive, direct interference with First Amendment free speech rights in the name of competition is typically unnecessary and constitutionally inappropriate."[1082]

Judge Kavanaugh offered similar observations in another case involving the FCC's "Viewability Rule," which "requir[ed] 'hybrid' cable companies—that is, those that provide both analog and digital cable service—to 'downconvert' from digital to analog broadcast signals from must-carry stations for subscribers with analog television sets."[1083] The FCC had allowed the Viewability Rule to lapse and replaced it with a new rule, in part because of constitutional concerns.[1084] Judge Kavanaugh, in a concurring opinion, reasoned that the FCC "was right to perceive a serious First Amendment problem with the Viewability Rule," echoing many of the arguments he made in *Cablevision* regarding the "dramatically changed marketplace" against which the Court must evaluate the constitutionality of the "broader must-carry regime."[1085] In Judge Kavanaugh's view, "cable regulations adopted in the era of *Cheers* and *The Cosby Show* are ill-suited to a

[1075] *Cablevision Sys.*, 597 F.3d at 1315 (Kavanaugh, J., dissenting).

[1076] *Id.* at 1315.

[1077] *Id.* at 1315–16.

[1078] *Id.* at 1316.

[1079] *Id.* at 1326–27.

[1080] *Id.* at 1327–28.

[1081] *Id.* at 1327 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 161 (Douglas, J., concurring in the judgment)).

[1082] *Id.* at 1328.

[1083] Agape Church, Inc. v. FCC & United States, 738 F.3d 397, 400 (D.C. Cir. 2013).

[1084] *Id.* at 413 (Kavanaugh, J., concurring).

[1085] *Id.*

marketplace populated by *Homeland* and *House of Cards*"; furthermore, "[b]ecause cable operators no longer wield market power," Judge Kavanaugh reasoned that "the Government can no more tell a cable operator today which video programming networks it must carry than it can tell a bookstore what books to sell or tell a newspaper what columnists to publish."[1086]

The significance of market power also featured prominently in Judge Kavanaugh's dissent from an en banc circuit decision *not* to review a panel order upholding the FCC's 2015 net neutrality rule.[1087] The rule prohibited ISPs from blocking or throttling (i.e., slowing down) legal content and from agreeing to favor the delivery of certain content for a fee or to benefit an affiliated entity.[1088] Judge Kavanaugh described the rule as "one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States."[1089] In Judge Kavanaugh's view, the rule "transform[ed] the Internet by imposing common-carrier obligations on [ISPs] and thereby prohibiting [them] from exercising editorial control over the content they transmit to consumers."[1090] He reasoned that imposing such obligations on ISPs without demonstrating that they possess "market power" violates the First Amendment under the *Turner Broadcasting* cases.[1091] While acknowledging that the net neutrality rule pertained to ISPs, not cable television operators, Judge Kavanaugh reasoned that these businesses "perform the same kind of functions," suggesting, by way of example, that "[d]eciding whether and how to transmit ESPN and deciding whether and how to transmit ESPN.com are not meaningfully different for First Amendment purposes."[1092] Judge Kavanaugh also rejected the FCC's attempt to distinguish ISPs from cable television operators on the basis that ISPs do not exercise editorial control, reasoning that even if ISPs "have not been aggressively exercising their editorial discretion," they do not forfeit their right to do so.[1093]

In view of the foregoing opinions, Judge Kavanaugh, if confirmed, could be a key voice on the Supreme Court as it continues to refine the contours of First Amendment law in the Internet age.[1094] Judge Kavanaugh's opinions suggest that he believes that, barring some sort of market

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[1086] *Id.* at 414–15; *see also* Comcast Cable Commc'ns, LLC v. FCC, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[T]he FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the *Wall Street Journal* or *Politico* or the *Drudge Report* what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature. In light of the Supreme Court's precedents interpreting the First Amendment and the massive changes to the video programming distribution market over the last two decades, the FCC's interference with Comcast's editorial discretion cannot stand.").

[1087] *See* U.S. Telecom. Ass'n v. FCC, 855 F.3d 381, 417–35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[1088] *See* Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,737, 19740 (Apr. 13, 2015) (summarizing prohibition on blocking, throttling, and paid prioritization in the 2015 Open Internet Order); *see generally* CRS Legal Sidebar WSLG1810, *Net Neutrality: Back to the Future (Part One)*, by Kathleen Ann Ruane. The FCC adopted an order in 2017 that "largely reverse[d] the . . . 2015 regulatory framework." CRS Report R40616, *The Net Neutrality Debate: Access to Broadband Networks* 11, by Angele A. Gilroy .

[1089] *U.S. Telecom. Ass'n*, 855 F.3d at 417 (Kavanaugh, J., dissenting).

[1090] *Id.*

[1091] *Id.* at 426–27. *But cf. id.* at 388 (Srinivasan, J., concurring in denial of rehearing en banc) (arguing that the net neutrality rule does not violate the First Amendment and noting that neither the FCC Commissioners who dissented from the agency's adoption of the rule nor the "principal parties" challenging the rule "who collectively represent virtually every broadband provider" raised a First Amendment objection).

[1092] *U.S. Telecom. Ass'n*, 855 F.3d at 428 (Kavanaugh, J., dissenting).

[1093] *Id.* at 429 ("[The FCC's argument] would be akin to arguing that people lose the right to vote if they sit out a few elections. Or citizens lose the right to protest if they have not protested before. Or a bookstore loses the right to display its favored books if it has not done so recently. That is not how constitutional rights work.").

[1094] *See, e.g.*, Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868–70 (1997) (reasoning, in holding two provisions

irregularity, the First Amendment should apply with the same rigor to restrictions on Internet speakers and content providers as to other purveyors of speech in the communications industry, and that technological developments and increased competition could lessen the need for government regulation in the communications marketplace.[1095]

## Commercial Speech and Commercial Disclosures

Some First Amendment contexts implicate more than one of the Supreme Court's tests for evaluating the constitutionality of a speech regulation.[1096] In these circumstances, the court may not reach agreement on the governing doctrine,[1097] and, as Judge Kavanaugh has argued, the outcome of the case may depend on which test the court applies and the factors that the court considers in applying it.[1098] Debates over the appropriate First Amendment test to apply have often arisen in the context of commercial speech and commercial disclosures.[1099]

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within the Communications Decency Act of 1996 unconstitutional, that although cases like *Turner Broadcasting* "have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers," "[t]hose factors are not present in cyberspace," which, among other things, "provides relatively unlimited, low-cost capacity for communication of all kinds"); Ashcroft v. ACLU, 542 U.S. 656, 666–73 (2004) (Kennedy, J., writing for the majority) (affirming preliminary injunction against enforcement of the Child Online Protection Act and remanding for a trial to determine, inter alia, whether blocking and filtering software provides a less speech-restrictive means to prevent children from accessing harmful materials on the Internet); Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (Kennedy, J., writing for the majority) ("[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas . . . .").

[1095] *See* U.S. Telecomms. Ass'n v. FCC, 855 F.3d 381, 428 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("As *Turner Broadcasting* concluded, the First Amendment's basic principles 'do not vary when a new and different medium for communication appears'—although there of course can be some differences in how the ultimate First Amendment analysis plays out depending on the nature of (and competition in) a particular communications market. . . . In short, [ISPs] enjoy First Amendment protection of their rights to speak and exercise editorial discretion, just as cable operators do." (citation omitted)); *id.* at 433 ("To be sure, the interests in diversifying and increasing content are important governmental interests in the abstract, according to the Supreme Court. But absent some market dysfunction, Government regulation of the content carriage decisions of communications service providers is not essential to furthering those interests, as is required to satisfy intermediate scrutiny." (internal citation omitted)).

[1096] *See, e.g.*, NIFLA v. Becerra, 138 S. Ct. 2361, 2371–76 (2018) (considering and rejecting the applicability of precedents that applied less than strict scrutiny in the context of professional speech regulations, informed consent laws, and certain commercial disclosures).

[1097] *See NIFLA*, 138 S. Ct. at 2381 (Breyer, J., dissenting) (arguing, for four members of the Court, that the majority's characterization of the disclosure requirement as a content-based regulation normally subject to strict scrutiny "threatens to create serious problems" for First Amendment law and expressing the view that "the Court substitutes its own approach—without a defining standard—for an approach that was reasonably clear").

[1098] *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1914–15 ("If nothing else, I want to underscore that the compelling interest/important interest/strict scrutiny/intermediate scrutiny formulations are rather indeterminate. Those verbal formulations require judges to balance a variety of hard-to measure factors. . . . At most, [these formulations] are a mood-setter, but they don't tell us in the end whether to uphold . . . a particular state regulation of doctors who perform abortions or a law that proscribes or limits expenditures in support of political candidates.").

[1099] *Compare* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) ("Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny."), *with id.* at 2673 (Breyer, J., dissenting) ("In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing such an effort.").

In its 1980 decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court developed an "intermediate" standard of scrutiny for evaluating commercial regulations that implicate speech.[1100] This test requires the government to articulate more than a rational basis for its regulatory decision, but does not necessitate that the law be the "least restrictive means" of achieving the government's interest (a key feature of strict scrutiny).[1101] However, since *Central Hudson*, the Court has, at times, departed from using the test articulated in the 1980 decision,[1102] with some members of the Court going so far as to question the basis for treating commercial speech differently from core political speech, which receives strict scrutiny—at least in certain circumstances.[1103] The debate over the proper test for evaluating commercial speech *restrictions* also calls into question the scope of doctrines created for purposes of evaluating commercial *disclosure* requirements, which some courts have likened to rational basis review.[1104] In *American Meat Institute v. Department of Agriculture*, Judge Kavanaugh offered a path to reconciling the Court's current tests for commercial speech and commercial disclosures.[1105]

In *American Meat Institute*, the full circuit considered the constitutionality of a federal regulation requiring the disclosure of certain country-of-origin information for meat products.[1106] As a threshold matter, the court considered which of two First Amendment standards developed by the Supreme Court applied to the regulation. The first standard was the "general test for commercial speech restrictions" set forth in *Central Hudson*: whether the regulation directly advances a substantial governmental interest and is narrowly drawn to achieve that end.[1107] The second standard involved the Court's decision in *Zauderer v. Office of Disciplinary Counsel*, which concerned government-mandated disclosures aimed at preventing consumer deception.[1108] Under

[1100] *See* 447 U.S. 557, 564–66 (1980); Fla. Bar v. Went for It, 515 U.S. 618, 623 (1995) ("[W]e engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson* . . . .").

[1101] *See* Fla. Bar, 515 U.S. at 624 (distinguishing *Central Hudson* from rational basis review); Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989) (holding that *Central Hudson* does not require the government to demonstrate that the regulation is the "least restrictive means" of achieving its interests).

[1102] *See, e.g.*, *Sorrell*, 564 U.S. at 557, 571 (holding that a state law restricting "[s]peech in aid of pharmaceutical marketing" is subject to "heightened judicial scrutiny," but ultimately concluding that the law is unconstitutional "whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied"); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (reasoning that because the challenged provisions are "directed at misleading commercial speech" and "impose a disclosure requirement rather than an affirmative limitation on speech," the appropriate test is "the less exacting scrutiny described in *Zauderer* [*v. Office of Disciplinary Counsel*] rather than *Central Hudson*'s intermediate scrutiny standard).

[1103] *See* Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 845 (9th Cir. 2017) ("[T]he Supreme Court has engaged in considerable debate about the contours of First Amendment protection for commercial speech, and whether *Central Hudson* provides a sufficient standard."); *id.* at 845–46 (collecting cases). *E.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment) ("In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* . . . should not be applied, in my view. Rather, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.").

[1104] *See* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 370–71 (D.C. Cir. 2014) ("The Supreme Court has stated that rational basis review applies to certain disclosures of 'purely factual and uncontroversial information.' (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985))).

[1105] Am. Meat Inst. v. United States Dep't of Agric., 760 F.3d 18, 30–35 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment).

[1106] *Id.* at 20–21 (majority opinion).

[1107] *Id.* at 21.

[1108] *Id.*; *see* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

the *Zauderer* standard, a "purely factual and uncontroversial" disclosure requirement comports with the First Amendment when it is "reasonably related to the [government's] interest in preventing deception of consumers."[1109] The en banc court in *American Meat Institute* interpreted *Zauderer* to apply outside the context of consumer deception and concluded that the country-of-origin labeling requirements passed muster under *Zauderer*.[1110]

Although he agreed with the majority's conclusion that the First Amendment does not bar the country-of-origin labeling requirements, Judge Kavanaugh wrote separately to explain how the "two basic *Central Hudson* requirements apply to this case."[1111] With respect to *Central Hudson*'s first prong requiring a substantial governmental interest, Judge Kavanaugh reasoned that the need to prevent consumer deception and to ensure consumer health or safety are "historical" and "traditional" interests justifying commercial disclosures.[1112] However, Judge Kavanaugh reasoned that the "the Government cannot advance a traditional anti-deception, health, or safety interest in this case because a country-of-origin disclosure requirement obviously does not serve those interests."[1113] Moreover, Judge Kavanaugh found that the interest that the government *had asserted*—providing consumers with information—was insufficient for First Amendment purposes.[1114] Nevertheless, Judge Kavanaugh reasoned that "country-of-origin labeling is justified by the Government's historically rooted interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign" counterparts.[1115]

Judge Kavanaugh then concluded that the labeling requirement satisfied *Central Hudson*'s second prong "concern[ing] the fit between the disclosure requirement and the Government's interest."[1116] In doing so, he characterized the debate over the *Central Hudson* versus *Zauderer* tests as presenting a "false choice,"[1117] reasoning that "*Zauderer* is best read simply as an application of *Central Hudson*, not a different test altogether."[1118] Under Judge Kavanaugh's interpretation, "*Zauderer* tells us what *Central Hudson*'s [second prong] means in the context of compelled commercial disclosures: The disclosure must be purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government's interest."[1119]

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[1109] *Am. Meat Inst.*, 760 F.3d at 22 (quoting *Zauderer*, 471 U.S. at 651).

[1110] *Id.* at 22–23, 27. In doing so, the court considered how *Zauderer* might align with *Central Hudson*'s two prongs. First, it noted that "the Supreme Court has not made clear whether *Zauderer* would permit government reliance on interests that do not qualify as substantial under *Central Hudson*'s standard," but concluded that "several aspects of the government's interest in country-of-origin labeling for food combine to make the interest substantial" in any event. *Id.* at 23. Second, it reasoned that "*Zauderer*'s method of evaluating [the] fit" between "the government's identified means and its chosen ends" differs "in wording, though perhaps not significantly in substance, at least on [the] facts" of *American Meat Institute*. *Id.* at 25–26. *But cf. id.* at 28–29 (Rogers, J., concurring in part) (arguing that the *Zauderer* Court did not "reformulate the *Central Hudson* standard but rather establishe[d] a different standard" based on the differences between disclosure requirements and outright speech prohibitions).

[1111] *Id.* at 30–31 (Kavanaugh, J., concurring in the judgment).

[1112] *Id.* (calling history and tradition "reliable guides" in evaluating whether an interest is substantial).

[1113] *Id.*

[1114] *Id.*

[1115] *Id.* at 32. Although the Executive had "refrained" from asserting this interest in the litigation, Judge Kavanaugh found it sufficient that Congress had articulated the interest in enacting the underlying country-of-origin labeling law. *Id.* at 32–33.

[1116] *Id.* at 33

[1117] *Id.* at 34 n.2.

[1118] *Id.* at 33.

[1119] *Id.* Judge Kavanaugh reasoned that in view of those requirements, the *Zauderer* standard is "far more stringent than mere rational basis review," even though other courts have described *Zauderer* as a rational basis test. *Id.* at 33–34 n.2.

Judge Kavanaugh's concurrence in *American Meat Institute* is potentially notable in several respects. First, while rejecting the view that the public's right to know in and of itself can justify compelled commercial disclosures, Judge Kavanaugh seemed to implicitly accept that cases like *Zauderer* may justify government-compelled disclosure for reasons other than preventing consumer deception[1120]—which is an open question for the Supreme Court.[1121] He did note, however, that "the compelled disclosure must be a disclosure *about the product or service in question* to be justified under *Central Hudson* and *Zauderer*"—a qualification that the Supreme Court recently confirmed, at least with respect to *Zauderer*'s application, in *NIFLA v. Becerra*.[1122] Second, Judge Kavanaugh interpreted the Supreme Court's precedents to require a *substantial* governmental interest, even under *Zauderer*.[1123] In doing so, he looked to "history and tradition" to discern what interests outside the context of preventing consumer deception might be "substantial."[1124] This approach raises a question as to whether Judge Kavanaugh, if confirmed, would invalidate compelled disclosures that lack a "historical pedigree."[1125] Finally, Judge Kavanaugh seemed to interpret *Zauderer*'s test to be as rigorous as *Central Hudson*'s intermediate scrutiny standard,[1126] notwithstanding contrary views of *Zauderer* from other courts.[1127] Although the foregoing observations could be viewed simply as the judge's attempts to interpret and reconcile existing Supreme Court precedent, they could also signal his potential alignment with the wing of the Court that has advocated for a more rigorous form of review for commercial speech and compelled speech.[1128]

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[1120] *See id.* at 33 ("As I read it, the Supreme Court's decision in *Zauderer* applied [*Central Hudson*'s second prong] to compelled commercial disclosures.").

[1121] *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2372 (2018) (reasoning that the Court "need not decide what type of state interest is sufficient to sustain a disclosure requirement" like California's notice requirement for unlicensed pregnancy centers, because even assuming *Zauderer*'s applicability, the requirement was not "uncontroversial" and the state's asserted justification was "purely hypothetical"). In its October 2017 term, the Court considered a petition for writ of certiorari concerning: (1) *Zauderer*'s applicability beyond the context of consumer deception; (2) the level of governmental interest required under *Zauderer*; and (3) whether *Zauderer* requires a disclosure to be uncontroversial, even when factually accurate. Petition for Writ of Certiorari at i, CTIA-Wireless Ass'n v. City of Berkeley, 138 S. Ct. 2708 (2018) (No. 17-976). On June 28, 2018, the Court granted the petition, vacated the judgment below, and remanded the case for further consideration in light of *NIFLA*. CTIA-Wireless Ass'n v. City of Berkeley, 138 S. Ct. 2708 (2018).

[1122] *Am. Meat Inst.*, 760 F.3d at 33 n.1 (Kavanaugh, J., concurring in the judgment) (emphasis added); *see* NIFLA v. Becerra, 138 S. Ct. 2361, 2372 (2018) (holding that the *Zauderer* standard did not apply to California's disclosure requirement for licensed pregnancy centers because, among other reasons, the required notice "in no way relate[d] to the services" that those centers provided).

[1123] *Am. Meat Inst.*, 760 F.3d at 31 (Kavanaugh, J., concurring in the judgment) ("Since its decision in *Central Hudson*, the Supreme Court has not stated that something less than a 'substantial' governmental interest would justify either a restriction on commercial speech or a compelled commercial disclosure."); *see also id.* at 34 ("[T]he majority opinion and I agree on the following: To justify a compelled commercial disclosure, assuming the Government articulates a substantial governmental interest, the Government must show that the disclosure is purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government's interest.").

[1124] *Id.* at 31–32.

[1125] *Id.* at 32 (reviewing "the Government's historically rooted interest in supporting American manufacturers, farmers, and ranchers" as a justification for country-of-origin labeling and concluding that this "historical pedigree is critical for First Amendment purposes and demonstrates that the Government's interest here is substantial").

[1126] *Id.* at 33–34 (rejecting the view that *Zauderer*'s standard is akin to rational basis review).

[1127] *See, e.g.*, Evergreen Ass'n v. City of N.Y., 740 F.3d 233, 245 (2d Cir. 2014) (characterizing *Zauderer* scrutiny of disclosure requirements as requiring rational basis review); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2012) (similar).

[1128] *See* Timothy Zick, *Judge Kavanaugh and Freedom of Expression*, SCOTUSBLOG (Aug. 7, 2018, 3:49 PM), http://www.scotusblog.com/2018/08/judge-kavanaugh-and-freedom-of-expression/ ("Some have suggested that

## Limits on First Amendment Protections

Like Justice Kennedy, Judge Kavanaugh's view of the First Amendment's protection of free speech is not unbounded. In cases where the challenged governmental action implicated national security or concerned government speech or a regulation directed at conduct, Judge Kavanaugh upheld the government's action.

*al Bahlul v. United States* involved a First Amendment challenge by an assistant to Osama bin Laden who complained that "he was unconstitutionally prosecuted [by a U.S. military commission] for his political speech," which included his production of "propaganda videos for al Qaeda."[1129] In an opinion concurring in part and dissenting in part from the judgment, Judge Kavanaugh reasoned that the government based the appellant's conspiracy conviction on the appellant's conduct, not his speech, but that in any event, appellant "had no First Amendment rights as a non-U.S. citizen in Afghanistan when he led bin Laden's media operation."[1130] Judge Kavanaugh further reasoned that even if the First Amendment did apply to the appellant's production of videos in Afghanistan, it did not protect the videos described in the appellant's indictment because they were aimed at inciting imminent lawless action and thus unprotected speech under relevant Supreme Court precedent.[1131] He noted that the Supreme Court has been even less willing to recognize protections for such speech when the government seeks to prevent imminent harms as a matter of international affairs and national security.[1132] Invoking the words of Justice Jackson,[1133] Judge Kavanaugh stated that the Constitution "is not a suicide pact."[1134]

In *Bryant v. Gates*, a former civilian employee with the military sought to publish in Department of Defense (DOD) newspapers distributed on military installations a series of advertisements soliciting readers to "blow the whistle" on alleged military cover-ups.[1135] The military denied his requests on the basis of a DOD rule prohibiting the newspapers from including partisan discussions and political commentary.[1136] The former employee challenged the rule and the DOD's application of the rule to his proposed advertisements on First Amendment grounds.[1137] Applying the test for non-public forums, the court concluded that the restriction on political advertising was reasonable "on its face and as applied to [the advertisements in question]."[1138] Although Judge Kavanaugh joined the court's opinion, he authored a separate concurrence "lest

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Kavanaugh's concurrence [in *American Meat Institute*] indicates a lack of support for commercial speech rights. However, in addition to emphasizing that 'the First Amendment protects commercial speech,' Kavanaugh interpreted *Zauderer* as denying government 'a free pass to spread their preferred messages on the backs of others' owing solely to its interest in providing consumers with information.).

[1129] al Bahlul v. United States, 767 F.3d 1, 75–76 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment in part and dissenting in part); *see also id.* at 5 (majority opinion) (describing facts of case).

[1130] *Id.* at 75–76 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

[1131] *Id.* at 76.

[1132] *Id.*

[1133] For a discussion of Judge Kavanaugh's judicial heroes and influences, see discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[1134] *See al Bahlul*, 767 F.3d at 76 (Kavnaugh, J., concurring in the judgment in part and dissenting in part) (citing Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)).

[1135] 532 F.3d 888, 891–92 (D.C. Cir. 2008).

[1136] *Id.* at 892.

[1137] *Id.* at 893.

[1138] *Id.*

this precedent be misinterpreted."[1139] In Judge Kavanaugh's view, the "government speech" doctrine—rather than a public forum analysis—best applied to speech restrictions concerning the DOD newspapers.[1140] Pursuant to that doctrine, he explained, because the publication constitutes the government's *own* speech, the military "may exercise viewpoint-based editorial control in running [it],"[1141] and could reject not only political advertisements as a category, but also political advertisements conveying a particular message that the military opposes.[1142]

Judge Kavanaugh also suggested an alternative analytical approach in a case involving a First Amendment challenge to a D.C. law prohibiting the defacement of public and private property.[1143] The panel rejected an anti-abortion protester's argument that the law unconstitutionally prohibited him from writing messages in sidewalk chalk on the street in front of the White House.[1144] Although Judge Kavanaugh agreed with the majority's analysis and resolution of the First Amendment issue under the public forum doctrine, he authored a separate concurrence "simply because [he did] not want the fog of First Amendment doctrine to make this case seem harder than it is."[1145] In his view, "[n]o one has a First Amendment right to deface government property."[1146]

## Conclusion

Although by no means unfailing indicators of how Judge Kavanaugh will approach future cases, some broad observations emerge from his free speech jurisprudence. First, Judge Kavanaugh has generally recognized political spending as a form of protected speech and has noted where the Court's election law jurisprudence has resulted in speaker-based distinctions, raising questions as to whether he would maintain those dividing lines.[1147] Second, Judge Kavanaugh has applied bedrock First Amendment principles to new forms of media and appears to have viewed

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[1139] *Id.* at 898 (Kavanaugh, J., dissenting).

[1140] *Id.* (offering a "far easier way to analyze" the parties' respective rights under the First Amendment).

[1141] *Id.* at 899. Judge Kavanaugh added that the courts should accord *more deference* to speech restrictions imposed by the military than to laws restricting speech that are aimed at civilian society. *Id.* (rejecting "the plaintiff's suggestion that the Judiciary micro-manage advertising selection by military newspapers" because that approach "would interfere with the military's pursuit of its critical mission and involve the courts in military decisions and assessments of morale, discipline, and unit cohesion that the Supreme Court has indicated are well beyond the competence of judges" (citing Parker v. Levy, 417 U.S. 733, 744 (1974); Goldman v. Weinberger, 475 U.S. 503, 507 (1986))).

[1142] *Id.* Similarly, in another case involving government speech, Judge Kavanaugh joined his colleagues on a three-judge panel in holding that the federal government may restrict grants to private organizations engaged in HIV/AIDS relief efforts to only those organizations that have a policy opposing prostitution and sex trafficking, because when the government "communicates its message, either through public officials or private entities, the government can—and often must—discriminate on the basis of viewpoint." DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758, 759–61, 764 (D.C. Cir. 2007). Six years later, the Supreme Court invalidated this funding condition, holding that unlike "conditions that define the limits of the government spending program—[that is,] those that specify the activities Congress wants to subsidize," which are constitutional, the requirement for grant recipients to have a policy opposing prostitution and sex trafficking impermissibly compels those recipients to "adopt—as their own—the Government's view on an issue of public concern" and thus dictates the views of the recipient, not the contours of the program. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214, 217–18 (2013).

[1143] Mahoney v. Doe, 642 F.3d 1112, 1114 (D.C. Cir. 2011).

[1144] *Id.*

[1145] *Id.* at 1122 (Kavanaugh, J., concurring).

[1146] *Id.* ("No one has a First Amendment right, for example, to spray-paint the Washington Monument or smash the windows of a police car. . . . When, as here, the Government applies a restriction on defacement in a content-neutral and viewpoint-neutral fashion, there can be no serious First Amendment objection.").

[1147] *See supra* notes 1040-62 and accompanying text.

regulations of the communications industry—where speech *is* the product offering—as particularly suspect under the First Amendment.[1148] Third, in a case concerning "country-of-origin" labeling requirements, Judge Kavanaugh staked a middle ground in the ongoing debate over the proper test to apply to commercial disclosures.[1149] Fourth, like Justice Kennedy, Judge Kavanaugh has recognized limitations on the First Amendment's reach.[1150] In particular, he has upheld government actions in cases that he deemed to involve unprotected speech or government speech.[1151]

[1148] *See supra* notes 1063-95 and accompanying text.

[1149] *See supra* notes 1096-1128 and accompanying text.

[1150] *See supra* notes 1129-46 and accompanying text.

[1151] *See id*.

More broadly, Judge Kavanaugh has advocated for deciding First Amendment challenges in some cases where his colleagues resolved the case on alternative grounds. *See* Reporters Committee for Freedom of the Press, *Special Report on Supreme Court Nominee Brett M. Kavanaugh*, https://www.rcfp.org/kavanaugh (last visited July 23, 2018) (noting that "[i]n several cases involving FCC restrictions on cable operators and cable providers, Judge Kavanaugh wrote separately to emphasize the First Amendment interests present in each of these cases, even as the majority denied or touched only briefly upon them"); *cf.* al Bahlul v. United States, 767 F.3d 1, 80 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (disagreeing with en banc court's decision to remand the First Amendment question because the issue was "not that complicated" and the deferential standard of review counseled in favor of resolving it during en banc review rather than delaying the final resolution of the case)

# National Security[1152]

Because of the unique docket at the D.C. Circuit, which has exclusive jurisdiction over certain matters related to military commissions and law of war detention,[1153] Judge Kavanaugh has authored or joined a large body of opinions related to national security.[1154] Like the themes echoed in several of Justice Kennedy's opinions,[1155] the nominee has frequently argued for courts to defer to the authority of the political branches on national security matters.[1156] To Judge Kavanaugh, this deference arises from concerns that the judicial branch lacks the institutional competency to address national security and foreign policy debates in the absence of a statutory directive.[1157] At the same time, the nominee's deference has limits, as he holds the view that deference is not warranted when a governing statute or constitutional provision calls for a judicial role.[1158] Judge Kavanaugh appears less likely than Justice Kennedy to look to international law principles to inform his interpretation of a particular statute or constitutional provision in the absence of an express directive to do so.[1159] In addition to his judicial rulings on national security matters, Judge Kavanaugh's non-judicial writings express a special interest in analyzing the constitutional limits on the Executive's power to take the United States to war abroad without congressional authorization, [1160] a matter that has not received significant attention from the Supreme Court in the modern era.[1161]

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[1152] CRS Legislative Attorney Stephen P. Mulligan authored this section of the report.

[1153] *See, e.g.*, 10 U.S.C. § 950g (granting exclusive jurisdiction to the D.C. Circuit to consider appeals from the Court of Military Commission Review); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (codified as amended at 10 U.S.C. § 801 note) ("[T]he [D.C.] Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.").

[1154] *See, e.g.*, Klayman v. Obama, 805 F.3d 1148, 1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("The Government's program for bulk collection of telephony metadata serves a critically important special need—preventing terrorist attacks on the United States. . . . In my view, that critical national security need outweighs the impact on privacy occasioned by this program." (citation omitted)); Ali v. Obama, 736 F.3d 542, 552 (D.C. Cir. 2013) ("[T]he Constitution allows detention of enemy combatants for the duration of hostilities."); Omar v. McHugh, 646 F.3d 13, 14–15 (D.C. Cir. 2011) (holding that a dual Jordanian-American citizen detained by the U.S. military in Iraq was not entitled to habeas corpus relief blocking the United States' plan to transfer him to Iraqi custody based on the detainee's belief that he was likely to be tortured by Iraqi officials); Al-Bihani v. Obama, 619 F.3d 1, 9–12 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (expressing the view that federal courts should not conclude that international law restricts presidential authority for wartime activities unless the political branches expressly provide such a restriction in a domestic statute or self-executing treaty).

[1155] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1861–63 (2017) ("Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" (quoting Christopher v. Harbury, 536 U.S. 403, 417 (2002))); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2017) ("[J]udicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.").

[1156] *See, e.g.*, Meshal v. Higgenbotham, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring); *Omar*, 646 F.3d at 15; *Al-Bihani*, 619 F.3d at 38 (Kavanaugh, J., concurring in denial of rehearing en banc); Kiyemba v. Obama, 561 F.3d 509, 519–20 (D.C. Cir. 2009) (Kavanaugh, J., concurring), *cert. denied*, 559 U.S. 1005 (2010).

[1157] *See, e.g.*, *Kiyemba*, 561 F.3d at 520–21 (Kavanaugh, J., concurring) (arguing that the judicial branch lacks standards and procedures by which to evaluate whether a detainee slated to be transferred to foreign custody is likely to be subject to torture); al Bahlul v. United States, 840 F.3d 757, 774 (D.C. Cir. 2016) (Kavanaugh, J., concurring, joined by Brown, J. and Griffith, J.) (contending that, unlike the Executive and Congress, judges have no basis on which to express an opinion as to whether military commissions are essential to the U.S. war effort).

[1158] *See infra* notes 1177-87 and accompanying text.

[1159] *See infra* notes 1192–1202 and accompanying text.

[1160] *See infra* notes 1208–16 and accompanying text.

Parallels between Justice Kennedy's and Judge Kavanaugh's deference to the political branches are evident in their approach to cases concerning implied constitutional causes of action in the national security realm.[1162] In his opinion for the Supreme Court in *Ziglar v. Abbasi*, Justice Kennedy reasoned that judicial recognition of an implied cause of action—allowing certain individuals who had been detained in the aftermath of the September 11, 2001 attacks to sue the government for monetary damages—would raise separation-of-powers concerns by requiring "judicial inquiry into the national-security realm."[1163] In *Meshal v. Higgenbotham*, Judge Kavanaugh similarly declined to recognize an implied constitutional cause of action for monetary damages arising out of the alleged torture and detention of an American citizen during U.S. anti-terrorism operations in Africa.[1164] In a passage echoing *Ziglar*, the nominee wrote in an opinion concurring in dismissal of the suit that it is Congress, not the judicial branch, that "decides whether to recognize a cause of action against U.S. officials for torts they allegedly committed abroad in connection with the war against al Qaeda and other radical Islamic terrorist organizations."[1165]

Judge Kavanaugh has been vocally deferential to the political branches when evaluating national security-related matters that he considered to concern policy choices rather than legal disputes.[1166] In *al Bahlul v. United States*—an en banc case concerning the scope of military commissions' jurisdiction—three dissenting judges argued that the government did not demonstrate that military exigency required the United States to try a defendant in a military commission, rather than in a court convened pursuant to the judicial authority established under Article III.[1167] Judge Kavanaugh responded, stating that the dissenting judges had "no business" evaluating military exigency because they had "no relevant expertise on the question of wartime strategy."[1168] The nominee has also opined that courts should not second-guess the judgment of the executive branch in other national security-related matters, such as security clearance decisions[1169] or when evaluating how a foreign country is likely to treat a U.S. detainee slated for transfer overseas.[1170]

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[1161] *See generally* CRS Report R41989, *Congressional Authority to Limit Military Operations*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

[1162] *Compare* Ziglar v. Abbasi, 137 S. Ct. 1843, 1861–63 (2017), *with* Meshal v. Higgenbotham, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring).

[1163] 137 S. Ct. at 1861.

[1164] *See* 804 F.3d at 430.

[1165] *Id.* at 430 (Kavanaugh, J., concurring). *See also* Saleh v. Titan Corp., 580 F.3d 1, 16 (D.C. Cir. 2009) (Silberman, J.) (Kavanaugh, J., joining opinion affirming dismissal of tort claims against private military contractors that provided services to the U.S. government at the Abu Ghraib military prison in Iraq based, in part, on the reasoning that Congress has "superior legitimacy in creating causes of action" but did not create the claim being asserted).

[1166] *See infra* notes 1167–76 and accompanying text.

[1167] 840 F.3d 757, 828 (D.C. Cir. 2016) (Rogers, J., dissenting) ("[T]hroughout this protracted litigation, the government has offered no reason to believe that expanding the traditionally understood scope of Article III's exception for law-of-war military commissions is necessary to meet a military exigency."). For additional background on *al Bahlul*, see CRS Legal Sidebar LSB10043, *Supreme Court Declines to Take Up Military Commission Challenges – Al Bahlul and Al-Nashiri*, by Jennifer K. Elsea.

[1168] *al Bahlul*, 840 F.3d. at 774 (Kavanaugh, J., concurring).

[1169] *See, e.g.*, Foote v. Moniz, 551 F.3d 656, 657–59 (D.C. Cir. 2014) (holding that unsuccessful applicant for a national security position at the Department of Energy could not maintain a racial discrimination claim against the agency because Supreme Court precedent precluded judicial review of the agency's decision not to certify the applicant as eligible to apply); Rattigan v. Holder, 689 F.3d 764, 775 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (contending that reports of employee misconduct that lead to review of security clearance eligibility decisions are not subject to judicial review under Title VII of the Civil Rights Act of 1964).

[1170] *See* Omar v. McHugh, 646 F.3d 13, 15 (D.C. Cir. 2011); Kiyemba v. Obama, 561 F.3d 509, 517–21 (D.C. Cir. 2009) (Kavanaugh, J., concurring), *cert. denied*, 559 U.S. 1005 (2010).

Similarly, in a dissenting opinion in an Alien Tort Statute suit against Exxon Mobil involving the Indonesian army,[1171] Judge Kavanaugh argued, among other reasons, that because the Department of State submitted a letter explaining that the case could adversely affect U.S. foreign relations and joint terrorism efforts, the suit should be dismissed.[1172]

*Klayman v. Obama* serves as another example that Judge Kavanaugh may be deferential to national security concerns when evaluating challenges to government action.[1173] In an opinion concurring in the denial of rehearing en banc, Judge Kavanaugh wrote that the intelligence community's "bulk collection of telephony metadata serves a critically important special need—preventing terrorist attacks on the United States."[1174] In Judge Kavanaugh's view, this national security need outweighed competing privacy concerns.[1175] And, in a passage echoing his deference toward the political branches, the nominee concluded that those with concerns about the metadata program should focus their efforts on Congress and the Executive.[1176]

But Judge Kavanaugh also has expressed the view that federal courts should play a role in some national security-related cases, particularly when the Executive purports to possess the power to deviate from a statutory or express constitutional restriction. "[P]residents must and do follow the statutes regulating the war effort[,]" Judge Kavanaugh wrote in 2016 article in the *Marquette Lawyer*.[1177] And, the nominee noted in the same article, that "in cases where someone has standing—a detainee, a torture victim, [or] someone who has been surveilled—the courts will be involved in policing the executive's use of wartime authority."[1178] Although federal courts should not create new rules to regulate the Executive's war powers, Judge Kavanaugh similarly wrote in a 2014 law review article, courts also should not "relax the constitutional principles or statutes that regulate the executive," even during the high stakes of military conflict.[1179] For example, in a 2016 speech following the death of Justice Scalia, Judge Kavanaugh expressed support for Justice Scalia's dissenting opinion in *Hamdi v. Rumsfeld*,[1180] which argued that courts should strictly enforce the Suspension Clause[1181] in cases challenging military detention of American citizens.[1182]

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[1171] 28 U.S.C. § 1350. For background on the Alien Tort Statute, see CRS Report R44947, *The Alien Tort Statute (ATS): A Primer*, by Stephen P. Mulligan.

[1172] *See* Doe v. Exxon Mobil Corp, 473 F.3d 345, 363 (D.C. Cir. 2007) (Kavanaugh, J., dissenting) ("When presented with a suit alleging wrongdoing committed in a foreign country, and particularly a suit implicating the actions of foreign government officials, federal courts should dismiss the complaint on justiciability grounds if the Executive Branch has reasonably explained that the suit would harm U.S. foreign policy interests.").

[1173] 805 F.3d 1148, 1148–49 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

[1174] *Id.* at 1149.

[1175] *Id.*

[1176] *Id.* ("To be sure, sincere and passionate concerns have been raised about the Government's program. Those policy arguments may be addressed by Congress and the Executive. Those institutions possess authority to scale back or put more checks on this program . . . .").

[1177] Kavanaugh, *One Government*, *supra* note 123, at 11.

[1178] *Id.*

[1179] Kavanaugh, *Administrative State*, *supra* note 22, at 725–26; *see also* Meshal v. Higgenbotham, 804 F.3d 417, 431 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("In justiciable cases, courts should not hesitate to enforce constitutional and statutory constraints on wartime activity.").

[1180] Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

[1181] U.S. CONST., art. I, § 1, cl. 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[1182] *See* Kavanaugh, *Justice Scalia*, *supra* note 92, at 14:40.

The case of *El-Shifa Pharmaceutical Industries Co. v. United States* may illustrate how Judge Kavanaugh's views expressed outside the courtroom concerning the role of the judicial branch in national security cases apply in practice.[1183] In *El-Shifa*, Judge Kavanaugh disagreed with the en banc D.C. Circuit's reliance on the political question doctrine as a basis to dismiss claims against the United States arising from the 1998 U.S. bombing of a Sudanese pharmaceutical factory believed to be associated with Al-Qaeda.[1184] While Judge Kavanaugh concluded that the case should be dismissed for failure to state an actionable claim, he argued that the court's reliance on the political question doctrine amounted to de facto approval of the Executive's assertion of military authority in a case in which it was the court's responsibility to address the substance of the claims.[1185] Presaging the Supreme Court's later ruling in *Zivotofsky v. Clinton*,[1186] Judge Kavanaugh reasoned that the political question doctrine does not require federal courts to decline to resolve a case "simply because the dispute involves or would affect national security or foreign relations."[1187] Accordingly, as a jurisdictional matter, Judge Kavanaugh appears skeptical of the view that courts do not have a role in cases solely based on the fact that the dispute raises national security concerns.

One of Judge Kavanaugh's most comprehensive bodies of national security-related jurisprudence, and one that may provide contrast between him and the jurist he may succeed, concerns the detention of enemy belligerents. Whereas Justice Kennedy was instrumental in the Supreme Court's ruling that the constitutional writ of habeas extended to foreign nationals held at Guantanamo Bay,[1188] Judge Kavanaugh ruled against detainees in a number of cases concerning the evidentiary rules that apply when adjudicating such habeas cases.[1189] Judge Kavanaugh frequently authored or joined panel opinions that concluded the government had presented

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[1183] *See* 607 F.3d 836, 852 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment).

[1184] *See id.*

[1185] *See id.* at 855 (describing a statutory challenge to the President's military action as a "weighty question—and one that must be confronted directly . . . not resolved *sub silentio* in favor of the Executive through use of the political question doctrine"); *id.* at 857 ("Applying the political question doctrine . . . would systematically favor the Executive Branch over the Legislative Branch—without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues.").

[1186] Zivotofsky v. Clinton, 566 U.S. 189, 191 (2012) (concluding that federal courts are "fully capable" of determining whether a statute authorizing Americans born in Jerusalem to elect to have "Jerusalem, Israel" listed as the place of birth on their passport could be given effect, despite the executive branch's objections to the statute and the foreign policy implications of the decision).

[1187] *El-Shifa Pharm.*, 607 F.3d at 856 n.3.

[1188] *See* Boumediene v. Bush, 553 U.S. 723, 796–97 (2008) (Kennedy, J.).

[1189] *See* Ali v. Obama, 736 F.3d 542, 551 (D.C. Cir. 2013) (affirming denial of petition for writ of habeas corpus because the government demonstrated by a preponderance of the evidence that the detainee was a member of a force associated with Al-Qaeda and the government's alleged failure to disclose certain evidence was harmless), *cert. denied*, 135 S. Ct. 118 (2014); Almerfedi v. Obama, 654 F.3d 1, 4–8 (D.C. Cir. 2011) (Rogers, J.) (Kavanaugh, J., joining opinion reversing district court's grant of a petition for a writ of habeas corpus based on, among other factors, the failure to address adequately the detainee's "false exculpatory statements"), *cert. denied*, 567 U.S. 905 (2012); al-Madhwani v. Obama, 642 F.3d 1071, 1073–78 (D.C. Cir. 2011) (Henderson, J.) (Kavanaugh, J., joining opinion upholding district court denial of a habeas petition because there was sufficient evidence the detainee was part of Al-Qaeda without considering the evidence that allegedly had been tainted by undue coercion), *cert. denied*, 567 U.S. 907 (2012); Uthman v. Obama, 637 F.3d 400, 402–08 (D.C. Cir. 2011) (reversing district grant of habeas corpus because sufficient evidence was presented that the detainee was part of Al-Qaeda even if the detainee was not part of the terrorist organization's "command structure"), *cert. denied*, 567 U.S. 905 (2012); Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010) (Randolph, J.) (Kavanaugh, J., joining opinion concluding that a "conditional probability analysis" is an appropriate method for assessing evidence of whether a person was part of Al-Qaeda and therefore subject to detention, and holding that the challenged detention was justified based on such an analysis), *cert. denied*, 562 U.S. 1194 (2011).

sufficient evidence that a Guantanamo detainee was "part of" Al-Qaeda and its associated forces, and therefore subject to military detention.[1190] In *Ali v. Obama*, for example, Judge Kavanaugh's opinion for the court explained that the standard of proof to uphold military detention may be less rigorous than the standard in criminal prosecutions because—even in "a long war with no end in sight"—military detention "comes to an end with the end of hostilities."[1191]

One issue in which Justice Kennedy and Judge Kavanaugh appear likely to diverge is the extent that international law may inform judicial decisionmaking. In 2004, Justice Kennedy joined a four-Justice plurality concluding that "longstanding law-of-war principles" that arise under international law informed the interpretation of the phrase "necessary and appropriate force" in the 2001 Authorization for the Use of Military Force[1192] (2001 AUMF).[1193] And in a concurring opinion in *Hamdan v. Rumsfeld*, Justice Kennedy wrote that, under the Uniform Code of Military Justice,[1194] Common Article 3 of the 1949 Geneva Conventions[1195] was "applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission."[1196] Justice Kennedy also occasionally considered international law in his opinions outside the national security context.[1197]

Judge Kavanaugh, by contrast, at times has been critical of arguments that international legal principles should influence judicial analysis in the absence of a clear statutory reference. In a 2010 concurring opinion in *Al-Bihani v. Obama*, Judge Kavanaugh expressed the view that the 2001 AUMF did not incorporate judicially enforceable international law limits on the President's wartime authority.[1198] "Many international-law norms are vague, contested or still evolving[,]"

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[1190] *See supra* note 1189 (citing cases in which Judge Kavanaugh participated wherein the D.C. Circuit concluded that detainees at Guantanamo Bay were not entitled to a writ of habeas corpus).

[1191] 736 F.3d 542, 552 (D.C. Cir. 2013), *cert. denied*, 135 S. Ct. 118 (2014). In an opinion concurring in the judgment in *Ali*, Judge Harry Edwards expressed concerns that the D.C. Circuit's law in Guantanamo habeas cases generally, involving a number of different judicial panels, had become so favorable to the government that detainees' habeas corpus rights had become "functionally useless." *Id.* at 553–54 (Edwards, J., concurring in the judgment).

[1192] Authorization for Use of Military Force, Pub. L. No. 104-40, 115 Stat. 224 [hereinafter *2001 AUMF*].

[1193] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion). *See also id.* at 520 (citing, among other sources, four multilateral treaties related to the international law of armed conflict for the proposition that it "is a clearly established principle of the law of war that detention may last no longer than active hostilities").

[1194] 10 U.S.C. § 821 (stating that the Uniform Code of Military Justice does not deprive "military tribunals of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions").

[1195] Common Article 3 of the 1949 Geneva Conventions states, in relevant part, that the "passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized people" is prohibited. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *First Geneva Convention*]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *Second Geneva Convention*]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Third Geneva Convention*]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

[1196] 548 U.S. 557, 641 (2006) (Kennedy, J., concurring in part).

[1197] *See, e.g.* Roper v. Simmons, 543 U.S. 551, 575 (2005) ("[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"); Lawrence v. Texas, 539 U.S. 558, 576 (2003) (citing, among other things, decisions from the European Court of Human Rights, in support of a ruling that a Texas anti-sodomy law was unconstitutional).

[1198] Al-Bihani v. Obama, 619 F.3d 1, 9–12 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc). Judge Kavanaugh sought to reconcile his interpretation of the 2001 AUMF in *Al-Bihani* with the Supreme Court's plurality opinion in *Hamdi* by interpreting the *Hamdi* plurality's references to international law "more narrowly as a

Judge Kavanaugh wrote in *Al-Bihani*.[1199] While federal courts historically have construed federal statutes to avoid conflicts with international law,[1200] Judge Kavanaugh argued that constitutional principles and 20th century judicial developments make such a rule of construction inappropriate in some cases.[1201] Judge Kavanaugh expressed similar views in his 2016 concurring opinion in *al Bahlul* where he stated that federal courts are not "roving enforcers of international law[,]" and they are not permitted to "smuggle international law into the U.S. Constitution and then wield it as a club against Congress and the President in wartime."[1202]

At the same time, Judge Kavanaugh has not been exclusively critical of international law. In his 2016 *al Bahlul* opinion, he described international law as "important" and stated that "the political branches have good reason to adhere" to it.[1203] Moreover, when governing statutes or regulations expressly incorporated international law into U.S. domestic law, Judge Kavanaugh interpreted and enforced international legal principles.[1204] For example, Judge Kavanaugh joined an opinion concluding that an applicable U.S. Army Regulation incorporated international legal protections afforded to medical personnel on the battlefield[1205]—although the court ultimately concluded that those protections did not apply under the facts of the case.[1206] And in a 2012 decision, Judge Kavanaugh analyzed whether international law recognized certain criminal offenses for which a defendant was convicted in a military commission because, in that case, Congress "*explicitly* incorporated international norms into domestic U.S. law."[1207]

Finally, in several academic publications, Judge Kavanaugh explored what he believes to be one of the most important questions in American constitutional law: whether the president has the power to take the United States into war overseas without congressional authorization.[1208] Judge

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direct response to [the] . . . argument that the AUMF did not authorize detention." *Al-Bihani*, 618 F.3d at 43. The nominee argued that, under *Hamdi*, international law could inform judicial interpretation of the 2001 AUMF insofar as international law authorized the Executive to take certain detention action, but international law could not place conclusive limits on the President's war powers. *See Al-Bihani*, 618 F.3d at 43.

[1199] *Al-Bihani*, 618 F.3d at 40.

[1200] Under the canon of construction known as the *Charming Betsy* canon, when two reasonable interpretations of an ambiguous statute are possible, courts should not construe a statute so as to violate international law. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

[1201] *Al-Bihani*, 618 F.3d at 40–41.

[1202] al Bahlul v. United States, 840 F.3d 757, 772–73 (D.C. Cir. 2016) (Kavanaugh, J., concurring), *cert. denied*, 138 S. Ct. 313 (2017).

[1203] *Id.* at 772.

[1204] *See infra* notes 1205–07 and accompanying text.

[1205] *See First Geneva Convention*, *supra* note 1195, art. 24 (providing that certain designated medical personnel "who fall into the hands of the adverse Party, shall be retained only insofar as the state of health, the spiritual needs and the number of prisoners of war require").

[1206] Al Warafi v. Obama, 16 F.3d 627, 629–32 (D.C. Cir. 2013) (Kavanaugh, J., joining opinion affirming denial of petition for writ of habeas corpus and concluding that detainee was not entitled to legal protection afforded to medical personnel under the First Geneva Convention), *cert. denied*, 134 S. Ct. 2134 (2014).

[1207] Hamdan v. United States (*Hamdan II*), 696 F.3d 1238, 1249 n.8 (D.C. Cir. 2012), *overruled on other grounds by* al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014). Although the D.C. Circuit sitting en banc overruled a statutory interpretation in Judge Kavanaugh's *Hamdan II* opinion, it did not disturb his conclusions regarding international law. *See al Bahlul*, 767 F.3d at 11.

[1208] *See* Brett M. Kavanaugh, *Congress and the President in Wartime*, LAWFARE (Nov. 28, 2017), https://www.lawfareblog.com/congress-and-president-wartime [hereinafter Kavanaugh, *Congress and President*] ("Perhaps the single most important question in American constitutional law is whether the president has authority to take the nation into a foreign war without congressional approval—that is, without either a congressional authorization for the use of force or a congressional declaration of war."); Kavanaugh, *Separation of Powers*, *supra* note 22, at 1475 ("The most significant issue is whether the President can order U.S. troops to initiate large-scale offensive hostilities in

Kavanaugh described the Constitution's war-making power as shared between the legislative and executive branches.[1209] In the realm of congressional power, according to Judge Kavanaugh, the legislative branch has broad authority to control whether the United States wages war[1210] and to regulate some aspects of how the Executive conducts military operations, such as surveillance, detention, interrogation, and military commissions.[1211] In the field of executive power, Judge Kavanaugh noted that Article II makes the President Commander in Chief of the Armed Forces.[1212] But, according to the nominee, it is difficult to determine the extent to which the President's war powers are "exclusive and preclusive"—meaning they cannot be regulated by Congress.[1213] Other than the power to command troops on the battlefield during a congressionally authorized war, Judge Kavanaugh has stated that the scope of the President's preclusive war powers are unsettled[1214]—although he did suggest in dicta that a statute regulating the President's "short-term bombing of foreign targets in the Nation's self-defense" may not survive constitutional scrutiny.[1215] Ultimately, Judge Kavanaugh appears to believe that constitutional questions concerning war and national security will continue to be the subject of "heated debate," and that all three branches of government will play a role in resolving them.[1216]

a foreign country without congressional approval."); Kavanaugh, *One Government*, *supra* note 123, at 11–12 ("[O]ne issue that looms particularly large is the question whether the president can order U.S. troops to wage war in a foreign country without congressional approval.").

[1209] *See* Kavanaugh, *Separation of Powers*, *supra* note 22, at 1479; Kavanaugh, *One Government*, *supra* note 123, at 10–11.

[1210] *See* Kavanaugh, *Separation of Powers*, *supra* note 22, at 1478–79 ("No one denies . . . that Congress can stop a President from waging war by, a minimum refusing to fund the war . . . ."); *id.* at 1479 (discussing congressional war powers under Article I, Section 8 of the Constitution).

[1211] Kavanaugh, *One Government*, *supra* note 123, at 11 (discussing statutes that regulate the President's exercise of war, including the Non-Detention Act, the Foreign Intelligence Surveillance Act, the War Crimes Act, and the Anti-Torture Act); Kavanaugh, *Congress and President*, *supra* note 1208 (analyzing the "forceful originalist and historical-practice case that presidents must and do comply with congressional regulation of wartime activities such as surveillance, detention, interrogation, and the use of military commissions").

[1212] *See* U.S. CONST., art. II, § 2, cl. 1; Kavanaugh, *Congress and President*, *supra* note 1208 ("The text of Article II makes the president the commander in chief, thereby ensuring civilian control of the military, among other things. But Article II does not afford the president, at least expressly, any other unilateral war powers.").

[1213] *See* Kavanaugh, *Separation of Powers*, *supra* note 22, at 1479 (describing the scope of the President's "preclusive and exclusive commander-in-chief authority" as "highly controversial with Congress and the public"); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 858 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment) ("In the national security realm, although the topic is of course hotly debated, most acknowledge at least some areas of exclusive, preclusive Presidential power—where Congress cannot regulate and the Executive 'wins' . . . .").

[1214] *See* Kavanaugh, *Separation of Powers*, *supra* note 22, at 1480; *El-Shifa*, 607 F.3d at 858–59.

[1215] *El-Shifa*, 607 F.3d at 859 ("A statute regulating or creating a cause of action to challenge the President's short-term bombing of foreign targets in the Nation's self-defense . . . might well unconstitutionally encroach on the President's exclusive, preclusive Article II authority as Commander in Chief.").

[1216] Kavanaugh, *One Government*, *supra* note 123, at 11–12 ("[O]n war powers issues, . . . there will always be heated debate, as there should be—and is today. But the basic framework in which the president, Congress, and the courts all play defined roles on national security has stood the test and reasonably adapted well . . . .").

# Second Amendment[1217]

The Roberts Court has been closely divided when interpreting the Second Amendment, and Justice Kennedy's replacement will likely play an important role going forward in shaping the jurisprudence governing the scope of the Second Amendment's right to keep and bear arms.[1218] Justice Kennedy provided key deciding votes in the two landmark Second Amendment rulings of the Roberts Court. First, in 2008, he joined the five-Justice majority in *District of Columbia v. Heller* (*Heller I*), which held for the first time that the Second Amendment protects an individual's right to possess a firearm.[1219] Then in 2010, he joined another 5-4 majority in *McDonald v. City of Chicago*, which held that the Second Amendment is applicable to the states via the Fourteenth Amendment.[1220] Neither *Heller I* nor *McDonald* purported to define the full scope of the right protected by the Second Amendment, although the Court cautioned that "the right secured by the Second Amendment is not unlimited."[1221] And the Court has issued virtually no opinions meaningfully interpreting the Second Amendment since *McDonald*.[1222] Accordingly, in the wake of *Heller I*, the various federal circuit courts have examined the contours of the Second Amendment with little guidance from the High Court, requiring the lower courts to identify the appropriate standard of review for federal and state firearm restrictions. And Judge Kavanaugh undertook this task a year after *McDonald* was decided in *Heller II*, in which he authored a notable dissent construing and applying *Heller I* differently from the prevailing method that other federal district and circuit courts use.[1223]

*Heller II* assessed whether the District of Columbia's Firearms Registration Amendment Act (FRA) comported with the Second Amendment.[1224] In particular, *Heller II* evaluated three of the FRA's provisions: (1) its firearm registration requirement; (2) its prohibition on the possession of certain semi-automatic rifles that fell within the FRA's definition of "assault weapons";[1225] and (3) its prohibition on the possession of large-capacity magazines with a capacity for more than ten rounds of ammunition.[1226] In a 2-1 ruling over Judge Kavanaugh's dissent, the D.C. Circuit largely upheld the challenged FRA provisions.[1227] The majority began by applying the two-step framework that has been employed by nearly all federal circuit courts that have considered Second Amendment challenges post-*Heller I*,[1228] first asking whether the provisions implicate a

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[1217] CRS Legislative Attorney Sarah Herman Peck authored this section of the report.

[1218] *See CRS Kennedy Report*, *supra* note 17, at 25–26.

[1219] District of Columbia v. Heller (*Heller I*), 554 U.S. 570 (2008).

[1220] 561 U.S. 742, 791 (2010) (plurality opinion) (holding that the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment); *see id*. at 855 (Thomas, J., concurring) (concluding that the Second Amendment is incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment).

[1221] *See Heller I*, 554 U.S. at 626.

[1222] *Cf.* Caetano v. Massachusetts, 136 S. Ct. 1027 (2016).

[1223] Heller v. District of Columbia (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011).

[1224] *Id.*

[1225] The FRA bans "assault weapons," which is a term defined to cover specified models and types of firearms and also, more generally, semi-automatic firearms with certain features, such as a pistol grip or a thumbhole stock. *Id.* at 1249 (citing D.C. CODE § 7-2501.01(3A)(A)). The plaintiffs had standing to pursue a challenge only to the FRA's prohibition on the possession of certain semi-automatic rifles. *Id.* at 1260.

[1226] *Id.* at 1247.

[1227] *Id.* at 1247–48. The court remanded to the district court the question whether certain registration requirements were constitutional under the Second Amendment because the record was not sufficiently developed. *Id.* at 1248.

[1228] *See, e.g.*, Powell v. Thompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (collecting cases). The D.C. Circuit was not the first federal circuit court to adopt this method. *See Heller II*, 670 F.3d at 1252 (citing cases from the Third, Fourth,

right protected by the Second Amendment, and, if so, second, analyzing the provisions under the appropriate level of judicial scrutiny (e.g., rational basis review, intermediate scrutiny, or strict scrutiny).[1229] Ultimately, the D.C. Circuit generally upheld the challenged requirements. While remanding the case to review several specific registration requirements, the court concluded that the general requirement that a gun be registered with the government fell within the category of "longstanding prohibitions" on the possession and use of firearms that the Supreme Court considered to be "presumptively lawful regulatory measures" that do not garner Second Amendment protection.[1230] Further, the court concluded that the ban on semi-automatic rifles and large-capacity magazines withstood intermediate scrutiny and, thus, were lawful because the government had shown a reasonable fit between the prohibitions and its interests in protecting police officers and controlling crime.[1231]

In his dissent, Judge Kavanaugh wrote at length about the meaning and import of the High Court's decision in *Heller I*, opining that:

> *Heller*, while enormously significant jurisprudentially, was not revolutionary in terms of its immediate real-world effects on American gun regulation. Indeed, *Heller* largely preserved the status quo of gun regulation in the United States. *Heller* established that traditional and common gun laws in the United States remain constitutionally permissible. The Supreme Court simply pushed back against an outlier local law—D.C's handgun ban—that went far beyond the traditional line of gun regulation.[1232]

And, in Judge Kavanaugh's view, the FRA—like the District of Columbia's handgun ban that came before it—is an "outlier" and thus unconstitutional under *Heller I*.[1233] He reasoned that the FRA provisions are outliers because they are not common or traditional firearm laws: "As with D.C.'s handgun ban [struck down in *Heller I*], . . . holding these D.C. laws unconstitutional would not lead to nationwide tumult. Rather, such a holding would maintain the balance historically and traditionally struck in the United States between public safety and the individual right to keep arms . . . ."[1234]

Notably, unlike the *Heller II* majority and several other federal circuit courts, Judge Kavanaugh proposed, in line with his general skepticism of balancing tests,[1235] that firearm laws should be evaluated not according to a particular level of scrutiny but, rather, "based on the Second Amendment's text, history, and tradition (as well as by appropriate analogues thereto when dealing with modern weapons and new circumstances)."[1236] While the nominee acknowledged

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Seventh, and Tenth Circuits).

[1229] *Heller II*, 670 F.3d at 1252.

[1230] *Id.* at 1252–53 (quoting District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 626–27 & n.26 (2008)). The D.C. Circuit remanded for further review several specific registration requirements that the court concluded were not long-standing. *See id.* at 1255–60. Some of the remanded provisions required, for example, knowledge of the firearms laws in the District of Columbia, attending a firearms training or safety course, and having vision that would qualify to obtain a driver's license. *See id.* at 1249.

[1231] *See id.* at 1262–64.

[1232] *See id.* at 1270 (Kavanaugh, J., dissenting).

[1233] *See id.* at 1271.

[1234] *See id.*

[1235] *See* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[1236] *See Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) (citation omitted). In more recent speeches, Judge Kavanaugh continues to maintain that firearms laws should be evaluated using a text, history, and tradition test. *See* Kavanaugh, *Two Challenges*, *supra* note 14, at 1918 ("I view *Heller* as having already told us that the content of exceptions to the Second Amendment right is not to be assessed based on strict scrutiny or intermediate scrutiny.

that *Heller I* did not direct lower courts as to the appropriate analytical framework for analyzing Second Amendment claims,[1237] he concluded that "look[ing] to text, history, and tradition to define the scope of the right and assess gun bans and regulations" is the "clear message" from *Heller I* because the Supreme Court had gauged firearms laws according to "historical tradition," including whether a measure is "longstanding" or regulates weapons that "citizens typically possess" and that are "in common use."[1238] Further, he contended that the *Heller I* majority rejected "judicial interest balancing," which, in his view, includes strict or intermediate scrutiny, to assess whether a government restriction on firearms is permissible.[1239]

Applying this analysis in his *Heller II* dissent, Judge Kavanaugh would have invalidated two of the three challenged FRA provisions. With respect to the FRA's gun registration law, the nominee maintained that the "fundamental problem" with the law was that—in contrast to gun licensing and recordkeeping laws—gun registration requirements were "not 'longstanding,'" in that registration of lawfully possessed guns "has not been traditionally required in the United States and, indeed, remains highly unusual today."[1240] In arguing for striking down the District of Columbia's ban on semi-automatic rifles that fell within the FRA's definition of "assault weapons," the nominee maintained that semi-automatic rifles are "traditionally and widely accepted as lawful possessions."[1241] And with respect to the FRA's prohibition on the possession of large-capacity magazines, the nominee would have remanded the case to the lower court to determine whether large-capacity magazines have traditionally been banned and are not in common use.[1242]

As the nominee's writings on the Second Amendment reveal, adding Judge Kavanaugh to the Supreme Court's bench could shape the way that Second Amendment claims are evaluated, which, in turn, could potentially affect the legality of firearm legislation at the federal, state, and local levels. For instance, were the Supreme Court to adopt Judge Kavanaugh's history and tradition test for evaluating the scope of the Second Amendment—an approach that differs from the prevailing two-step approach adopted by nearly all federal circuit courts[1243]—it is possible that renewed challenges will be raised to some firearms laws that were upheld under the previous two-step approach.[1244] That said, it is still possible that a court would reach the same result

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Rather, the exceptions are to be assessed by reference to history and tradition.").

[1237] *See Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting). However, the *Heller I* Court appeared to reject rational-basis review. *See* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 628 n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

[1238] *Heller II*, 670 F.3d at 1271–72 (Kavanaugh, J., dissenting) (quoting *Heller I*, 554 U.S. at 627–27) (internal quotation marks omitted).

[1239] *See id*. at 1280–82. The *Heller II* majority argued that *Heller I* rejected only dissenting Justice Breyer's suggested "interest-balancing" approach and not all balancing tests. *See id*. at 1264 ("Appendix: Regarding the Dissent").

[1240] *Id.* at 1291 (Kavanaugh, J., dissenting).

[1241] *Id.* at 1288; *see also id.* at 1285 (concluding that "a ban on a class of arms," such as semi-automatic rifles, "that have not traditionally been banned and are in common use" is in direct conflict with *Heller I*'s core holding). In so concluding, Judge Kavanaugh, while acknowledging the public safety rationale for gun regulations, maintained that this rationale could not justify the FRA's ban on most semi-automatic rifles because "semi-automatic handguns are more dangerous as a class than semi-automatic rifles." *Id.* at 1286, 1290 (noting that unlike semi-automatic rifles, semi-automatic handguns can be concealed and "are used far more often than any other kind of gun in violent crimes.").

[1242] *Id.* at 1296 n.20.

[1243] *See, e.g.*, CRS Report R44618, *Post-Heller Second Amendment Jurisprudence*, by Sarah Herman Peck.

[1244] "Assault weapon" bans similar to the FRA have been upheld in other circuits, and the Supreme Court has declined to review those cases. *See* Kolbe v. Hogan, 138 S. Ct. 469 (2017) (denying petition for certiorari to review en banc Fourth Circuit opinion concluding that certain "assault weapons" are outside the scope of the Second Amendment);

regarding a firearm law's permissibility under Judge Kavanaugh's suggested methodology as under the earlier approach. Moreover, as the nominee noted in *Heller II*, government bodies may have *more* flexibility under his proposed method of analysis than under the strict scrutiny test used at times by some circuit courts[1245] because "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller [I]*."[1246]

Judge Kavanaugh's disagreement with how the lower courts have generally interpreted the Second Amendment has prompted some commentators to argue that the nominee would necessarily vote in favor of granting a petition for certiorari in a case involving the Second Amendment.[1247] While the decision to grant certiorari generally does not hinge on a Justice's mere agreement or disagreement with a lower court's opinion,[1248] it is certainly possible that a new Justice could result in changes to the Court's docket, including with respect to Second Amendment cases.[1249] Since *Heller I*, the Supreme Court has reviewed two Second Amendment challenges: first, two years after *Heller I* in *McDonald v. City of Chicago*,[1250] and then six years after that in *Caetano v. Massachusetts*.[1251]

In *Caetano*, the Court, without ordering merits briefing or oral argument, issued a short per curiam opinion vacating the decision of the Massachusetts Supreme Court that had upheld a state law prohibiting the possession of stun guns.[1252] However, the two-page *Caetano* opinion principally opined that the state court opinion directly conflicted with *Heller I*, without engaging in a comprehensive analysis and offering little clarification on the Court's Second Amendment jurisprudence.[1253] Since *Caetano*, the Supreme Court has not granted a petition for certiorari in any Second Amendment matter. During this period, though, Justices Thomas and Gorsuch have

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Friedman v. City of Highland Park, 136 S. Ct. 447 (2015) (denying petition for certiorari to review Seventh Circuit decision that upheld city ordinance prohibiting certain semi-automatic firearms).

[1245] *See, e.g.*, United States v. Chovan, 735 F.3d 1127, 1136–42 (9th Cir. 2013); United States v. Marzzarella, 614 F.3d 85, 99–100 (3d Cir. 2010).

[1246] *Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting).

[1247] *See, e.g.*, Avery Gardiner, *The Second Amendment and Judge Kavanaugh*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (July 19, 2018), http://www.bradycampaign.org/blog/the-second-amendment-and-judge-kavanaugh ("So [Judge Kavanaugh's] presence on the Court means it's quite likely the court will start granting cert on gun cases."); Tyler Yzaguirre, *Gun Advocates Need to Tread Carefully, Despite* Young v. Hawaii *Victory*, WASH. EXAMINER (Aug. 1, 2018), https://www.washingtonexaminer.com/opinion/gun-advocates-need-to-tread-carefully-despite-young-v-hawaii-victory (contending that a major Second Amendment case is more likely to be heard at the Court if Judge Kavanaugh is confirmed); *see generally* Hugh Hewitt, *Brett Kavanaugh and the "Rule of Four,"* WASH. POST (July 11, 2018), https://www.washingtonpost.com/opinions/the-pressure-on-john-roberts-has-been-lifted/2018/07/11/fac07ea0-8529-11e8-8553-a3ce89036c78_story.html (arguing that Judge Kavanaugh's confirmation to the High Court will result in the Court granting certiorari in more cases).

[1248] *See* SUP. CT. R. 10 (describing the various considerations when reviewing a petition for certiorari, including whether the lower court's decision conflicts with another court's decision or whether the case raises an "important question of federal law" that should be settled by the Supreme Court); *see also* Martin v. Blessing, 571 U.S. 1040, 1045 (2013) (Alito, J., statement respecting denial of the petition for writ of certiorari) (noting that the Supreme Court is "not a court of error correction").

[1249] THOMAS H. HAMMOND, CHRISTOPHER W. BONNEAU & REGINALD S. SHEEHAN, STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT 251 (2005) (noting that the addition of a new Justice may alter the cases in which the Court grants certiorari).

[1250] McDonald v. City of Chicago, 561 U.S. 742 (2012).

[1251] Caetano v. Massachusetts, 136 S. Ct. 1027 (2016).

[1252] *Id.*

[1253] *Id.* at 1027–28.

dissented from the denial of certiorari in cases raising Second Amendment claims.[1254] Because only four Justices are needed for the Court to grant certiorari, and with a number of potentially important Second Amendment cases percolating in the lower courts,[1255] Judge Kavanaugh, if confirmed, could play an important role in deciding whether the Supreme Court adds another Second Amendment case to its docket.

[1254] *See* Silvester v. Becerra, 138 S. Ct. 945 (2018) (Thomas, J., dissenting); Peruta v. California, 137 S. Ct. 1995 (2017) (Thomas, J. dissenting, joined by Gorsuch, J.).

[1255] Recently, for example, the Ninth Circuit invalidated a Hawaii statute limiting the open carry of firearms after concluding that the Second Amendment encompasses a right to carry a firearm openly in public for self-defense. Young v. Hawaii, 896 F.3d 1044, 1074 (9th Cir. 2018). A few days before that, the Fifth Circuit upheld federal laws prohibiting federally licensed firearms dealers (FFL) from selling a firearm directly to a person who does not reside in the state in which the FFL is located. Mance v. Sessions, 896 F.3d 699, 701 (5th Cir. 2018) (per curiam). Additionally, on appeal to the Third Circuit is a repeat challenge to New Jersey's restrictions on publicly carrying handguns. *See* Notice of Appeal, Rogers v. Grewal, No. 18-cv-01544 (D. N.J. June 18, 2018). In *Drake v. Filko*, the Third Circuit already upheld a New Jersey requirement for an applicant to demonstrate "justifiable need" to carry a handgun in public to receive a concealed handgun permit. 724 F.3d 426, 440 (3d Cir. 2013). This issue is perhaps more likely to receive a grant of certiorari because there is a split among the circuits as to how to evaluate restrictions on carrying concealed firearms. *Compare* Peruta v. Cty. of San Diego, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (concluding the Second Amendment "does not extend to the carrying of concealed firearms in public by members of the general public"), *cert. denied sub nom.* Peruta v. California, 137 S. Ct. 1995 (2017), *with* Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (striking down the District of Columbia's concealed carry regime after concluding that the right to carry a concealed firearm is a core Second Amendment right), *and* Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012) (assuming that the Second Amendment protects a right to carry a concealed firearm and, after applying intermediate scrutiny, upholding New York's "good cause" requirement for obtaining a concealed carry permit).

# Separation of Powers[1256]

Separation of powers—that is, the law governing the allocation of power among the three branches of the federal government—is perhaps the most critical area of law in understanding Judge Kavanaugh's jurisprudence. Indeed, the nominee views the doctrine of separation of powers as fundamental to every aspect of adjudication, having noted that, from his perspective, "every case is a separation of powers case."[1257] Separation of powers was also an important issue for the Justice whom Judge Kavanaugh may succeed, Justice Kennedy. Like most of his fellow Justices, Justice Kennedy viewed the separation of powers as a fundamental aspect of the American constitutional system.[1258] Nonetheless, Justice Kennedy did not adopt one particular approach in separation-of-powers cases. As he was on so many other issues, Justice Kennedy was seen as a centrist of separation of powers, embracing in different cases both functional and formal analyses when providing the deciding vote in the Court's most recent decisions on the Constitution's allocation of powers among the federal branches.[1259]

Like Justice Kennedy, Judge Kavanaugh views the separation of powers as "not simply [a] matter[] of etiquette or architecture," but as an essential and foundational aspect of the American constitutional system that serves primarily to protect the public from governmental abuse.[1260] His general approach is arguably formalist, placing significant emphasis on the text and history of those provisions of the Constitution that establish the "blueprint" for the fundamental design of the federal government and readily implementing the boundaries that he interprets to flow from those provisions.[1261] As such, Judge Kavanaugh stresses both the importance of the separation of powers itself and the necessity of the judiciary's role in enforcing the Framers' clear structural choices.[1262]

Perhaps because of the significance he attaches to the doctrine, for Judge Kavanaugh, the separation of powers is the lens through which he approaches a wide variety of controversies, including cases relating to standing,[1263] administrative law,[1264] appropriations law,[1265] national

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[1256] CRS Legislative Attorney Todd Garvey authored this section of the report.

[1257] Kavanaugh, *Role of the Judiciary*, *supra* note 24, at 4.

[1258] *See*, *e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 536 (2009) (Kennedy, J., concurring); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

[1259] *See CRS Kennedy Report*, supra note 17, at 26–27. For a description of the difference between formalism and functionalism in the separation of powers, see William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21–22 (1998).

[1260] Sissel v. HHS, 799 F.3d 1035, 1052 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[1261] *Id.* at 1050, 1052 (noting the judiciary's "critical role in preserving the structural compromises and choices embedded in the constitutional text"); Free Enter. Fund v. PCAOB, 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[I]t is always important in a case of this sort to begin with the constitutional text and the original understanding . . . .").

[1262] *Sissel*, 799 F.3d at 1064. In addition to judicial enforcement, structural requirements can be enforced by other branches through their own allotted powers. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) (noting that the Framers "rested the structure of our central government on the system of checks and balances").

[1263] *See* Coal. for Mercury-Free Drugs v. Sebelius, 671 F.3d 1275, 1278 (D.C. Cir. 2012) (noting standing doctrine's separation-of-powers roots).

[1264] *See* Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 453 (D.C. Cir. 2017) (describing agency authority question as involving the separation of powers).

[1265] *See* Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, (D.C. Cir. 2012) ("The Appropriations Clause is

security law,[1266] war powers, [1267] and others. Many of these aspects of Judge Kavanaugh's jurisprudence are addressed in other parts of this report and will not be discussed here.[1268] Instead, this section focuses on his general theory of the domestic separation of powers and how it shapes his views on specific topics such as the judiciary's role in checking violations of the doctrine; the President's obligation to comply with and enforce the law; legislative and executive immunity; executive privilege; requiring the President to comply with a subpoena; and the structural design of administrative agencies.

## Judge Kavanaugh's General Theory of the Separation of Powers

As opposed to Justice Kennedy, who did not necessarily adhere to a uniform approach in separation-of-powers cases, Judge Kavanaugh appears to have a distinct doctrinal approach to implementing and enforcing the Constitution's balance of power between Congress, the courts, and the President.[1269] While some commentators have described Judge Kavanaugh's general separation-of-powers theory as one that is generally predisposed to a strong Executive, especially in cases that pit the executive branch against the legislative branch,[1270] it is does not appear that a desire for a powerful Executive necessarily drives the nominee's views. To be sure, Judge Kavanaugh has acknowledged that his views of the separation of powers, and executive power specifically, have been informed by his various experiences as an executive branch lawyer.[1271] And there are certainly areas, discussed in more detail below, in which Judge Kavanaugh has written separately to articulate a position that favors executive power, at times at the expense of congressional authority.[1272] In other instances, however, Judge Kavanaugh has written separately

thus a bulwark of the Constitution's separation of powers . . . .").

[1266] *See* Meshal v. Higgenbotham, 804 F.3d 417, 426 (D.C. Cir. 2015) (Kavanaugh, J., concurring) (noting separation-of-powers concerns when there is "judicial inquiry—in the absence of congressional authorization—in a case involving both the national security and foreign policy arenas").

[1267] *See* Al-Bihani v. Obama, 619 F.3d 1, 9–12 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (discussing the separation of powers in relation to the AUMF).

[1268] *See* discussions *supra* in *Statutory Interpretation*, *Administrative Law*, *Environmental Law*, and *National Security*.

[1269] Judge Kavanaugh's approach to separation of powers, like other areas of law, is generally defined by textualism, original meaning, and historical analysis, in addition to precedent. *See* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[1270] *See, e.g*, Jen Kirby, *Seven Legal Experts on How Kavanaugh Views Executive Power—and What it Could Mean for Mueller*, VOX.COM (July 11, 2018), https://www.vox.com/policy-and-politics/2018/7/11/17551648/kavanaugh-mueller-trump-executive-power-legal; Marimow, *supra* note 174.

[1271] Kavanaugh, *One Government*, *supra* note 123, at 9 ("My job in the White House counsel's office and as staff secretary gave me, I think, a keen perspective on our system of separated powers.").

[1272] For example, his views on the Take Care Clause and the President's Article II powers appear to provide the executive branch with greater flexibility in following and enforcing federal statutes. *In re* Aiken Cty. (*Aiken County II*), 725 F.3d 255, 261–67 (D.C. Cir. 2013). Similarly, in regard to how Congress designs independent agencies, Judge Kavanaugh has issued opinions recognizing greater limits Congress's authority to create agencies with significant political and operational independence from the President. *See* PHH Corp. v. CFPB, 839 F.3d 1, 8 (D.C. Cir. 2016), *overruled in part by* 881 F.3d 75 (D.C. Cir. 2018) (en banc) (concluding that a single director independent agency is invalid); Free Enter. Fund v. PCAOB, 537 F.3d 667, 701 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010) (concluding that dual layers of for-cause removal protections violates Article II). The nominee has also explicitly announced a policy preference for a strong executive functioning free of distractions, including those that would inhere to the investigation, indictment, or prosecution of a sitting President. *See* Kavanaugh, *Separation of Powers*, *supra* note 22, at 1459–62 (2009). In addition to viewing such protections as good policy, he also appears to have suggested that there is likely a constitutional bar to prosecuting the President while in office. Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157–61 (1998) [hereinafter Kavanaugh, *The President*].

in order to express a position that would tend to favor Congress, at times at the expense of executive power.[1273]

Instead of being solely guided by a preference toward the power of a particular branch, Judge Kavanaugh's views on the separation of powers appear to be more complex and nuanced. The nominee's opinions suggest a basic mode of interpretation in separation-of-powers cases that focuses primarily on the constitutional text and its original understanding.[1274] If the text is ambiguous, as it is in most aspects of the separation of powers, Judge Kavanaugh regularly turns to historical practice to inform the meaning of the Constitution's structural provisions.[1275] Because of this "history-focused approach," Judge Kavanaugh has generally viewed laws and actions that have few or no historical analogues as suspect.[1276]

Beyond this initial interpretive framework, there appears to be a trio of conceptual principles that not only influence, but define Judge Kavanaugh's approach to the separation of powers: liberty, accountability, and governmental effectiveness. As discussed in more detail below, these three principles have consistently acted as a frame for his analyses and guided him in his ultimate conclusion in separation-of-powers cases.

*Liberty.* Judge Kavanaugh's enforcement of separation-of-powers boundaries does not appear to be grounded in preserving a specific allocation of authority among the branches.[1277] Instead, his emphasis on policing transgressions from the constitutional scheme is a product of his concern over the protection of individual rights.[1278] The Framers made specific structural choices out of fear that an accumulation of power in any single branch would pose a threat to individual

[1273] For example, his opinions on the Speech or Debate Clause's legislative immunity reflect his acceptance of a broad constitutional protection, shielding Members from executive branch investigation and prosecution. *See* Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives, 720 F.3d 939, 953–57 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); *In re* Grand Jury Proceedings, 571 F.3d 1200, 1203–08 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Similarly, in an important opinion on statutory restrictions on executive power and the political question doctrine, Judge Kavanaugh wrote separately to warn his colleagues about interpreting the political question doctrine in a way that would result in a de facto expansion of executive power at the expense of legislative power. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 855–59 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment) (claiming that expanding the political question doctrine "would not reflect benign deference to the political branches," but would rather "systematically favor the Executive Branch over the Legislative Branch—without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues"). In *El-Shifa*, Judge Kavanaugh also declared that "[t]he Executive plainly possesses a significant degree of exclusive, preclusive Article II power in both the domestic and national security arenas." *Id.* at 858.

[1274] *See Free Enter. Fund*, 537 F.3d at 687–89.

[1275] *See PHH Corp.*, 839 F.3d at 7–8 (observing that "history and tradition are critical factors in separation of powers cases where the constitutional text does not otherwise resolve the matter"); *Sissel*, 799 F.3d at 1056 (stating that "the history of Congressional practice is relevant here").

[1276] *See PHH Corp.*, 839 F.3d at 8 (describing that the CFPB's structure was a "gross departure from settled historical practice"); *Free Enter. Fund*, 537 F.3d at 686 (reasoning that the "previously unheard-of" use of dual layers of for-cause removal protections make an agency "unaccountable and divorced from Presidential control to a degree not previously countenanced in our constitutional structure."); *El-Shifa*, 607 F.3d at 855–56.

[1277] *PHH Corp.*, 839 F.3d at 33 ("[T]he Constitution's separation of powers is not solely or even primarily concerned with preserving the powers of the branches. The separation of powers is primarily designed to protect individual liberty.").

[1278] *See* Sissel v. HHS, 799 F.3d 1035, 1051 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) (declaring that there were "many finely tuned mechanisms the Framers adopted to separate power within the new national government, so as to avoid the dangers of concentrated power and thereby protect individual liberty"). Judge Kavanaugh has emphasized that the Framers' intent to protect liberty extends beyond inter-branch design to intra-branch design. *Id.* ("Many feared that a single legislative body would become too powerful, swallow up the other Branches, and threaten individual liberty.").

freedoms through governmental abuse.[1279] Accordingly, the starting and ending point of Judge Kavanaugh's view of separation-of-powers analysis is consistently focused on enforcing the structural provisions of the Constitution in order to protect individual liberty.[1280] Moreover, he has described "the liberty protected by the separation of powers" as "primarily freedom from government oppression, in particular from the effects of legislation that would unfairly prohibit or mandate certain action by individual citizens, backed by punishment."[1281] As a result of his focus on coercive action, his separation-of-powers concerns are most acute in cases involving governmental imposition and enforcement of law or regulations upon private entities.[1282]

*Accountability.* Liberty, in Judge Kavanaugh's view, goes hand in hand with accountability. "Our constitutional structure is premised," Judge Kavanaugh has written, "on the notion that . . . unaccountable power is inconsistent with individual liberty."[1283] This accountability rationale is most apparent in Judge Kavanaugh's discussion of the executive branch structure, where the Constitution ensures, in the nominee's view, that the executive power be wielded by the President, and the President alone, because he is accountable to the voters.[1284] This accountability-rationale forms the foundation for Judge Kavanaugh's conclusion that the President must be able to supervise and direct those subordinate officials who exercise executive power. As a result, the nominee has viewed laws that seek to excessively insulate a government official from presidential control as a threat to democratic accountability and inconsistent with the structural separation of powers.[1285] For instance, he concluded that a "single-Director independent agency," such as the CFPB, lies "outside" of constitutional norms in part because such an agency head "is not elected by the people and is . . . not remotely comparable to the President in terms of accountability."[1286]

*Effectiveness.* Judge Kavanaugh's view of the separation of powers does not necessarily appear to seek to preserve liberty and ensure accountability at the expense of a workable government. Instead, Judge Kavanaugh has reasoned that the Constitution's structural provisions were intended to preserve "effective" government.[1287] For example, the Founders choice of a single, unitary head of the Executive was intended, in the nominee's view, to "enhance[] efficiency and energy in the administration of the government."[1288] The legislative branch, on the other hand,

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[1279] *See* THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

[1280] Kavanaugh, *Our Anchor*, *supra* note 24, at 1913 ("The constitutional structure is tilted toward liberty.").

[1281] *Id.* at 1909.

[1282] *PHH Corp.*, 839 F.3d at 19–20 (noting that single headed independent agencies like the Social Security Administration and the Office of Special Counsel are not a precedent for the CFPB because they do not pose the same threat to individual liberty as they have no authority to enforce laws against private citizens).

[1283] Free Enter. Fund v. PCAOB, 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010); *In re* Aiken Cty. (*Aiken County I*), 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

[1284] *Aiken County I*, 645 F.3d at 439–40 (concluding that Article II vests "not some of the executive power, but all of it" with the President and observing that "[t]he President is dependent on the people for election and re-election . . . . Presidential control of those agencies thus helps maintain democratic accountability and thereby ensure the people's liberty").

[1285] *Id.* at 440 ("The Framers designed our constitutional structure with the idea that unaccountable power is inconsistent with individual liberty.").

[1286] PHH Corp. v. CFPB, 881 F.3d 75, 188 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

[1287] *Id.* at 439 ("The Constitution's Framers sought a national government that would be more effective than under the Articles of Confederation . . . .").

[1288] *Free Enter. Fund*, 537 F. 3d at 689.

was intended, according to Judge Kavanaugh, to be effective, but not necessarily efficient, as the legislative process was "designed to be difficult" in order to "protect individual liberty and guard against the whim of majority rule."[1289] For example, it is the principle of effectiveness that appears to animate Judge Kavanaugh's view that legal immunity for government officials protects effectiveness by limiting the distractions of litigation.[1290]

## Judicial Role in Maintaining the Separation of Powers

Judge Kavanaugh's opinions and academic writings appear to support a robust role for judges in enforcing the separation of powers. As noted elsewhere in this report, Judge Kavanaugh has suggested that judges should, and indeed are required as part of their judicial duty, to take an active role in interpreting statutory delegations of authority to federal agencies, rather than deferring to the agency's view.[1291] That conception of the role of the judge extends to enforcing the structural separation of powers, where the nominee has said that deferring to Congress's or the President's views of the Constitution would be to "abdicate to the political branches" a "constitutional responsibility assigned to the judiciary."[1292] Judge Kavanaugh's view of the judiciary's role in the separation of powers is reflected in his concurring opinion in *El-Shifa Pharmaceutical Industries v. United States*.[1293] The en banc majority opinion in *El-Shifa* affirmed a district court opinion holding that the political question doctrine barred a claim under the Federal Tort Claims Act by a Sudanese pharmaceutical company whose plant had been destroyed by an American missile strike.[1294] Judge Kavanaugh wrote separately to establish his position that the political question doctrine has never, and should not be, applied to avoid judicial review when the claim is for violation of a statute, rather than violation of the Constitution.[1295] In reaching that decision, Judge Kavanaugh relied on the practical effect of an extension of the political question doctrine to statutes that regulate executive conduct, noting that dismissal in such cases would amount to an implicit holding "that the statute intrudes impermissibly on the Executive's prerogatives."[1296] Such an approach, he wrote, would "systematically favor the Executive branch over the Legislative Branch."[1297] Instead, Judge Kavanaugh concluded that such "[w]eighty" separation-of-powers questions "must be confronted directly through careful analysis of Article II—not answered by backdoor use of the political question doctrine, which may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner."[1298]

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[1289] Kavanaugh, *Our Anchor*, *supra* note 24, at 1909–10.

[1290] *See* Kavanaugh, *Separation of Powers*, *supra* note 22, at 1459–62.

[1291] See discussion *supra* in *Administrative Law*.

[1292] PHH Corp. v. CFPB, 839 F.3d 1, 34 (D.C. Cir. 2016) (writing that "our job as judges is to enforce the law, not abdicate to the political branches"), *overruled in part by* 881 F.3d 75 (D.C. Cir. 2018) (en banc). *See also* Sissel v. HHS, 799 F.3d 1035, 1052 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("Because the constitutional structure helps safeguard individual liberty, the Judiciary has long played a critical role in preserving the structural compromises and choices embedded in the constitutional text.").

[1293] *El-Shifa*, 607 F.3d at 855–59.

[1294] *Id.* at 839.

[1295] *Id.* at 856 ("The Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never.").

[1296] *Id.* at 857.

[1297] *Id.*

[1298] *Id.*

Judge Kavanaugh's separate opinion in *Sissel v. HHS* is instructive for both his general approach to the separation of powers and his views on the judicial role in enforcing the doctrine.[1299] In *Sissel*, Judge Kavanaugh dissented from a denial of rehearing en banc in a case asserting that certain ACA provisions requiring individuals lacking health insurance coverage to pay a penalty were grounded in an amendment introduced in the Senate and therefore violated the Origination Clause, which provides that "All Bills for raising revenue shall originate in the House of Representatives."[1300] The panel opinion concluded that whether a law is subject to the Origination Clause depends on the primary purpose of that bill.[1301] According to the panel, the ACA was not a revenue raising bill because its purpose was to "spur conduct, not to raise revenue" and, therefore, did not have to originate in the House.[1302] Judge Kavanaugh agreed with the panel's ultimate holding that the law did not violate the Origination Clause, but not its rationale. In an analysis that reflects his traditional separation-of-powers analysis—namely a focus on text, history, and personal liberty—Judge Kavanaugh instead concluded that the ACA was, in fact, a revenue raising bill that originated in the House. While it was true that the Senate had replaced the original House language, Judge Kavanaugh reasoned that such Senate alterations to House language were "permissible" under the Clause's text and history. [1303] Judge Kavanaugh took exception to the panel's purpose-focused, functionalist approach, arguing that it threatened the efficacy of a constitutional provision that was an "integral part of the Framers' blueprint for protecting people from excessive federal taxation."[1304] The Framers, Judge Kavanaugh argued, had deliberately divided power among the House and Senate, much as they had divided power among the branches, in order to "avoid the dangers of concentrated power and thereby protect individual liberty."[1305] By providing the House with the "exclusive" power to originate tax bills, the Framers adopted a structural safeguard designed to protect against the "dangers inherent in the power to tax."[1306] The panel decision, Judge Kavanaugh opined, had adopted a mode of reasoning that would "blow" open a "giant new exemption from the Origination Clause"[1307] that would functionally eliminate the judiciary's role in policing adherence to that Clause. In justifying judicial intervention, Judge Kavanaugh wrote that "the Judiciary has long played a critical role in preserving the structural compromises and choices embedded in the constitutional text."[1308] That role is the same whether a court is asked to enforce structural separation among the branches, or wholly within a branch.[1309] "It is not acceptable," argued Judge Kavanaugh, "for courts to outsource preservation of the constitutional structure to the political branches."[1310]

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[1299] Sissel v. HHS, 799 F.3d 1035, 1049–64 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[1300] U.S. CONST. art. I, § 7, cl. 1.

[1301] *Sissel*, 799 F.3d at 1035–36.

[1302] *Id. at* 1036.

[1303] *Id.* at 1050–53 (analyzing the "text, history, and precedent" of the Origination Clause).

[1304] *Id.* at 1050.

[1305] *Id.* at 1051.

[1306] *Id.*

[1307] *Id.* at 1057–58.

[1308] *Id.* at 1052.

[1309] *Id.* (citing Unites States v. Munoz-Flores, 495 U.S. 385, 395 (1990)).

[1310] *Id.* at 1064 ("[C]ourts must enforce the Constitution's structural protections even when the affected branch does not.").

## Presidential Execution of the Law

The opinion that perhaps sheds some of the greatest light on Judge Kavanaugh's view of the scope of executive power vis-à-vis Congress is an opinion involving appropriations for nuclear waste disposal. In a portion of a 2013 ruling, *In re Aiken County*, Judge Kavanaugh staked out a position on a relatively unsettled area of the law: namely, the nature of the obligation the Take Care Clause[1311] imposes on the executive branch to follow and enforce federal law.[1312] The Take Care Clause, and its relationship to the President's general Article II powers, has been the subject of significant legal debate.[1313] Judge Kavanaugh's position in that case, which is generally consistent with the position expressed by the executive branch, would appear to provide the President with some, but not complete flexibility in how he approaches the execution of federal statutes.[1314]

*In re Aiken County* concerned whether the Nuclear Regulatory Commission (NRC) was required to act on the Department of Energy's license application for a nuclear waste depository at Yucca Mountain, despite the fact that adequate appropriations were not available to complete that review.[1315] Writing for the court, Judge Kavanaugh determined that the NRC had a statutory obligation to review the license, could not simply disregard the law, and, therefore, must expend available, if insufficient, funds on that task.[1316] However, having found that the NRC's inaction violated the agency's general obligation to comply with the law, Judge Kavanaugh nevertheless addressed a pair of tangential constitutional principles that—when applicable—could permit the executive branch to "decline to act in the face of a clear statute."[1317] His opinion acknowledged at the outset that neither principle applied to the case at hand, and indeed a concurring judge found the discussion to be "unnecessary."[1318] Judge Kavanaugh nevertheless proceeded to address what he viewed as "settled, bedrock principles of constitutional law."[1319]

First, Judge Kavanaugh addressed the President's authority to disregard a statutory provision the President views as unconstitutional.[1320] While each branch may independently interpret the Constitution,[1321] and Presidents have long claimed the authority to disregard laws they determine

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[1311] U.S. CONST. art II § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

[1312] *In re* Aiken Cty. (*Aiken County II*), 725 F.3d 255, 261–66 (D.C. Cir. 2013).

[1313] *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5–12 (1994) (describing the "intense controversy" over presidential execution of the law and control of the executive branch). For further discussion of the Take Care Clause, see CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

[1314] *Compare Aiken County II*, 725 F.3d at 261–66, *with* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199–200 (1994) (discussing the President's authority to disregard unconstitutional statutes); Prosecution for Contempt of Congress of an Executive Branch Official Who has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 125 (1984) (discussing the President's prosecutorial discretion). *See also* Kavanaugh, *One Government*, *supra* note 123, at 15 ("If there's a reasonable constitutional objection, then the President may decline to follow the law unless and until a final court order tells him otherwise.").

[1315] *Aiken County II*, 725 F.3d at 258–59.

[1316] *Id.* at 259–61 ("In these circumstances, where previously appropriated money is available for an agency to perform a statutorily mandated activity, we see no basis for a court to excuse the agency from that statutory mandate.").

[1317] *Id*. at 261.

[1318] Judge A. Raymond Randolph joined all but this part of Judge Kavanaugh's opinion, descrbing it as "unnecessary to decide the case." *Id.* at 267 (Randolph, J., concurring).

[1319] *Id*. at 259 (majority opinion).

[1320] *Id*. at 261–62.

[1321] *See* United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution."). *But see* City of Boerne v. Flores, 521 U.S. 507,

to be unconstitutional,[1322] the Supreme Court has not established clear principles to govern whether the President may unilaterally declare that a statute may be disregarded. Judge Kavanaugh's opinion concluded that the President has such authority, writing that "[i]f the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a final Court order dictates otherwise."[1323] Consistent with his history-focused approach to the separation of powers, Judge Kavanaugh claimed that Presidents have "routinely exercise[d]" such a power.[1324] The President may, he reasoned, implement a determination of unconstitutionality by directing his subordinates not to follow the law "unless and until a final Court decision in a justiciable case says that a statutory mandate or prohibition on the executive branch is constitutional."[1325] This view would appear to set a default position that favors the President's determinations over the constitutionality of a law over those of Congress, given that the President's determination controls until an explicit court ruling rejects that position. It could be taken to imply that even when existing Supreme Court precedent suggests a conclusion that runs counter to the President's determination, the President may still be authorized to disregard a law he views as unconstitutional until a court directly rules on his claim.[1326] Because, by not implementing a law, a President may make it less likely that a "case or controversy" will arise upon which a court could ultimately rule,[1327] this view of nonenforcement may necessarily enhance the executive's constitutional views.

Second, Judge Kavanaugh addressed the "very controversial" topic of prosecutorial discretion.[1328] The doctrine of prosecutorial discretion provides the President and executive branch officials with leeway in deciding when, and at times whether, to enforce federal laws that place obligations on the general public.[1329] Kavanaugh's *Aiken County* opinion views this discretion as arising from the President's authority under Article II, and perhaps primarily, from the power to pardon.[1330] His opinion articulated broad presidential discretion in determining whether to initiate the enforcement of specific laws, noting that enforcement decisions can be based "on the President's own constitutional concerns about a law or because of policy objections to the law, among other reasons."[1331] Judge Kavanaugh's view on prosecutorial discretion appears to have also been

536 (1997) (concluding that the Court's interpretation of the Constitution "must control").

[1322] *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199 (1994); *cf.* Laurence Tribe, *Larry Tribe on the ABA Signing Statements Report*, BALKINIZATION (Aug. 6, 2006), https://balkin.blogspot.com/2006/08/larry-tribe-on-aba-signing-statements.html (noting that "presidents have never taken" the view that "a president's only legitimate options are either to veto an entire bill or to sign it and then enforce it in its entirety regardless of his good faith views as to the constitutional infirmities either of some part of the bill or of some distinct set of its possible applications").

[1323] *Aiken County II*, 725 F.3d at 259.

[1324] *Id*. at 261.

[1325] *Id.*

[1326] *Id.* at 259–61. Judge Kavanaugh also argued that "[i]n declining to follow a statutory *mandate* that the President independently concludes is unconstitutional, the President generally may decline to expend funds on that unconstitutional program, at least unless and until a final Court order rules otherwise." *Id*. at 262 n.3.

[1327] *See* Dawn E. Johnson, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROB. 7, 58 (2000) (discussing the "likelihood of judicial review" as a factor for consideration in enforcing objectionable statutes).

[1328] *Aiken County II*, 725 F.3d at 265.

[1329] See United States v. Nixon, 418 U.S. 683, 693 (1974) (noting that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

[1330] *Aiken County II*, 725 F.3d at 263 ("The President may decline to prosecute . . . just as the President may pardon certain violators of federal law.").

[1331] *Id.*

informed by his fidelity to individual liberty principles. "One of the greatest *unilateral* powers a president possesses," wrote Judge Kavanaugh, "is the power to protect individual liberty by essentially under-enforcing federal statutes regulating prior behavior… ."[1332]

Judge Kavanaugh maintained, however, that prosecutorial discretion has its limits, especially with regard to laws that do not require the executive branch to enforce legal mandates on the public. The doctrine does not, for example, "encompass the discretion not to follow a law imposing a mandate or prohibition on the Executive Branch," for example a statutory requirement that an agency issue a rule or administer a program.[1333] Such mandates, as a general rule, must be followed unless, in Judge Kavanaugh's view, the President has a constitutional objection.[1334]

Judge Kavanaugh's views on prosecutorial discretion appear to have evolved between his 2013 *Aiken County* opinion and a 2016 article in the *Marquette Lawyer*.[1335] In discussing prosecutorial discretion in 2015, he again relied on the scope of the pardon power as informative, questioning "What sense does it make to force the executive to prosecute someone, only then to be able to turn around and pardon everyone?"[1336] However, he went on to evidently backtrack from his 2013 statement that the President's discretion in the enforcement of law was a "settled, bedrock principle of constitutional law" and instead described experiences over recent years as showing that the appropriate scope of prosecutorial discretion "is far from settled, either legally or politically."[1337] He then wrote:

> I will admit that I used to think that I had a good answer to this issue of prosecutorial discretion: that the president's power of prosecutorial discretion was broad and matched the power to pardon. But I will confess that I'm not certain about the entire issue as I sit here today. And I know I'm not alone in my uncertainty.[1338]

As such, it would appear that Judge Kavanaugh's views on the scope of the President's power of prosecutorial discretion may not be fully settled.

## Legislator and Presidential Immunity

Judge Kavanaugh's views on maintaining an effective government, both in the legislative and executive branches, appear to have informed his views on when Members of Congress and the President may be subject to civil and criminal litigation. Congress's immunity stems from the Speech or Debate Clause, which provides that "for any Speech or Debate in either House" a Member "shall not be questioned in any other Place."[1339] The Speech or Debate Clause has generally been interpreted as providing Members with both civil and criminal immunity for "legislative acts."[1340] The Supreme Court has described the privilege as being essential to the separation of powers as it ensures that Members have "wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch."[1341] Presidential

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[1332] *Id.* at 264.

[1333] *Id*. at 266.

[1334] *Id.*

[1335] Kavanaugh, *One Government, supra* note 123, at 14–16.

[1336] *Id*. at 16. The article was the result of a speech the nominee gave the previous year.

[1337] *Id*.

[1338] *Id*.

[1339] U.S. CONST. art. I, § 6, cl. 1.

[1340] *See* Gravel v. United States, 408 U.S. 606, 625 (1972).

[1341] *Id*. at 616.

immunity, on the other hand, is not explicitly provided for in the Constitution. Instead, it has been asserted by some to be implicit in Article II and consistent with the separation of powers.[1342] For example, the DOJ Office of Legal Counsel has previously concluded that the criminal indictment or prosecution of a sitting President would "impermissibly interfere with the President's ability to carry out his constitutionally assigned functions."[1343] That conclusion was based on a variety of factors, including the "burdens" and "stigma" that would be associated with criminal proceedings against a President.[1344] While the Supreme Court has previously held that a sitting President enjoys immunity from civil claims for damages predicated on an official act, but is not immune while in office from civil suits for unofficial misconduct, it has not addressed the question of whether a sitting President can be investigated, indicted, or prosecuted for criminal wrongdoing.[1345]

*Legislative Immunity.* Judge Kavanaugh has twice written separately in order to offer a broader conception of legislative immunity under the Speech or Debate Clause than supported by existing D.C. Circuit precedent. In *In re Grand Jury Subpoena*, the panel held that the Clause prevents a Member from being required to respond to a grand jury subpoena relating to testimony the Member provided during a disciplinary investigation by a congressional ethics committee, so long as that testimony related to official conduct.[1346] Judge Kavanaugh filed a concurring opinion in which he articulated his concerns that the panel, and previous D.C. Circuit precedent, had effectively "watered down" Speech or Debate Clause protections for Members by drawing an ambiguous distinction between statements relating to official and personal conduct.[1347] The nominee maintained that *any* statement made by a Member "to a congressional ethics committee is speech in an official congressional proceeding and thus falls within the protection of the clause."[1348] In so doing, Judge Kavanaugh relied principally on the plain text of the Speech or Debate Clause, writing that the panel opinion "does not square with the text of the Constitution, which gives absolute protection to 'any speech' by a Member in an official congressional proceeding."[1349]

Judge Kavanaugh has also stressed that the Clause protects not only legislative independence from the executive branch, but also from the courts in the form of court ordered disclosures. For example, in *Howard v. Office of the Chief Administrative Officer of the House of Representatives*, Judge Kavanaugh dissented from a holding that the Speech or Debate Clause did not prevent a congressional employee from pursuing an employment discrimination claim against a congressional office under the Congressional Accountability Act, even when the congressional employer asserts that the reason for the employee's termination or demotion related to

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[1342] *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 244–60 (2000) (reviewing a previous opinion and reaffirming the conclusion that indictment or criminal prosecution of a sitting President would violate the separation of powers.)

[1343] *Id*. at 223.

[1344] *Id*. at 236, 249.

[1345] *See* Clinton v. Jones, 520 U.S. 681, 705–06 (1997) (finding no absolute immunity in civil suits against the President arising from unofficial acts); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (finding absolute immunity in civil claims for damages predicated on an official act).

[1346] *In re* Grand Jury, 571 F.3d 1200, 1203 (D.C. Cir. 2009) (Kavnaugh, J., concurring).

[1347] *Id*. Judge Kavanaugh argued that the D.C. Circuit had previously gone "off the rails . . . by focusing on the *subject matter* of the underlying disciplinary proceeding—and by applying a test that grants protection only when the investigation concerns a Member's official conduct, as opposed to his or her personal conduct." *Id*. at 1206.

[1348] *Id*. at 1204.

[1349] *Id*. at 1206.

"legislative activity."[1350] Under the majority's reasoning in *Howard*, an employee may still proceed with his or her claim and attempt to prove that the employer's stated reason was actually pretext by "using evidence that does not implicate protected legislative matters."[1351] Judge Kavanaugh disagreed, again adopting a broader view of the protections afforded by the Speech or Debate Clause by reasoning that the majority's holding would "necessarily [] require congressional employers to either produce evidence of legislative activities or risk liability."[1352] The Speech or Debate Clause, he articulated, prevents Members and congressional employers from being "put to this kind of choice by an Article III federal court."[1353]

*Presidential Immunity*. Judge Kavanaugh has not heard any case or written any opinion on the extent to which the Constitution provides a sitting President with immunity from criminal investigation, indictment, or prosecution. He has however, addressed the topic in his academic writings, where he has acknowledged that his views on the topic are informed by his unique personal experiences both investigating a President in Independent Counsel Kenneth Starr's office and advising a President as a White House attorney.[1354] Two academic articles—one published in 1998 and the other from 2009—suggest that Judge Kavanaugh believes that a sitting President should, as a policy matter, be accorded both civil and criminal immunity by Congress, and perhaps, that the criminal prosecution of a sitting President is prohibited by the Constitution.[1355]

The more recent publication, a 2009 Minnesota Law Review article, made a series of legislative proposals to create a "more effective and efficient federal government."[1356] One of those proposals recommended that Congress enact a law providing that all civil suits, criminal prosecutions, and criminal investigations involving a sitting President be deferred until the President has left office.[1357] His rationale for the proposal was based principally on governmental effectiveness. "The indictment and trial of a sitting President" Judge Kavanaugh asserted, "would cripple the federal government, rendering it unable to function with credibility."[1358] Judge Kavanaugh also noted the unwanted burdens and distractions associated with mere investigations of the President, writing that the "lesser burdens of a criminal investigation—including preparing for questioning by criminal investigators—are time-consuming and distracting."[1359] Importantly,

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[1350] 720 F.3d 939, 953–57 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

[1351] *Id*. at 949.

[1352] *Id*. at 956.

[1353] *Id*.

[1354] Kavanaugh, *Separation of Powers*, *supra* note 22, at 1459–62; Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157–61 (1998) [hereinafter Kavanaugh, *The President*]; Kavanaugh, *One Government*, *supra* note 123, at 9 ("My job in the White House counsel's office and as staff secretary gave me, I think, a keen perspective on our system of separated powers.").

[1355] Kavanaugh, *Separation of Powers*, *supra* note 22, at 1460 ("It would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents . . . be deferred while the President is in office. . . . Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President."); Kavanaugh, *The President*, *supra* note 1354, at 2161 ("The Constitution itself seems to dictate . . . that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.").

[1356] Kavanaugh, *Separation of Powers*, *supra* note 22, at 1459.

[1357] *Id*. at 1459–62 ("[I]t would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents, like certain members of the military, be deferred while the President is in office. . . .Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President.").

[1358] *Id*. at 1461.

[1359] *Id*. at 1461–62 ("I think this temporary deferral also should excuse the President from depositions or questioning in

the article does *not* address the *legal* question of what protections may be afforded the President by the Constitution directly, but only notes that "even in the absence of congressionally conferred immunity, a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office."[1360]

Judge Kavanaugh's 1998 article in the Georgetown Law Journal provided a more robust discussion of the nominee's constitutional views on the question of presidential immunity—at least as they existed at that time and in the context of an independent counsel investigation.[1361] Like his 2009 piece, the 1998 article was framed in the context of a series of legislative proposals, one of which would have provided that Congress enact a statute establishing that a sitting President not be "subject to indictment."[1362] In considering the question of presidential immunity, Judge Kavanaugh again opined that a "serious question exists as to whether the Constitution permits the indictment of a sitting President."[1363] However, his subsequent analysis may suggest that he believed indictment of a sitting President to be constitutionally impermissible on the grounds that the appropriate constitutional remedy for serious presidential misconduct, as guided by history and original understanding, is investigation, impeachment, and removal by Congress, and only then prosecution.[1364] The Framers, he argued, warned against the "ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel."[1365] Instead, Judge Kavanaugh wrote that the original intent of the Framers and "the Constitution itself seem[] to dictate . . . that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office."[1366] Although he framed his discussion as "what should happen," and never explicitly stated that the Constitution outright forbids indictment of the President, Judge Kavanaugh nevertheless seemed to suggest, in the context of discussing this legislative proposal, that "[i]f Congress declines to investigate, or to impeach and remove the President, there can be no criminal prosecution of the President at least until his term of office expires."[1367] This conclusion would not, however, mean that the President or other executive branch officials are "above the law" or otherwise not subject to federal criminal provisions. Instead, Judge Kavanaugh's envisioned immunity applies only to the President—and only temporarily—as a President would generally be subject to prosecution for wrongdoing after being removed from office.[1368]

civil litigation or criminal investigations.").

[1360] *Id*. at 1461 n.31.

[1361] Kavanaugh, *The President*, *supra* note 1354, at 2157–61.

[1362] *Id*. at 2157. The article appears to waver between framing the question as whether the President is subject to *indictment* or *prosecution*.

[1363] *Id*.

[1364] *Id*. at 2158–60 ("Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made—in the Congress of the United States.").

[1365] *Id*. at 2160.

[1366] *Id*. at 2158.

[1367] *Id*. at 2161.

[1368] *Id*. at 2137 (reasoning that the "ultimate judgment on the President's conduct" should be made by Congress).

## Executive Privilege

Related to the question of whether the President may be indicted is the role executive privilege—that is, the constitutionally based privilege that protects executive communications that relate to presidential decisionmaking—may play in an investigation of the President or executive branch officials. The Supreme Court has only rarely addressed executive privilege, but its clearest explanation of the doctrine came in the unanimous opinion issued in *United States v. Nixon*.[1369] That case involved President Nixon's assertion that executive privilege protected him from complying with a criminal trial subpoena—issued at the request of the Watergate Special Prosecutor—for electronic recordings of conversations he had in the Oval Office with White House advisers.[1370] The Court rejected both President Nixon's threshold argument, that the Court lacked jurisdiction over what he viewed to be essentially an "intra-branch dispute" between the President and a subordinate executive branch official,[1371] and his substantive argument that the Constitution accorded the President an absolute privilege from compliance with a subpoena.[1372] In rebuffing the President, the *Nixon* opinion recognized executive privilege as an implied constitutional principle, holding that the "privilege of confidentiality of presidential communications" is "fundamental to the operation of Government and inextricably rooted in the separation of powers."[1373] However, the Court determined that the President's "generalized interest" in the confidentiality of his communications was outweighed by the "demonstrated, specific need for evidence in a pending criminal trial" and ordered the tapes turned over to the district court for *in camera* review.[1374] The Court suggested two caveats to its holding. First, it acknowledged that the "degree of deference" accorded to a President's executive privilege claim may be higher when the privilege claim relates to "military or diplomatic secrets."[1375] And second, the Court clarified that "we are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information."[1376]

Judge Kavanaugh has expressed mixed views on the *Nixon* decision. During a 1999 roundtable discussion, Judge Kavanaugh expressed some skepticism as to *Nixon*'s rejection of the threshold issue of justiciability, suggesting that "maybe *Nixon* was wrongly decided—heresy though it is to say."[1377] The nominee's concern with the *Nixon* holding appears to have been based on his views of the separation of powers and the President's authority to control both executive branch information and subordinate executive branch officials, a view more fully articulated in Judge Kavanaugh's opinions on agency structure and the presidential removal power discussed below. As the future nominee explained:

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[1369] United States v. Nixon, 418 U.S. 683, 703–16 (1974).

[1370] *Id*. at 686.

[1371] *Id*. at 697 ("In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability.").

[1372] *Id*. at 706 ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.").

[1373] *Id*. at 708.

[1374] *Id*. at 712.

[1375] *Id*. at 710.

[1376] *Id*. at 712 n.19.

[1377] *See* Mark Sherman, *Kavanaugh: Watergate Tapes Decision May have Been Wrong*, AP NEWS (Jul. 22, 2018), https://www.apnews.com/3ea406469d344dd8b2527aed92da6365.

> *Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implications to this day that most people do not appreciate sufficiently. … Maybe the tension of the time led to an erroneous decision.[1378]

In that same discussion, Judge Kavanaugh later stated: "Should *United States v. Nixon* be overruled on the ground that the case was a nonjusticiable intrabranch dispute? Maybe so."[1379] Legal commentators have debated the significance of these apparently off-the-cuff remarks, with some arguing that the statement was simply rhetoric used to underscore inconsistencies with a fellow panelist's arguments, while others interpreted the statement as a "radical critique of *Nixon*."[1380]

More recently however, Judge Kavanaugh has characterized *Nixon* as one of "the most significant cases in which the Judiciary stood up to the President" and one of the "greatest moments in American judicial history."[1381] Additionally, in his 1998 article, in which he engaged in a significant discussion of Watergate and the *Nixon* case, he never questioned the Court's holding, instead acknowledging that *Nixon* had "essentially defined the boundaries of executive privilege."[1382]

In some ways, Judge Kavanaugh's view of *Nixon* is less favorable to presidential power than others who have viewed the 1974 decision as requiring an ad hoc balancing test in all cases.[1383] For example, the 1998 article reflected Judge Kavanaugh's interpretation of *Nixon* as establishing a strict, bright-line rule that "the courts may not enforce a President's [executive] privilege claim (other than one based on national security) in response to a grand jury subpoena or criminal trial subpoena."[1384] In line with his broader views on judicial balancing tests,[1385] Judge Kavanaugh rejected the assertion that *Nixon* required the courts to balance, on a case-by-case basis, the President's interest in confidentiality against the need for evidence in a particular criminal investigation or prosecution. So long as the basic requirements of relevance (with respect to a grand jury subpoena) or relevance and admissibility (with respect to a trial subpoena)[1386] are met, any claim of executive privilege not based on national security or foreign affairs must, in Judge

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[1378] *Id*.

[1379] *Id*.

[1380] *Compare* Carrie Severino, *Does Brett Kavanaugh Want to Overrule* United States v. Nixon*? Not So Fast*, NAT'L REV. (Jul. 23, 2018), https://www.nationalreview.com/bench-memos/does-brett-kavanaugh-want-to-overrule-united-states-v-nixon-not-so-fast/, *with* Mark Joseph Stern, *Trump's Shield on the Bench*, SLATE (Jul. 23, 2018), https://slate.com/news-and-politics/2018/07/brett-kavanaughs-criticism-of-united-states-v-nixon-should-worry-robert-mueller.html.

[1381] Kavanaugh, *Our Anchor*, *supra* note 24, at 1922; Kavanaugh, *Judge As Umpire*, *supra* note 24, at 688.

[1382] Kavanaugh, *The President*, *supra* note 1354, at 2162.

[1383] *See* Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1341 (1999) (describing *Nixon* as creating an "ad hoc," "poorly-designed," and "mushy judicial balancing test"); Benjamin J. Priester, Paul G. Rozelle, and Mirah A. Horowitz, *The Independent Counsel Statute: A Legal History*, 62 LAW & CONTEMP. PROB. 5, 80–81 (1999) (characterizing *Nixon* as holding that "the specific need for the production of relevant evidence in a criminal proceeding could outweigh the privilege if the prosecutor could establish a specific need for each and every piece of evidence subpoenaed").

[1384] Kavanaugh, *The President*, *supra* note 1354, at 2168–69.

[1385] *See supra Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[1386] Kavanaugh, *The President*, *supra* note 1354, at 2168 (citing United States v. Nixon, 418 U.S. 683, 714 (1974)). *See also* FED. R. CRIM. P. 17.

Kavanaugh's view, fail under the principles recognized in *Nixon*.[1387] However, Judge Kavanaugh observed that a President could act outside the courts to protect confidential information by asserting his control over executive law enforcement in order to prevent a judicial dispute over presidential communications from ever getting to the Court. "To do so," wrote Judge Kavanaugh, "a President must order the federal prosecutor not to seek the information and must fire the prosecutor if he refuses (as President Nixon fired [special prosecutor] Archibald Cox)."[1388] Such an action would "focus substantial public attention" on the President and force him to take "political responsibility for his privilege claim,"[1389] suggesting that the nominee's view of the role of executive privilege would impose significant costs on the President if he wished to shield his communications from a criminal investigation.

While there is inadequate evidence to determine precisely how Judge Kavanaugh views the *Nixon* opinion, in light of the nominee's apparent acceptance of *Nixon's* delineation of executive privilege, it is possible that Judge Kavanaugh's statement that "maybe *Nixon* was wrongly decided," to the extent that the comment was intended to provide a substantive legal opinion, related primarily to the justiciability question of whether the Court should have mediated a dispute between the President and another executive branch official. [1390] A hesitancy to have a court give effect to a subordinate executive branch official's imposition on the President would appear to be consistent with Judge Kavanaugh's general view that executive officials should be accountable to, and under the supervision and control of the President,[1391] as well as his view that it should be Congress—and not the courts or an independent prosecutor—that provides the initial remedy to presidential misconduct.[1392]

Judge Kavanaugh further opined on the underlying justiciability issues that were at play in *Nixon* in a 2009 concurring opinion he filed in another case involving a dispute between two executive branch agencies, *SEC v. Federal Labor Relations Authority*.[1393] In his opinion, Judge Kavanaugh articulated the general proposition that "judicial resolution of intra-Executive disputes is questionable under both Article II and Article III."[1394] Article II is violated, Judge Kavanaugh

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[1387] Judge Kavanaugh reached this conclusion as a matter of existing law and good policy. Kavanaugh, *The President*, *supra* note 1354, at 2173–74 (claiming that *Nixon* demonstrates "as a matter of law that the only executive privilege currently valid against the United States in federal criminal proceedings is a national security/state secrets privilege. As a policy matter, that rule reflects the proper balance of the President's need for confidentiality and the government's interest in obtaining all relevant evidence for criminal proceedings").

[1388] *Id*. at 2162.

[1389] *Id*. at 2162, 2175.

[1390] A footnote in his 1998 article suggests Judge Kavanaugh's awareness of the justiciability question. With regard to his proposal that Congress enact a statute providing that courts should not recognize executive privilege claims made in response to a grand jury or criminal trial subpoena, Judge Kavanaugh noted that "This proposed language is premised on the assumption that a special counsel's motion to enforce a subpoena would be justiciable. The Court in *Nixon* so held, and there is no reason to revisit that decision . . . ." Kavanaugh, *The President*, *supra* note 1354, at 2162 n.89.

[1391] *See* Free Enter. Fund v. PCAOB, 537 F.3d 667, 689 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

[1392] *See* Kavanaugh, *The President*, *supra* note 1354, at 2158–60. With respect to Congress's investigatory role, and congressional authority to obtain presidential communications, Judge Kavanaugh has asserted that as opposed to criminal proceedings, "*Nixon* indicated that the privilege may well be absolute in . . . *congressional* . . . proceedings." *Id*. at 2171 (emphasis added). The D.C. Circuit did not find the privilege to be absolute in the context of a congressional investigation. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (1974) (concluding that Congress may overcome a claim of executive privilege by showing that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions").

[1393] SEC v. Fed. Labor Relations Auth., 568 F.3d 990, 997–98 (D.C. Cir. 2009) (Kavanaugh, J. concurring).

[1394] *Id*. at 997.

asserted, because such an internal dispute should be resolved by the President in the exercise of his executive powers, while Article III is violated because executive branch agencies are not sufficiently "adverse" so as to create the type of "case or controversy" that is necessary for Article III jurisdiction.[1395] However, Judge Kavanaugh—citing to, among other cases, *Nixon*—acknowledged that Supreme Court and lower court precedent have established that courts may hear an intra-branch dispute when one party to the case is an independent agency.[1396] In that scenario, "an independent agency can [] be sufficiently adverse to a traditional executive agency to create a justiciable case" because "Presidents cannot (or at least do not) fully control independent agencies."[1397] Independent agencies, as Judge Kavanaugh described them, are "agencies whose heads cannot be removed by the President except for cause and that therefore typically operate with some (undefined) degree of substantive autonomy from the President."[1398] As a result, Judge Kavanaugh's concurrence appeared to view existing precedent to allow for the adjudication of disputes involving agencies that have been afforded independence under a statute. At the same time, it is unclear whether the nominee would consider it appropriate for a court to resolve an executive branch dispute with an entity that has "substantive autonomy from the President," but is not directly endowed with statutory independence.[1399]

## Executive Compliance with a Subpoena

Judge Kavanaugh's conception of presidential immunity and executive privilege may also give rise to questions about his views on whether the President may be made to comply with a subpoena for testimony in a criminal proceeding. While the courts will not "proceed against the [P]resident as against an ordinary individual," it is clear under existing jurisprudence that the President is nonetheless not immune from all compulsory judicial process.[1400] In *Nixon*, the Court established that a President may be ordered to comply with a judicial subpoena for *documents* in a criminal matter, but the opinion did not address compelled *testimony*.[1401] Similarly, in *Clinton v. Jones*, the Court held that the President is not immune from civil suits for damages arising from unofficial acts,[1402] but avoided the question of compelled presidential *testimony*, noting only that the case did not require the Court "to confront the question whether a court may compel the attendance of the President at any specific time or place."[1403] Instead the Court assumed that "the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so."[1404] The executive branch, on the other hand, has taken a clear position on compelled presidential

[1395] *Id*.

[1396] *Id.*

[1397] *Id*.

[1398] *Id*. (describing independent agencies as "a kind of extraconstitutional Fourth Branch").

[1399] Notably, the Watergate special prosecutor was an official with "substantive autonomy from the President" who the President could not remove at will. *See Nixon*, United States v. Nixon, 418 U.S. 683, 694 n.8 (1974). However, at the time *Nixon* was decided, the special prosecutor's independence, including his removal protections, were conveyed through regulation, rather than statute. 38 Fed. Reg. 30739 (Nov. 7, 1973). The *Nixon* opinion nonetheless described the regulations as having the "force of law" so long as they remained in place. *Nixon*, 418 U.S. at 694 n.8.

[1400] *Nixon*, 418 U.S. at 715 (quoting United States v. Burr, 25 F. Cas. 187, 192 (CC Va. 1807)).

[1401] *Id*. at 713–14.

[1402] Clinton v. Jones, 520 U.S. 681, 705–06 (1997).

[1403] *Id*. at 691.

[1404] *Id*. at 692.

testimony, concluding that "sitting Presidents are not required to testify in person at criminal trials."[1405]

Judge Kavanaugh has written little on the precise question of whether a President can be compelled to provide testimony in a criminal proceeding. As previously noted, his 2009 article suggested that as a policy matter, Congress should provide the sitting President with immunity from "[e]ven the lesser burdens" of "depositions or questioning in civil litigation or criminal investigations."[1406] And although arguably concluding that the Constitution does not permit indictment or prosecution of the President, his 1998 article did not explicitly extend that constitutional analysis to presidential testimony at the investigative stage.[1407] However, Judge Kavanaugh's general separation-of-powers views may raise some question of whether he would be willing to enforce a subpoena requiring the President to testify. First, assuming that the subpoena is issued by another executive branch official, the dispute raises questions on how the nominee views the justiciability holding in *Nixon*.[1408] And second, Judge Kavanaugh's academic writings on immunity—in which he has expressed concern over the "burdens" and "distractions" of litigation and investigations involving the President[1409]—may suggest some sympathy toward the historical executive branch argument that compelling the President's "personal attendance" would infringe upon the President's ability to carry out his "official functions."[1410]

## Structural Design of Independent Agencies

One area of the Court's separation-of-powers jurisprudence where Judge Kavanaugh's views have already proven quite influential concerns Congress's authority to provide officers and agencies with independence from the President through the use of removal restrictions and other statutory aspects of agency design.[1411] Judge Kavanaugh has played a significant role in what appears to be an ongoing revitalization of the judiciary's recognition of the President's removal power, and the corollary principle that the President, in order to maintain accountability within the executive branch, must maintain some degree of effective supervision and control over subordinate executive officers. This recognition, Judge Kavanaugh asserts, does not necessarily

[1405] *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 253 n. 29 (2000) (citing Memorandum for Arthur B Culvahouse, Jr., Counsel to the President, from Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* at 3 (Oct. 17, 1988).

[1406] Kavanaugh, *Separation of Powers*, *supra* note 22, at 1461, 1462 n.35.

[1407] *See* Kavanaugh, *The President*, *supra* note 1354, at 2158–61.

[1408] *See* SEC v. Fed. Labor Relations Auth., 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J. concurring).

[1409] *See* Kavanaugh, *Separation of Powers*, *supra* note 22, at 1459 ("[T]he job of President is far more difficult than any other civilian position in government … The decisions a President must make are hard and often life-or-death, the pressure is relentless, the problems arise from all directions, the criticism is unremitting and personal, and at the end of the day only one person is responsible."); *Id*. at 1461 ("Even the lesser burdens of a criminal investigation—including preparing for questioning by criminal investigators—are time-consuming and distracting. Like civil suits, criminal investigations take the President's focus away from his or her responsibilities to the people. And a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President.").

[1410] 24 Op. O.L.C. at 253 n.29.

[1411] Christopher Walker, *Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG, (July 26, 2018) ("[Judge] Kavanaugh's views on Article II presidential control of federal agencies, and in particular of so-called independent agencies, could implicate a number of important administrative law issues that may reach the Supreme Court in the near future.").

expand the scope of executive power, but instead only ensures that what executive power exists is exercised by the President.[1412]

Some historical context is necessary to understand Judge Kavanaugh's positions in this area. Although not explicitly provided for in the Constitution, the President's authority to remove subordinate executive branch officials has historically played a central role in the President's ability to carry out his Article II powers.[1413] Removal, the Supreme Court has reasoned, is a "powerful tool for control" because "[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and . . . obey."[1414] The precise scope of the removal power, however, as well as Congress's authority to restrict that power through statute in order to insulate an agency or individual official from presidential influence, has been the subject of several Supreme Court opinions. In the 1926 decision of *Myers v. United States*, the Court invalidated a law that required Senate consent for the removal of certain executive officials, holding that the Constitution conferred the removal power "exclusive[ly]" to the President so as to ensure he maintained "general administrative control of those executing the laws."[1415] However, the Court limited the breadth of *Myers* in the 1935 case *Humphrey's Executor v. United States*, holding that Congress could limit the President's authority to remove members of independent agencies engaged in "quasi-judicial or quasi-legislative" functions by requiring that such officials may only be removed for "inefficiency, neglect of duty, or malfeasance in office."[1416] The use of these "for-cause" removal protections to insulate an agency official from the President's control was again upheld in 1988 in *Morrison v. Olson*, but this time as applied to the Independent Counsel, a single independent official with limited tenure and relatively narrow jurisdiction, rather than a member of an independent commission.[1417]

Judge Kavanaugh entered the judicial fray regarding the President's removal power with an influential dissent in the 2008 case *Free Enterprise Fund v. PCAOB*.[1418] In *Free Enterprise Fund*, the D.C. Circuit panel majority upheld provisions of the Sarbanes-Oxley Act of 2002, which had created a new PCAOB and insulated its members from presidential control through dual layers of "for-cause" removal protections.[1419] Board members could be removed only "for cause" by the

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[1412] Free Enter. Fund v. PCAOB, 537 F.3d 667, 689 n.2 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("It is important to distinguish the question of who is responsible for exercising the executive power from the question of the scope of executive power. The fact that a single President is responsible and accountable for exercising the executive power does not mean that the scope of executive power is broad or narrow."), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

[1413] *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010) (claiming that since 1789 "the executive power included a power to oversee executive officers through removal");1 Annals of Cong. 463 (1789) (statement of James Madison) ( "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.").

[1414] Bowsher v. Synar, 478 U.S. 714, 726 (1986).

[1415] 272 U.S. 52, 164 (1926).

[1416] 295 U.S. 602, 629 (1935).

[1417] 487 U.S. 654, 692 (1988) ("This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws.") Moreover, the official at issue in *Morrison* was determined to be an "inferior officer." *Id*. at 671.

[1418] Free Enter. Fund v. PCAOB, 537 F.3d 667, 686–715 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). *See* S. COMM. JUDICIARY, 115th Cong., QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT, NOMINATION NO. PNXX-115 (2018), https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20(PUBLIC).pdf (last visited Aug. 20, 2018) (listing the decision as his most significant).

[1419] *Free Enter. Fund*, 537 F.3d at 668─69. For-cause removal restrictions general prevent the President from removing an officer except in cases of "inefficiency, neglect of duty, or malfeasance in office." *See* Bowsher v. Synar, 478 U.S. 714, 725 n.4 (1986) (noting that "statutes establishing independent agencies typically specify" that an official is

Securities and Exchange Commission (SEC), who in turn, could themselves be removed by the President, but only for cause.[1420] Thus, the President had no direct ability to order the removal of Board members. The panel majority upheld the law, relying primarily on *Humphrey's Executor* and *Morrison* and their approval of Congress's use of "for-cause" removal restrictions, while holding that the structure did "not strip the President of sufficient power to influence the Board and thus [did] not contravene separation of powers."[1421]

Judge Kavanaugh dissented, calling the imposition of dual layers of for-cause removal protections between the President and Board members inconsistent with the original understanding of Article II and historical practice.[1422] The Framers, Judge Kavanaugh reasoned, established a unitary head of the executive branch to ensure accountability "by making one person responsible for *all* decisions made by and in the Executive Branch."[1423] The structure of the PCAOB, on the other hand, unduly limited the President's ability to exercise that control, resulting in a "fragmented, inefficient, and unaccountable Executive Branch" that the President could not "fully direct and supervise."[1424] With regard to historical practice, Judge Kavanaugh described the dual layers of removal protections as "uniquely structured," "novel," lacking any "historical analogues," and "a previously unheard-of restriction on and attenuation of the President's authority over executive officers"[1425]

Judge Kavanaugh also argued that because the Sarbanes-Oxley Act "completely" stripped the President of any direct removal authority over the members of the PCAOB,[1426] upholding that structure would require an impermissible extension of *Humphrey's Executor* and *Morrison*.[1427] His reasoning was likely informed by his general position "that *Humphrey's* [*Executor*] and *Morrison* authorize a significant intrusion on the President's Article II authority to exercise the executive power and take care that the laws be faithfully executed."[1428] Viewing those rulings as narrow exceptions to the general rule of *Myers*, Judge Kavanaugh argued the two cases represent the "outermost constitutional limits of permissible congressional restrictions on the President's

removable only "for inefficiency, neglect of duty, or malfeasance in office"); Kirti Datla and Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 787 (2013) ("The typical removal protection clause specifies that an official can be removed only for 'inefficiency, neglect of duty, or malfeasance in office.'").

[1420] *Id*.

[1421] *Id*. at 669.

[1422] *Id*. at 688–704. Judge Kavanaugh also found that the PCAOB violated the Appointments Clause because the Board Members were principal officers that must be appointed by the President with the advice and consent of the Senate rather than by the SEC. *Id*. at 687. In doing so, Judge Kavanaugh relied on the reasoning applied in *Edmond v. United States*, which he viewed as superseding that which was applied in *Morrison*. *Id*. at 709 (applying *Edmond's* "directed and supervised" analysis). On appeal, the Supreme Court also applied *Edmond*'s approach. *Free Enter. Fund*, 561 U.S. at 510. However, after the Court severed the offending removal protections, thereby making Board members removable at will by the SEC, the Court had "no hesitation in concluding that under *Edmond* the Board members are inferior officers." *Id*.

[1423] *Free Enter. Fund*, 537 F.3d at 689.

[1424] *Id*. at 691.

[1425] *Id*. at 686–99 ("[N]ever before in American history has there been an independent agency whose heads are appointed by and removable only for cause by another independent agency, rather than by the President or his alter ego.").

[1426] *Id*. at 698.

[1427] *Id*. ("In this case, that sensible principle dictates that we hold the line and not allow encroachments on the President's removal power beyond what *Humphrey's Executor* and *Morrison* already permit.").

[1428] *Id*. at 696.

removal power."[1429] Finally, Judge Kavanaugh warned that upholding this law would "green-light Congress to create a host of similar entities," which would "splinter executive power to a degree not previously permitted."[1430]

On appeal, the Supreme Court in a 5-4 ruling authored by Chief Justice Roberts embraced Judge Kavanaugh's dissent, and invalidated the PCAOB's structure.[1431] Citing Judge Kavanaugh's dissent, the Court's decision invalidated the "novel" dual for-cause removal scheme on the grounds that it "impaired" the President's "ability to execute the laws . . . by holding his subordinates accountable for their conduct."[1432]

Judge Kavanaugh's general skepticism of unique structural schemes that attempt to insulate executive branch officials from presidential control was again evident in *PHH Corporation v. CFPB*.[1433] *PHH* involved a challenge to the structural design of the CFPB, an independent agency headed not by a multi-member commission, but by a single Director.[1434] Judge Kavanaugh issued two substantially similar opinions in the case, both concluding—much like his earlier dissenting opinion in *Free Enterprise Fund*—that the novel scheme violated the separation of powers and the President's powers under Article II. His first opinion represented an initial panel majority striking down the CFPB's current structure.[1435] That decision, however, was vacated when the D.C. Circuit granted en banc review.[1436] Upon review, Judge Kavanaugh reaffirmed his views, however this time dissenting from the en banc majority opinion that concluded the CFPB's structure was constitutionally permissible under *Humphrey's Executor* and *Morrison*.[1437]

Judge Kavanaugh's *PHH* opinions[1438] focused on three primary factors, all of which relate directly to his established approach to separation of powers. First, he emphasized the novelty of the CFPB's structure—most independent agencies are headed by multiple members, rather than a single director. "Never before," wrote Judge Kavanaugh, "has an independent agency exercising substantial executive authority been headed by just one person."[1439] In his view, this departure from historical practice indicated a potentially serious constitutional defect.[1440] Second, Judge Kavanaugh concluded that the concentration of power in a single, unaccountable Director posed a serious threat to liberty.[1441] While other independent agency heads may have removal protections,

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[1429] *Id*. at 698.

[1430] *Id*. at 699–700.

[1431] Free Enter. Fund v. PCAOB, 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

[1432] *Id*. at 496 ("This novel structure does not merely add to the Board's independence, but transforms it. . . . The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.").

[1433] 839 F.3d 1, 1–55 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017); PHH Corp. v. CFPB, 881 F.3d 75, 164–200 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

[1434] *PHH Corp.*, 839 F.3d at 16.

[1435] *Id*. at 8.

[1436] PHH Corp. v. CFPB, No. 15-1177, 2017 U.S. App. LEXIS 2733, at *5 (D.C. Cir. Feb. 16, 2017).

[1437] *PHH Corp.*, 881 F.3d at 164-200 (Kavanaugh, J., dissenting). The decision was not appealed to the Supreme Court. *See* Evan Weinberger, *PHH Opts Not to Ask Supreme Court to Review CFPB Structure*, BLOOMBERG NEWS (May 2, 2018), https://www.bna.com/phh-opts-not-n57982091770/.

[1438] For simplicity, and because Judge Kavanaugh's two opinions are substantially similar, this report only cites to his initial panel opinion.

[1439] *PHH Corp.*, 839 F.3d at 8.

[1440] *Id.*

[1441] *Id*. ("The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not

Judge Kavanaugh argued that the multi-member structure demands consensus and acts as a check on the whims of an independent, individual agency head.[1442] Third, Judge Kavanaugh argued that removal protections for a unitary agency head diminished the President's Article II power to control the executive branch beyond what has been judicially approved for multi-member independent agencies.[1443] In multi-member commissions with statutory removal protections, the President may at least appoint and remove the chair of the agency, ensuring some influence over the agency's direction. With the CFPB, however, Judge Kavanaugh noted that the President may not alter the head of the agency until the end of the five-year term, which means, at least in some cases, the President might not ever be permitted to align the agency with his own policy goals.[1444]

Perhaps one of the most important questions arising from Judge Kavanaugh's opinions in *Free Enterprise Fund* and *PHH* is what they suggest about his views on the constitutional permissibility of more traditional independent agencies, for example, those that operate with only one layer of for-cause protections and in the form of a multi-member commission. Judge Kavanaugh has previously signaled his discomfort with traditional independent agencies, questioning both their general effectiveness and their underlying legal foundations.[1445] For example, in *PHH*, Judge Kavanaugh noted that *Humphrey's Executor* was "inconsistent" with *Myers*, has "received significant criticism," and is "in tension with" the Supreme Court's holding in *Free Enterprise Fund*.[1446] On *Morrison*, Judge Kavanaugh has written that "the independent counsel experiment ended with nearly universal consensus that the experiment had been a mistake and that Justice Scalia had been right back in 1988 to view the independent counsel system as an unconstitutional departure from historical practice and a serious threat to individual

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only departs from settled historical practice, but also poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency.").

[1442] *Id*. at 26–27.

[1443] *Id*. at 33 (noting that "neither *Humphrey's Executor* nor any later case gave Congress a free pass, without any boundaries, to create independent agencies that depart from history and threaten individual liberty.").

[1444] *Id*. ("A President may be stuck for his or her entire four-year term with a single Director appointed by a prior President with different views.").

[1445] For example, in *Aiken County I*, Judge Kavanaugh made several, very critical statements about *Humphrey's Executor*, including that the 1935 case "approved the creation of 'independent' agencies—independent, that is, from presidential control and thus from democratic accountability." *In re* Aiken Cty. (*Aiken County I*), 645 F.3d 428, 441 (D.C. Cir. 2011) (Kavanaugh, J., concurring). He also wrote that "there can be little doubt" that the Supreme Court's holding in *Free Enterprise Fund* is "in tension with *Humphrey's Executor*." *Id*. at 446. He also described the "uneven effectiveness" of independent agencies. *Id*. With regard to *Morrison*, when asked if he could think of a case that "deserves to be overturned" during a 2016 event, Judge Kavanaugh responded: "*Morrison v. Olson* . . . . [I]t's been effectively overruled, but I would put the final nail in." *See* Kavanaugh, *AEI Interview*, *supra* note 202, at 51:12.

Judge Kavanaugh's comment on *Morrison* is likely colored by several considerations. First, Judge Kavanaugh has previously noted support for Justice Scalia's dissent in that case and asserted that there exists a "nearly universal consensus that the [Independent Counsel] experiment had been a mistake." *PHH Corp.*, 839 F.3d at 20. Second, the *Morrison* opinion contained numerous holdings, including that the Independent Counsel was an inferior officer under the Appointments Clause and that Congress had not excessively insulated the Independent Counsel from presidential control in violation of the separation of powers. *Morrison*, 487 U.S. at 670–77, 693–97. However, the multi-factor functional reasoning applied by the Court in determining that the Independent Counsel was an inferior officer was not applied in the Court's subsequent decision of *Edmond v. United States*, 520 U.S. 651 (1997). In fact, Justice Scalia's majority opinion in *Edmond* applied the same formalist reasoning he used in his *Morrison* dissent, namely that an inferior officer is one who is "directed and supervised" by a principal officer. *Edmond*, 520 U.S. at 663–65. Thus, it would appear that *Edmond* has cast doubt upon the continuing validity of *Morrison*'s reasoning for determining whether an official is an inferior or principal officer. It is, therefore, possible that in stating that *Morrison* has "been effectively overruled" Judge Kavanaugh was referring to the Court's Appointments Clause analysis, rather than its separation-of-powers analysis.

[1446] *PHH Corp.*, 839 F.3d at 34 n.15.

liberty."[1447] Moreover, the very notion of a subordinate executive branch official operating with independence from the President appears to at least arguably be inconsistent with Judge Kavanaugh's interpretation of the President's constitutional authority to supervise and control "*all* decisions made by and in the Executive Branch."[1448] However, he has not expressly called for overturning *Humphrey's Executor*, nor for the invalidation of all independent agencies.[1449] The nominee has explicitly stated that "*Humphrey's Executor* is an entrenched Supreme Court precedent, protected by stare decisis."[1450] Ultimately, it is clear that Judge Kavanaugh has concerns about the Court's holdings in *Humphrey's Executor* and *Morrison*. However, there is some question whether, if confirmed to the Supreme Court, he would view the cases as establishing the "outermost" limits of a constitutional framework that he would be willing to work within, or, whether, if provided with the opportunity, he would be a vote to overturn *Humphrey's Executor*, *Morrison*, or both. If confirmed, a Justice Kavanaugh would likely be presented with the opportunity to present his views, as additional questions of Congress's authority to insulate executive branch officials and agencies from presidential control are likely to come before the court in the near future.[1451]

[1447] *Id*. at 20 (citing Morrison v. Olson, 487 U.S. 654**,** 699 (1988) (Scalia, J., dissenting)).

[1448] Free Enter. Fund v. PCAOB, 537 F.3d 667, 689 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

[1449] Moreover, the appropriate remedy in Judge Kavanaugh's views is unlikely to be invalidation of the entire agency, but rather invalidation of the agency's removal restrictions so as to transform the independent agency into a typical executive branch agency. *See PHH Corp.,* 839 F.3d at 39 (concluding that "we remedy the constitutional violation here by severing the for-cause removal provision from the statute").

[1450] *Aiken County I*, 645 F.3d at 446.

[1451] The Fifth Circuit in *Collins v. Mnuchin*, No. 17-20364, 2018 U.S. App. LEXIS 19510 (5th Cir. July 16, 2018), may have recently "teed up a potential early blockbuster" case for the Supreme Court by ruling that the structure of the Federal Housing Finance Agency, an independent agency led by a single director, was unconstitutional. *See Calling Judge Kavanaugh*, WALL. ST. J. (July 29, 2018).

# Substantive Due Process and Fundamental Rights[1452]

In *Obergefell v. Hodges*, the Justice that Judge Kavanaugh might succeed, Justice Kennedy, wrote that the "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."[1453] Many fundamental rights that the Court has identified as warranting constitutional protection stem from the Fifth and Fourteenth Amendments, which prohibit the federal government and the states from depriving any person of "life, liberty, or property, without due process of law."[1454] The Court has interpreted these Amendments not only to accord *procedural* protections against such deprivations,[1455] but also to contain a *substantive* component that prohibits the government from infringing certain fundamental rights unless the government's law or action is narrowly tailored to serve a compelling state interest.[1456] These fundamental rights include "most of the rights enumerated in the Bill of Rights,"[1457] as well as additional, unenumerated rights that the Court has recognized over the years, such as the right to marry or the right to privacy in making certain intimate decisions.[1458]

Justice Kennedy's legacy on the bench is closely tied to the issue of substantive due process, having authored or joined the controlling opinions in a number of closely divided cases recognizing unenumerated rights. These cases include his joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which reaffirmed *Roe v. Wade*'s recognition of a woman's right to an abortion before fetal viability;[1459] his opinion for the Court in *Lawrence v. Texas*, which recognized the right of consenting adults to engage in private, sexual conduct without governmental interference;[1460] and his opinion for the Court in *Obergefell*, which recognized the right of same-sex couples to marry.[1461] However, Justice Kennedy has also declined to recognize due process protections in other cases, such as when he joined the Court's refusal to recognize a fundamental right to physician-assisted suicide in *Washington v. Glucksberg*.[1462]

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[1452] CRS Legislative Attorney Victoria L. Killion authored this section of the report.

[1453] 135 S. Ct. 2597, 2598 (2015).

[1454] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[1455] *See Due Process*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "procedural due process" as the "minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments, esp. if the deprivation of a significant life, liberty, or property interest may occur").

[1456] *See* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." (internal citations omitted)); *CRS Kennedy Report*, *supra* note 17, at 6 n.46 (explaining that the "Court has interpreted the Fifth and Fourteenth Amendments' Due Process Clauses to contain a substantive component, wherein the Constitution protects certain fundamental liberty interests from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest" (citing *Glucksberg*, 521 U.S. at 719–21)).

[1457] Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

[1458] *Glucksberg*, 521 U.S. at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, *ibid*; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, [Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)].").

[1459] 505 U.S. 833, 846 (1992).

[1460] 539 U.S. 558, 578 (2003).

[1461] 135 S. Ct. at 2599; *see also CRS Kennedy Report*, *supra* note 17, at 6–7, 27–29 (discussing Justice Kennedy's substantive due process decisions).

Justice Kennedy's central role in the development of the Court's substantive due process jurisprudence has cast Judge Kavanaugh's decisions in this area and the nominee's broader judicial philosophy on the subject into the spotlight.[1463] In particular, commentators have focused on Judge Kavanaugh's opinions in a case that reached the Supreme Court involving an unaccompanied alien minor who sought an abortion while in U.S. immigration custody, and the judge's scholarly commentary on the *Glucksberg* decision.[1464] These sources and certain other opinions and commentary by Judge Kavanaugh provide very limited insight into his approach to analyzing substantive due process questions, and are unlikely to serve as reliable predictors of the outcome in any given case. Of the relatively few substantive due process cases that Judge Kavanaugh encountered during his tenure on the D.C. Circuit,[1465] he authored opinions in only a handful of those cases,[1466] some of which presented unique factual and procedural scenarios[1467] or directly implicated controlling Supreme Court precedent.[1468] Nevertheless, his apparent endorsement of an approach to due process grounded in history and tradition suggests that if confirmed, Judge Kavanaugh may deploy a more narrow view of substantive due process than Justice Kennedy in defining the contours of future rights and protections.[1469] This section begins by discussing the nominee's sole opinion on the right to an abortion, before turning to his other writings and comments on substantive due process.

## Abortion Jurisprudence

Perhaps more than any other issue, considerable attention has been given to how Judge Kavanaugh might adjudicate cases concerning abortion.[1470] As previously noted, Justice Kennedy co-wrote the Court's 1992 opinion in *Planned Parenthood of Southeastern Pennsylvania v.*

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[1462] 521 U.S. 702, 728 (1997).

[1463] *See, e.g.*, Amy Howe, *Judge Kavanaugh on Abortion: Rehnquist as 'Judicial Hero' and the Case of Jane Doe*, SCOTUSBLOG (July 18, 2018, 4:08 PM), http://www.scotusblog.com/2018/07/judge-kavanaugh-on-abortion-rehnquist-as-judicial-hero-and-the-case-of-jane-doe/.

[1464] *See* Adam Feldman, *Empirical SCOTUS: Indirectly Inferring Kavanaugh's Position in Abortion Cases*, SCOTUSBLOG (July 26, 2018, 11:58 AM), http://www.scotusblog.com/2018/07/empirical-scotus-indirectly-inferring-kavanaughs-position-in-abortion-cases/; Linda Greenhouse, *Opinion: A Kavanaugh Signal on Abortion?*, N.Y. TIMES (July 18, 2018), https://www.nytimes.com/2018/07/18/opinion/abortion-kavanaugh-trump-supreme-court.html; Howe, *supra* note 1463; Ruth Marcus, Opinions: *Kavanaugh Looks a Lot Like Some Former Justices. Just Not Anthony Kennedy*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/opinions/kavanaugh-looks-a-lot-like-some-former-justices-just-not-anthony-kennedy/2018/07/13/83d49c92-86c6-11e8-8f6c-46cb43e3f306_story.html; Josh Gerstein, *Teenage Immigrant Abortion Case Could Be Hurdle for Kavanaugh's Supreme Court Bid*, POLITICO (July 6, 2018, 5:42 PM), https://www.politico.com/story/2018/07/06/trump-supreme-court-pick-kavanaugh-immigrant-abortion-teen-700856.

[1465] A search of cases in LEXIS for "judges(Kavanaugh) and ((Fourteenth or Fifth) /2 Amendment) and "due process" and (Glucksberg or substantive or fundamental or liberty)" returned only 37 results, including some cases that did not involve a substantive due process question.

[1466] *See generally CRS Kavanaugh Opinions Report, supra* note 5, tbls. 1–3 (listing opinions written by Judge Kavanaugh).

[1467] *See* Garza v. Hargan, 874 F.3d 735, 756 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) ("This is a novel and highly fraught case. The case came to us in an emergency posture. The panel reached a careful decision in a day's time . . . .").

[1468] *See* Omar v. McHugh, 646 F.3d 13, 21 (D.C. Cir. 2011) ("[T]he inquiry that Omar asks this Court to undertake in this habeas case . . . 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.").

[1469] *See* discussion *infra* in *Judge Kavanaugh's Commentary on* Glucksberg.

[1470] *See supra* note 1464.

*Casey*,[1471] which, by a vote of five Justices, reaffirmed "the essential holding of *Roe v. Wade*"[1472] recognizing: (1) a woman's right, as a matter of substantive due process, to choose to have an abortion before fetal viability[1473] and to obtain it without undue interference from the government; (2) a state's power to restrict abortions after viability with exceptions in circumstances where the pregnant woman's life or health is in danger; and (3) a state's legitimate interests throughout the course of a pregnancy in protecting the woman's health and the fetus's life.[1474] In a separate portion of the *Casey* opinion authored and adopted by only three Justices—Justices Kennedy, O'Connor, and Souter—the Court replaced *Roe*'s "rigid trimester framework" for evaluating abortion regulations[1475] with an "undue burden standard" under which a law is invalid "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[1476] The Court has applied these principles and standards from *Casey* in subsequent cases.[1477]

Twenty-five years after *Casey*, in *Garza v. Hargan*, Judge Kavanaugh was asked to consider on an emergency basis how—if at all—to apply *Casey*'s undue burden standard in a case involving an unaccompanied alien minor (referred to in court opinions as Jane Doe or J.D.) who entered the United States illegally and sought to terminate her pregnancy while living under U.S. custody.[1478] J.D., through her guardian ad litem, challenged the government's refusal to transport her or allow her to be transported to obtain state-mandated pre-abortion counseling and the abortion procedure itself.[1479] On October 18, 2017, the U.S. District Court for the District of Columbia issued a temporary restraining order (TRO), requiring the government to transport J.D., or to make her available for transport, "promptly and without delay to the abortion provider closest to J.D.'s [detention] shelter in order to obtain the [pre-abortion] counseling required by state law on October 19, 2017, and to obtain the abortion procedure on October 20, 2017 and/or October 21,

[1471] 505 U.S. 833, 846 (1992).

[1472] Roe v. Wade, 410 U.S. 113 (1973).

[1473] *Casey*, 505 U.S. at 870 (plurality opinion) ("[T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." (citing *Roe*, 410 U.S. at 163)).

[1474] *Id.* at 846 (majority opinion).

[1475] *Id.* at 873 (plurality opinion). As the *Casey* plurality explained *Roe*'s trimester framework, "almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake." *Id.* at 872.

[1476] *Id.* at 878.

[1477] *See* Stenberg v. Carhart, 530 U.S. 914, 921, 938, 945–46 (2000) (invalidating a Nebraska law that banned "partial birth abortions" because it did not contain the required health-of-the-mother exception under *Casey* and imposed an undue burden); Gonzales v. Carhart, 550 U.S. 124, 132, 146–47, 150, 156 (2007) (upholding the Federal Partial-Birth Abortion Ban Act of 2003, after concluding that it did not impose an undue burden and in view of the governmental interests articulated in *Casey*); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (invalidating two Texas abortion requirements under *Casey*'s undue burden standard).

[1478] Garza v. Hargan, No. 17-5236, 2017 U.S. App. LEXIS 20711 (D.C. Cir. Oct. 20, 2017) (per curiam), *vacated in part on reh'g en banc*, 874 F.3d 735 (D.C. Cir. 2017) (per curiam), *cert. granted, judgment vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018) (per curiam).

[1479] *See* Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, No. 17-02122 (D.D.C. Oct. 13, 2017). J.D.'s guardian ad litem filed the case as a putative class action on behalf of J.D. and similarly situated unaccompanied minors in U.S. immigration custody. *See* Azar v. Garza, 138 S. Ct. 1790, 1791 (2018) (per curiam). For simplicity, this discussion of the TRO proceedings and related appeals refers to J.D. as the relevant party in lieu of her guardian ad litem or the other putative class members.

2017."[1480] The TRO further restrained the government, for a period of fourteen days, from "interfering with or obstructing J.D.'s access to abortion counseling or an abortion."[1481]

The government immediately appealed the district court's ruling, arguing that it was not imposing an undue burden on J.D.'s purported right to an abortion under *Casey*, because (1) the government did not prohibit J.D. from obtaining an abortion, but rather refused to "facilitate" the abortion; (2) J.D. was free to leave the United States and return to her home country; and (3) J.D. could obtain an abortion in the United States after the government has transferred custody of J.D. to an immigration sponsor.[1482] On October 20, 2017, the assigned panel composed of Judge Kavanaugh, Judge Karen L. Henderson, and Judge Patricia Millett issued a non-precedential,[1483] per curiam (i.e., unsigned) order from which Judge Millett dissented.[1484] The order vacated the TRO insofar as it required the government to release J.D. for purposes of obtaining pre-abortion counseling or an abortion.[1485] The order also expressed apparent agreement with the government's third argument that transferring J.D. to an immigration sponsor would "not unduly burden the minor's right under Supreme Court precedent to an abortion"—at least so long as "the process of securing a sponsor to whom the minor is released occurs expeditiously."[1486] The order authorized the district court to allow the government eleven days (i.e., until October 31, 2017) to secure a sponsor for J.D. and to release her into the sponsor's custody, noting the government's agreement that, upon release, J.D. then would be "lawfully able, if she chooses, to obtain an abortion on her own pursuant to the relevant state law."[1487] In the event the government did not meet its deadline, the order permitted the district court to "re-enter" a TRO "or other appropriate order."[1488] The order concluded by noting that the government had "assumed, for purposes of this case, that J.D.—an unlawful immigrant who apparently was detained shortly after unlawfully crossing the border into the United States—possesses a constitutional right to obtain an abortion in the United States."[1489]

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[1480] Garza v. Hargan, No. 17-02122, 2017 U.S. Dist. LEXIS 175415, at *2 (D.D.C. Oct. 18, 2017), *vacated in part*, No. 17-5236, 2017 U.S. App. LEXIS 20711 (D.C. Cir. Oct. 20, 2017).

[1481] *Id.*

[1482] *See* Oral Argument at 0:50–1:40, Garza v. Hargan, No. 17-5236 (D.C. Cir. Oct. 20, 2017), https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/EE442BCAB574219F852581BF0057B320/$file/17-5236.mp3 (summarizing the government's three main arguments in an exchange between the government's counsel and Judge Kavanaugh). The government also filed an emergency motion to stay the TRO pending appeal, which the D.C. Circuit granted on October 19, 2017, but only to the extent that the TRO required the government to transport or allow J.D. to be transported to obtain an abortion procedure. Garza v. Hargan, No. 17-5236, 2017 WL 4707112, at *1 (D.C. Cir. Oct. 19, 2017) (per curiam); *see also id.* (stating that the "portion of the order requiring appellants to transport J.D. or allow J.D. to be transported . . . to obtain the counseling required by state law remains in effect").

[1483] The order specified that "this disposition will not be published" pursuant to D.C. Circuit Rule 36, which states that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." *Garza*, 2017 U.S. App. LEXIS 20711, at *3; D.C. CIR. R. 36(e)(2).

[1484] *Garza*, 2017 U.S. Dist. LEXIS 175415, at *2.

[1485] *Id*. The panel's order left intact some aspects of the district court's order, including three paragraphs temporarily restraining the government from: (1) "further forcing J.D. to reveal her abortion decision to anyone, or revealing it to anyone"; (2) "retaliating against J.D. based on her decision to have an abortion"; and (3) "retaliating or threatening to retaliate against the contractor that operates the shelter where J.D. currently resides for any actions it has taken or may take in facilitating J.D.'s ability to access abortion counseling and an abortion." *Garza*, 2017 U.S. Dist. LEXIS 175415, at *2.

[1486] *Garza*, 2017 U.S. App. LEXIS 20711, at *3.

[1487] *Id.*

[1488] *Id.*

[1489] *Id.*

In her dissenting statement, Judge Millett addressed all three of the government's arguments.[1490] She rejected the view that merely releasing J.D. for the abortion procedure would constitute facilitating an abortion, as well as the government's position that J.D. could leave the country, reasoning that conditioning J.D.'s right to an abortion on voluntary departure imposed an undue burden because it would require J.D. to relinquish her legal claims to stay in the United States.[1491] While acknowledging the government's "understandable" desire to find J.D. a sponsor, she argued that the sponsorship process could proceed simultaneously with the abortion and "is not a reason for forcing J.D. to continue the pregnancy."[1492] Judge Millett posited that further delay would make it more difficult for J.D. to find a local abortion provider and increase the health risks associated with the abortion procedure.[1493]

Following the panel's order, on October 24, 2017, the full circuit granted J.D.'s petition for rehearing en banc, reinstated the district court's TRO, and denied the government's motion to stay the TRO pending appeal "substantially for the reasons set forth" in Judge Millett's dissenting statement.[1494] The en banc court then remanded the case to the district court to revise the dates for the government's compliance with the TRO (which had already passed). Three judges—Judges Henderson, Kavanaugh, and Thomas B. Griffith—dissented from the en banc order.[1495] Writing for herself, Judge Henderson argued that the en banc court should have addressed the "antecedent" question of whether J.D., as a minor detained after attempting to enter the United States unlawfully, had a constitutional right to an abortion, which she ultimately answered in the negative.[1496]

Judge Kavanaugh, in a dissent which Judges Henderson and Griffith also joined, did not opine on whether J.D. had a constitutional right to obtain an abortion in the United States, noting that "[a]ll parties have assumed [such a right] for purposes of this case."[1497] Nor did he discuss the merits of the government's arguments about facilitating abortion or J.D.'s ability to leave the country. Instead, he argued a more narrow point: that the panel decision, rendered in emergency proceedings, "prudently accommodated the competing interests of the parties" by providing the government with a limited time period in which to find a sponsor for J.D.[1498] In Judge Kavanaugh's view, the panel order fully comported with the Supreme Court's abortion cases, which "repeatedly" recognized the government's "permissible interests in favoring fetal life, protecting the best interests of the minor, and not facilitating abortion, so long as the Government does not impose an undue burden on the abortion decision."[1499] First, Judge Kavanaugh found it "reasonable for the United States to think that transfer to a sponsor would be better than forcing the minor to make the decision [to continue or terminate her pregnancy] in an isolated detention camp with no support network available."[1500] Second, he argued that requiring the government to

[1490] Garza v. Hargan, No. 17-5236, 2017 WL 9854555 (Oct. 20, 2017).

[1491] *Id.* at *2–*4.

[1492] *Id.* at *4.

[1493] *Id.* at *5.

[1494] Garza v. Hargan, 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc) (per curiam).

[1495] *Id.* at 743–56 (D.C. Cir. 2017) (Henderson, J., dissenting and Kavanaugh, J., dissenting, joined by Henderson and Griffith, JJ.).

[1496] *Id.* at 743–46 (Henderson, J., dissenting).

[1497] *Id.* at 753 (Kavanaugh, J., dissenting).

[1498] *Garza*, 874 F.3d at 754 (Kavanaugh, J., dissenting).

[1499] *Id.* at 755.

[1500] *Id.*

complete the sponsorship process expeditiously[1501] imposed no undue burden, reasoning 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 laws, parental notice laws, informed consent laws, and waiting periods, among other regulations."[1502] Although he acknowledged that "many Americans—including many Justices and judges—disagree with one or another aspect of the Supreme Court's abortion jurisprudence," the nominee explained that "[a]s a lower court, our job is to follow the law as it is, not as we might wish it to be" and argued that the "three-judge panel here did that to the best of its ability, holding true to the balance struck by the Supreme Court."[1503] Judge Kavanaugh viewed the en banc court's decision, in contrast, as "a radical extension of the Supreme Court's abortion jurisprudence" amounting to "a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."[1504]

On June 4, 2018, the Supreme Court unanimously vacated the D.C. Circuit's en banc order, because J.D. had obtained an abortion before the case reached the Supreme Court, thus rendering her claim for injunctive relief moot.[1505]

## Substantive Due Process Cases Decided Under *Glucksberg*

Apart from his dissent in *Garza*, Judge Kavanaugh has authored at least two other potentially notable substantive due process opinions. These cases involved the threshold question of how to determine whether an unenumerated right is fundamental and thus protected under the substantive component of the Due Process Clauses, an issue the Court has debated in recent years. Under the standards set forth in 1997 in *Washington v. Glucksberg*, in order for a right to be fundamental, it must be "deeply rooted in this Nation's history and tradition."[1506] However, in 2015, in *Obergefell v. Hodges*, the Court indicated that the process of identifying and protecting fundamental rights is not susceptible to one formula and that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries."[1507]

In *Doe v. District of Columbia*, Judge Kavanaugh considered a pre-*Obergefell* due process challenge to a 2003 District of Columbia policy authorizing surgeries under certain circumstances

[1501] Judge Kavanaugh noted that the panel order did not purport to define "expeditious" for purposes of future cases, but surmised that in such cases, "the term 'expeditious' presumably would entail some combination of (i) expeditious from the time the Government learns of the pregnant minor's desire to have an abortion and (ii) expeditious in the sense that the transfer to the sponsor does not occur too late in the pregnancy for a safe abortion to occur." *Id.* at 753. He added that "under Supreme Court precedent, the Government cannot use the transfer process as some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur." *Id.* at 753 n.3.

[1502] *Id.* at 755.

[1503] *Id.* at 756.

[1504] *Id.* at 752.

[1505] Azar v. Garza, 138 S. Ct. 1790, 1793 (2018) (per curiam); *see also id.* at 1792–93 (discussing the reasons why vacating the en banc court's decision is appropriate under Supreme Court precedent). Following the Supreme Court's decision, the district court that issued the original TRO certified the *Garza* class and preliminarily enjoined enforcement of certain government policies and practices with regard to unaccompanied minors in immigration detention seeking to obtain an abortion. Garza v. Hargan, 304 F. Supp. 3d 145 (D.D.C. 2018). The D.C. Circuit is scheduled to hear the government's appeal from that decision in September. U.S. Court of Appeals for the D.C. Circuit, Public Calendar from 06/01/2018 through 10/02/2018, https://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000 (last visited Aug. 3, 2018).

[1506] 521 U.S. 702, 721 (1997) (internal quotation marks and citation omitted).

[1507] 135 S. Ct. 2584, 2598 (2015).

for intellectually disabled persons in the District's care.[1508] The plaintiffs, representing a class of "intellectually disabled persons who live in District of Columbia facilities and receive medical services from the District of Columbia," argued that the 2003 policy violated the procedural due process rights of the class members because it did not require the D.C. agency responsible for their medical care to consider their wishes in the process of deciding whether to authorize surgery.[1509] They also raised a substantive due process claim, presumably based on what the district court called their "liberty interest to accept or refuse medical treatment."[1510] With respect to the procedural due process claim, Judge Kavanaugh wrote that "accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions—with harmful or even deadly consequences to intellectually disabled persons."[1511]

While expressing skepticism as to whether the plaintiffs' "complaint about procedures used by [the agency] can be properly shoehorned into a *substantive* due process claim," Judge Kavanaugh proceeded to reject that argument as well.[1512] Quoting *Glucksberg*, Judge Kavanaugh reasoned that the "plaintiffs have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [the asserted right] were sacrificed.'"[1513] Although he emphasized the plaintiffs' lack of evidence to support the *historical* foundations for recognizing a right to consultation under the circumstances, Judge Kavanaugh added an observation regarding the *current* legislative environment in which the plaintiffs advanced their due process arguments. Specifically, he remarked that "the breadth of plaintiffs' constitutional claims is extraordinary because no state of which we are aware applies the rule suggested by plaintiffs," intimating the unlikelihood that "all states' laws and practices" regarding medical treatment for intellectually disabled persons who have never attained competence are unconstitutional.[1514]

In another case that predated *Obergefell,* Judge Kavanaugh applied the *Glucksberg* decision again in *Empresa Cubana Exportadora de Alimentos y Productos Varios v. Department of the Treasury*.[1515] The case concerned a 1998 law that modified an exception to a Cuban asset regulation that had allowed a company called Cubaexport to register and renew the trademark HAVANA CLUB with the U.S. Patent and Trademark Office.[1516] The 1998 law prohibited Cubaexport from renewing its trademark when it came due for renewal in 2006.[1517] Cubaexport

[1508] 489 F.3d 376, 377 (D.C. Cir. 2007).

[1509] *Id.* at 377–78, 382.

[1510] *Id.* at 380 (internal quotation marks and citation omitted).

[1511] *Id.* at 382.

[1512] *Id.* at 383 (emphasis added).

[1513] *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)). The same year that *Doe* was decided, Judge Kavanaugh joined an en banc opinion of the D.C. Circuit in applying *Glucksberg* to conclude that the Constitution does not "provide[] terminally ill patients a right of access to experimental drugs that have passed limited safety trials but have not been proven safe and effective." Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 697 (D.C. Cir. 2007) (en banc) (holding that "there is no fundamental right 'deeply rooted in this Nation's history and tradition' of access to experimental drugs for the terminally ill" (internal citation omitted) (quoting *Glucksberg*, 521 U.S. at 720–21)).

[1514] *Doe*, 489 F.3d at 383.

[1515] 638 F.3d 794 (D.C. Cir. 2011) [hereinafter *Empresa Cubana Exportadora de Alimentos*].

[1516] *Id.* at 795–96.

[1517] *Id.* at 796.

argued, inter alia, that the 1998 law violated the substantive due process doctrine.[1518] Writing for two members of a three-judge panel, Judge Kavanaugh rejected Cubaexport's "inflated conception of substantive due process," and cited *Glucksberg* for the proposition that "[u]nless legislation infringes a fundamental right, judicial scrutiny under the substantive due process doctrine is highly deferential."[1519] The nominee concluded that the case did not involve a fundamental right—which Cubaexport apparently did not contest—so the court needed to consider only whether the legislation, including its retroactive application to Cubaexport's previously registered trademark, was rationally related to a legitimate government interest.[1520] Judge Kavanaugh held that the 1998 law "easily satisfied" that standard because it was "rationally related to the legitimate government goals of isolating Cuba's Communist government and hastening a transition to democracy in Cuba."[1521] In addition, "any unfairness" resulting from retroactive application of the renewal bar to previously registered trademarks was "mitigated—indeed eliminated—by the fact that [the government] has clearly warned that exceptions from trademarks were revocable at any time."[1522]

Perhaps the most pointed remarks Judge Kavanaugh has made on substantive due process came in a 2017 lecture at the American Enterprise Institute, where Judge Kavanaugh offered some limited commentary on the *Glucksberg* decision and its place in substantive due process jurisprudence.[1523] He began by noting that the *Glucksberg* opinion reflected the view of its author, Chief Justice Rehnquist, that "unenumerated rights"—that is, those not specifically listed in the Bill of Rights—"could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition."[1524] Judge Kavanaugh then remarked that "even a first-year law student could tell you that the *Glucksberg* approach to unenumerated rights was not consistent with the [earlier] approach of the abortion cases such as *Roe v. Wade* in 1973—as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood v. Casey*."[1525] Judge Kavanaugh did not explicitly question the legal reasoning underpinning the *Roe* and *Casey* decisions—though he noted that Chief Justice Rehnquist's views may not have prevailed in *Casey* due to stare decisis, the judicial doctrine, discussed in more detail above,[1526] that emphasizes the importance of adhering to precedent.[1527] However, his remarks do suggest that Judge Kavanaugh views the Court's pre-*Glucksberg* due process decisions as part of a "general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."[1528] In this regard, Judge Kavanaugh sees *Glucksberg* as "an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy."[1529]

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[1518] *Id.* at 797.

[1519] *Id.* at 800.

[1520] *Id.*

[1521] *Id.* at 801.

[1522] *Id.* Judge Kavanaugh did not decide whether Cubaexport, as a foreign national, had *any* substantive due process rights under the U.S. Constitution in light of the court's rejection of Cubaexport's due process argument under *Glucksberg*. *Id.* at 801 n.6.

[1523] *See* Kavanaugh, *From the Bench*, *supra* note 24, at 16.

[1524] *Id.*

[1525] *Id.*

[1526] *See supra Judge Kavanaugh's Judicial Approach, Philosophy, and Influences*.

[1527] *See* Kavanaugh, *From the Bench*, *supra* note 24, at 16.

[1528] *Id.*

[1529] *Id.*

Judge Kavanaugh's statements about *Glucksberg* and judicial restraint echo remarks he made the year before concerning the recognition of unenumerated rights:

> I don't think . . . there's some new font [of authority] for courts to go around . . . and create a bunch of new rights that we think ourselves are important. I think we need to stick to what the Supreme Court has articulated is the test for unenumerated rights, which is deeply rooted in history and tradition. Otherwise, courts really will become politicians or political policymaking bodies.[1530]

## Conclusion

Commentators have questioned whether Judge Kavanaugh's judicial philosophy and practice in the realm of substantive due process may translate into a decision that dramatically reshapes the Court's abortion jurisprudence.[1531] The dearth of abortion cases in Judge Kavanaugh's judicial portfolio, as well as the unique posture of the *Garza* case—in particular, the emergency nature of the proceedings, the government's choice to assume that J.D. could avail herself of constitutional protections, and the narrow issue on which Judge Kavanaugh wrote—provide little basis to discern the nominee's position on whether *Roe* or *Casey* was wrongly decided. Even if Judge Kavanaugh would have decided *Roe* or *Casey* differently as a matter of first impression, any assessment of his willingness to overrule these decisions if nominated to the Court would need to include an evaluation of the judge's position on the role of stare decisis,[1532] including which of the stare decisis factors Judge Kavanaugh might weigh more heavily in assessing whether to uphold or overrule a constitutional decision.[1533]

Nonetheless, the nominee has been skeptical of a court discovering new rights within the substantive component of the Due Process Clauses. While he may not have foreclosed Justice Kennedy's vision in *Obergefell* of a court guided by history and tradition but open to "new insight[s]" into the meaning of liberty,[1534] Judge Kavanaugh appears to share Chief Justice Rehnquist's more circumscribed approach to defining the contours of due process rights and protections. More so than Judge Kavanaugh's opinions applying *Glucksberg*—which could be viewed more narrowly as adherence to binding precedent—the Judge's statements during his 2017 lecture on Chief Justice Rehnquist, combined with his overarching judicial philosophy, suggest that the nominee might endorse *Glucksberg*'s emphasis on consulting history and tradition before extending constitutional protections to an asserted right.[1535] As a result, it appears that Judge Kavanaugh likely views substantive due process more skeptically than the Justice he may succeed.

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[1530] *See* Kavanaugh, *AEI Interview*, *supra* note 202, at 44:10–44:52.

[1531] *See*, *e.g.*, Greenhouse, *supra* note 1464; Howe, *supra* note 1463.

[1532] *See* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences* regarding Judge Kavanaugh's statements on stare decisis.

[1533] *See* Janus v. Am. Fed'n of State, County, and Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) (listing, among the "factors that should be taken into account in deciding whether to overrule a past decision," the "quality of [the prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision").

[1534] 135 S. Ct. 2584, 2598 (2015).

[1535] *See* discussion *supra* in *Judge Kavanaugh's Judicial Approach, Philosophy, and Influences* regarding the importance of history and tradition to Judge Kavanaugh's judicial philosophy more broadly.

# Takings[1536]

Relative to Justice Kennedy, who, during his tenure on the Supreme Court, cast several significant votes in eminent domain cases that decided whether and when federal and state governments may take private property for public use,[1537] Judge Kavanaugh does not appear to have significantly addressed the merits of a takings claim in a judicial opinion.[1538] This is unsurprising, as the D.C. Circuit does not hear many takings claims because the Tucker Act vests the U.S. Court of Federal Claims (CFC) with jurisdiction over such claims when the plaintiff seeks more than $10,000 in compensation from the federal government.[1539] With limited exceptions,[1540] the CFC's jurisdiction over such claims is exclusive,[1541] and appeals from the CFC are to the Federal Circuit, not the D.C. Circuit.[1542] While the Fifth Amendment applies to the District of Columbia, there are few takings cases that have arisen against the District during Judge Kavanaugh's time on the court.[1543] Of the takings cases that he adjudicated, Judge Kavanaugh has either joined the majority opinion or summarily disposed of the takings issues.[1544] As a result, there is currently an insufficient basis to evaluate Judge Kavanaugh's views regarding the scope of the Takings Clause or the extent to which the Takings Clause protects private property rights.[1545] Nonetheless, with takings cases presently pending before the Supreme Court,[1546] Judge Kavanaugh, if confirmed, will likely have the opportunity to consider the issue. Accordingly, questions concerning his views on the issue could be explored in a confirmation hearing.[1547]

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[1536] CRS Legislative Attorney Linda Tsang authored this section of the report.

[1537] *See CRS Kennedy Report*, *supra* note 17, at 29. The Takings Clause of the Fifth Amendment of the U.S. Constitution limits government action by providing that private property shall not be "taken for public use" without "just compensation." *See* U.S. Const. amend. V.

[1538] In one of the few takings cases that CRS identified in which he participated, Judge Kavanaugh joined an opinion that held that ripeness requirements do not apply to claims that the government violated the Fifth Amendment by taking private property without identifying a valid public use. Rumber v. District of Columbia, 487 F.3d 941, 943–44 (D.C. Cir. 2007). *See also* Cannon v. District of Columbia, 717 F.3d 200, 206–07 (D.C. Cir. 2013) (holding that the plaintiff-employees' takings claim failed because they had no entitlement to both full salary and their annuities as property interests) [hereinafter *Cannon I*].

[1539] *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). The $10,000 amount specified here would encompass most claims for just compensation against the federal government.

[1540] For example, the D.C. Circuit has exercised jurisdiction over a facial takings challenge to a federal agency rule. *E.g.*, Bldg. Owners & Managers Assoc. Int'l v. FCC, 254 F.3d 89, 97–100 (D.C. Cir. 2001); *see generally* Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 711 (D.C. Cir. 2008) ("[T]he Claims Court is not a proper venue if a statute creates an identifiable class of cases in which application of the statute will necessarily constitute a taking.") (internal citations and quotations omitted).

[1541] The CFC has exclusive jurisdiction over such claims "by default." In other words, no federal law vests another federal court with jurisdiction over these claims. Robert Meltz, *The Impact of* Eastern Enterprises *and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 ALA. L. REV. 1161, 1161 (2000).

[1542] 28 U.S.C. § 1295(a)(3).

[1543] *See, e.g.*, *Cannon I*, 717 F.3d at 206–07; Tate v. District of Columbia, 627 F.3d 904, 909 (D.C. Cir. 2010); Rumber v. District of Columbia, 487 F.3d 941, 943–44 (D.C. Cir. 2007).

[1544] *See, e.g.*, Cannon v. District of Columbia, 783 F.3d 327 (D.C. Cir. 2015) (disposing takings claims as barred by the law of the case doctrine). See *supra* note 2 for other cases in which Judge Kavanaugh joined the majority opinion.

[1545] *See generally* Robinson Meyer, *Justice Kennedy's Retirement Could Reshape the Environment*, THE ATLANTIC (June 27, 2018), https://www.theatlantic.com/science/archive/2018/06/kennedys-departure-could-reshape-the-environment/563930/ (speculating on the future of property rights and the Supreme Court's view of the Takings Clause with Justice Kennedy's successor).

[1546] *E.g.*, Knick v. Township of Scott, Pennsylvania, No. 17-647 (S. Ct. petition for cert. granted Mar. 5, 2018).

[1547] *See, e.g.*, *Kagan Confirmation Hearing*, *supra* note 810, at 243–44 (asking nominee her views on the Takings Clause); *Sotomayor Confirmation Hearing*, *supra* note 810, at 101–02 (similar).

# Appendix. Judge Kavanaugh by the Numbers

**Table A-1. Dissents and Concurrences Authored on the D.C. Circuit***

Listed by Dissent Rate for Period May 31, 2006 through July 9, 2018

| Judge | Total Number of Cases Resulting in Reported Opinions | Number of Reported Cases in Which the Judge Authored a Separate Opinion (Dissent or Concurrence) | Separate Opinion Rate | Number of Reported Cases in Which the Judge Authored a Dissent | Dissent Rate |
|---|---|---|---|---|---|
| ***Brett M. Kavanaugh (2006–Present)*** | ***676*** | ***105*** | ***15.53%*** | ***58*** | ***8.58%*** |
| Karen L. Henderson (1990–Present) | 725 | 87 | 12.00% | 42 | 5.79% |
| Judith W. Rogers (1994–Present) | 754 | 80 | 10.61% | 37 | 4.91% |
| David S. Tatel (1994–Present) | 700 | 38 | 5.43% | 15 | 2.14% |
| Thomas B. Griffith (2005–Present) | 691 | 26 | 3.76% | 9 | 1.30% |
| Merrick Garland (1997–Present) | 610 | 11 | 1.80% | 6 | 0.98% |

**Source:** Congressional Research Service.

**Notes:** To generate this table, a search was conducted over the indicated date range using the LEXIS database for all *reported* D.C. Circuit decisions (i.e., published in the *Federal Reporter*), including any reported per curiam denials of petitions for rehearings en banc. (Including unreported cases would introduce thousands of additional cases, as LEXIS includes short, unreported per curiam denials of rehearing motions in its database). The "Total Number of Cases Resulting in Reported Opinions" was determined by using the LEXIS document segment term JUDGES. Dissents were determined by using the LEXIS document segment term DISSENTBY. Concurrences were determined by using the LEXIS document segment term CONCURBY. The search includes in the total number of reported cases column at least one sole-judge order by Judge Kavanaugh, *Baker & Hostetler LLP v. United States*, 471 F.3d 1355 (D.C. Cir. 2006), for which it would be unusual for a dissent to occur. The search excludes any cases in which a judge sat by designation on another circuit or a three-judge district court panel.

*Date Range and Judge Limitations*: This search was conducted on August 21, 2018. To ensure the search reflected a consistent and similar caseload, the search was limited to opinions written by judges who were on active status as circuit judges during the entire period in which Judge Kavanaugh served, from the date after he assumed office as a D.C. Circuit Judge (May 31, 2006) through the date of his nomination to the Supreme Court (July 9, 2018).

***As reported on LEXIS.** The table is dependent on the coding of the LEXIS database and does *not* necessarily provide precise numbers for D.C. Circuit opinions authored by Judge Kavanaugh or his colleagues. For a complete listing of Judge Kavanaugh's authored opinions, including including three-judge district court opinions or unreported opinions not included in this table, see CRS Report R45269, *Judicial Opinions of Judge Brett M. Kavanaugh*, coordinated by Michael John Garcia.

**Table A-2. Majority Opinions That Drew Dissents and Concurrences on the D.C. Circuit***

Listed by Percentage of Dissents Generated for the Period May 31, 2006 through July 9, 2018

| Author of Majority Opinion | Total Number of Reported Majority Opinions Authored | Number of Reported Majority Opinions That Drew a Separate Opinion (Dissent or Concurrence) | Percentage of Authored Reported Majority Opinions Accompanied by a Separate Opinion | Number of Reported Majority Opinions That Drew a Dissent | Percentage of Authored Reported Majority Opinions Accompanied by a Dissent |
|---|---|---|---|---|---|
| ***Brett M. Kavanaugh (2006–Present)*** | ***192*** | ***47*** | ***24.48%*** | ***30*** | ***15.63%*** |
| David S. Tatel (1994–Present) | 207 | 47 | 22.71% | 29 | 14.01% |
| Thomas B. Griffith (2005–Present) | 187 | 41 | 21.93% | 25 | 13.37% |
| Judith W. Rogers (1994–Present) | 236 | 40 | 16.95% | 27 | 11.44% |
| Karen L. Henderson (1990–Present) | 240 | 40 | 16.67% | 23 | 9.58% |
| Merrick Garland (1997–Present) | 165 | 10 | 6.06% | 3 | 1.82% |

**Source:** Congressional Research Service.

**Notes:** To generate this table, a search was conducted over the indicated date range using the LEXIS database for all *reported* D.C. Circuit decisions (i.e., reported in Federal Reporter). (Including unreported cases would introduce thousands of additional cases, as LEXIS includes short, unreported per curiam denials of rehearing motions in its database). Because the table requires an author of an opinion to determine separate-opinion- and dissent-rate, per curiam opinions are not included in the table, including per curiam orders denying rehearing en banc. Also excluded from this list are any instances where the majority opinion author additionally issued a separate concurrence and no other judge wrote separately. The "Total Number of Majority Opinions Authored" was determined by using the LEXIS document segment term OPINIONBY. Dissents were determined by using the LEXIS document segment term DISSENTBY. Concurrences were determined by using the LEXIS document segment term CONCURBY.

*Date Range and Judge Limitations*: This search was conducted on August 21, 2018. To ensure the search reflected a consistent and similar caseload, the search was limited to majority opinions written by judges who were on active status as circuit judges during the entire period in which Judge Kavanaugh served, from the date after he assumed office as a D.C. Circuit judge (May 31, 2006) through the date of his nomination to the Supreme Court (July 9, 2018).

***As reported on LEXIS.** The table is dependent on the coding of the LEXIS database and does *not* necessarily provide precise numbers for D.C. Circuit opinions authored by Judge Kavanaugh or his colleagues. For a complete listing of Judge Kavanaugh's authored opinions, including including three-judge district court opinions or unreported opinions not included in this table, see CRS Report R45269, *Judicial Opinions of Judge Brett M. Kavanaugh*, coordinated by Michael John Garcia.

**Table A-3. Supreme Court Review of D.C. Circuit Cases in Which Judge Kavanaugh Joined or Authored an Opinion***

| D.C. Circuit Case | Judge Kavanaugh's Position | Supreme Court Decision | Supreme Court Vote |
|---|---|---|---|
| Opinions Authored or Joined by Judge Kavanaugh | | | |
| EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012) | **Authored majority opinion**, holding EPA rule related to air pollution crossing state lines exceeded Agency's authority under Clean Air Act. | **Reversed and remanded**, EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014) (concluding rule in question was permissible construction of Clean Air Act). | 6-2 |
| United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011) | **Joined per curiam opinion,** in part as to holding that criminal defendant bears burden of persuasion to show he withdrew from criminal conspiracy outside of statute-of-limitations period. | **Affirmed**, Smith v. United States, 568 U.S. 106 (2013) (concluding defendant bears burden of establishing withdrawal from charged conspiracy). | 9-0 |
| Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007) | **Joined majority opinion,** holding district court lacked jurisdiction to consider habeas corpus petition filed by American citizen held overseas in custody of multi-national military force. | **Vacated and remanded**, Munaf v. Geren, 553 U.S. 674 (2008) (concluding courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens held overseas in custody of multi-national military force). | 9-0 |
| Dissenting Opinions Authored by Judge Kavanaugh | | | |
| Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc) | **Authored dissent from en banc majority**, concluding that the federal government, when holding pregnant unlawful immigrant minor in custody, may permissibly seek to transfer her to an immigration sponsor before she decides whether to obtain an abortion. | **Vacated and remanded**, Azar v. Garza, 138 S. Ct. 1790 (2018) (concluding case became moot as a result of plaintiff's voluntary, unilateral actions because minor had obtained an abortion while appellate review was pending). | 9-0 |
| Wesby v. District of Columbia, 816 F.3d 96 (D.C. Cir. 2016) (denying reh'g en banc) | **Authored dissent from denial of rehearing en banc**, concluding two police officers who arrested a group of trespassers were entitled to qualified immunity regardless of whether they actually had probable cause to make arrests. | **Reversed and remanded**, District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (holding that police officers had probable cause to arrest plaintiffs and were entitled to qualified immunity). | 9-0 |

| D.C. Circuit Case | Judge Kavanaugh's Position | Supreme Court Decision | Supreme Court Vote |
|---|---|---|---|
| Priests for Life v. HHS, 808 F.3d 1 (D.C. Cir. 2015) (denying reh'g en banc) | **Authored dissent from denial of rehearing en banc**, concluding that the Religious Freedom Restoration Act's requirement for religious organizations to submit a form to avoid having to comply with the requirement to provide employees with access to cost-free contraception was not the government's least restrictive means of furthering its compelling interest in facilitating access to contraception. | **Vacated and remanded**, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (vacating and remanding case to allow courts of appeals address arguments made by parties in response to Supreme Court's order for supplemental briefing). | 8-0 |
| White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) | **Authored opinion concurring in part and dissenting in part** rejecting majority's conclusion that EPA permissibly ignored cost considerations when assessing propriety of regulating certain electric utilities. | **Reversed and remanded**, Michigan v. EPA, 135 S. Ct. 2699 (2015) (holding EPA unreasonably deemed cost irrelevant when considering whether to regulate electric utilities in question). | 5-4 |
| Coal. for Responsible Regulation, Inc. v. EPA, 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012) (denying reh'g en banc) | **Authored dissent from denial of rehearing en banc**, concluding that EPA interpreted term "air pollutant" too broadly when promulgating certain greenhouse gas regulations. | **Affirmed in part and reversed in part**, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) (concluding that EPA's interpretation of "air pollutant" was too broad). | 5-4 |
| United States v. Jones, 625 F.3d 766 (D.C. Cir. 2010) (denying reh'g en banc) | **Authored dissent from denial of rehearing en banc**, concluding that the D.C. Circuit sitting en banc should have considered Fourth Amendment implications of physically intruding upon suspect's personal property by installing tracking device on suspect's vehicle. | **Affirmed**, United States v. Jones, 565 U.S. 400 (2012) (holding that attaching tracking device to vehicle constituted "search" within the meaning of Fourth Amendment because government "physically occupied" defendant's property for the purpose of obtaining information). | 9-0 |
| Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (PCAOB), 537 F.3d 667 (D.C. Cir. 2008) | **Authored dissent** concluding that: (1) dual for-cause limitations on removal of members of independent agency violated constitutional separation-of-powers principles; and (2) process for appointing agency heads violated Appointments Clause. | **Affirmed in part, reversed in part, and remanded**, Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010) (holding dual for-cause removal restrictions violated separation-of-powers principles, but offending provisions were severable thereby mitigating any potential Appointments Clause issues). | 5-4 |

**Source:** Congressional Research Service.

**Notes:** This table lists Supreme Court cases that reviewed D.C. Circuit opinions authored or joined by Judge Kavanaugh or where Judge Kavanaugh authored an opinion dissenting, in whole or in part, from the circuit panel's controlling opinion or a denial of rehearing en banc. With the exceptions noted, the table includes any D.C. Circuit panel or en banc opinion written or joined by Judge Kavanaugh that was, at least in part, reviewed in a written opinion by the Supreme Court. It also includes cases reviewed by the Supreme Court in which Judge

Kavanaugh wrote or joined an opinion concurring in or dissenting from the D.C. Circuit's decision not to rehear a case en banc. Written opinions vacating lower court rulings on procedural grounds that are directly aimed at preventing a decision from "spawning" unforeseen "legal consequences," *see, e.g.,* Camreta v. Greene, 563 U.S. 692, 713 (2011) (discussing vacatur under *United States v. Munsingwear Corp*., 340 U.S. 36 (1950)), are included in the table. As a result, cases like *Garza* and *Priests for Life,* which vacated lower court rulings in formal written opinions by the Court, are contained in the table. The table does not include cases in which the nominee voted in favor of rehearing the case en banc but did not author or join a written opinion, such as *Zivotofsky v. Secretary of State*, 610 F.3d 84 (D.C. Cir. 2010). Nor does the table include: (1) short orders of the Supreme Court, such as grants or denials of petitions for a writ of certiorari, or orders summarily and simultaneously granting certiorari, vacating the ruling, and remanding the case for further proceedings; (2) temporary orders of the Supreme Court, such as stays of D.C. Circuit orders; or (3) summary affirmances of opinions authored or joined by Judge Kavanaugh. Thus, the table does not include *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), *aff'd*, 565 U.S. 1104 (2012), or *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (Kavanaugh, J.), *aff'd*, 561 U.S. 1040 (2010), because the Supreme Court summarily affirmed (i.e., in a short order) both decisions without issuing a written opinion.

***As reported on LEXIS**. This table is dependent on the coding of the LEXIS database.

**Table A-4. Supreme Court Opinions (Majority, Concurrences, and Dissents) Citing Judge Kavanaugh's *Separate* Opinions***

Listed by Supreme Court Justice

| Supreme Court Opinion | Authoring Justice's Position | Citation(s) to Judge Kavanaugh |
|---|---|---|
| Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (Roberts, C.J.) | Majority opinion by Chief Justice Roberts held Alien Tort Statute (ATS) did not apply to violations of law of nations occurring outside United States. | "Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. *See Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 77–78 (C.A.D.C.2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom)."<br>*Kiobel*, 569 U.S. at 124. |
| Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010) (Roberts, C.J.) | Majority opinion by Chief Justice Roberts held Sarbanes-Oxley Act's "dual for-cause" limitation on removal of members of Public Company Account Oversight Board (PCAOB) violated separation-of-powers principles, but appointment of members of Board by SEC did not violate Appointments Clause. | "In a system of checks and balances, '[p]ower abhors a vacuum,' and one branch's handicap is another's strength."<br>*Free Enter. Fund*, 561 U.S. at 500 (quoting Free Enter. Fund v. PCAOB, 537 F.3d 667, 695 n.4 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).<br><br>"As Judge Kavanaugh noted in dissent below: 'Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency.'"<br>*Id.* at 505–06 (quoting *Free Enter. Fund*, 537 F.3d, at 699 (Kavanaugh, J., dissenting)). |
| Michigan v. EPA, 135 S. Ct. 2699 (2015) (Scalia, J.) | Majority opinion by Justice Scalia held EPA unreasonably deemed cost irrelevant when it decided to regulate power plants. | "One does not need to open up a dictionary in order to realize the capaciousness of this phrase. In particular, 'appropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'"<br>*Michigan*, 135 S. Ct. at 2707 (quoting White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part)). |

| Supreme Court Opinion | Authoring Justice's Position | Citation(s) to Judge Kavanaugh |
|---|---|---|
| Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) (Scalia, J.) | Majority opinion by Justice Scalia held EPA exceeded its authority in subjecting stationary sources of pollution to certain permitting requirements based solely on greenhouse gas emissions; however, EPA reasonably required sources that would need permits based on emission of conventional pollutants to comply with "best available control technology" for greenhouse gases. | "Judge Kavanaugh argued below that it would be plausible for EPA to read 'any air pollutant' in the PSD context as limited to the six NAAQS pollutants. . . . We do not foreclose EPA or the courts from considering [this] construction[ ] in the future, but we need not do so today."<br>*Util. Air*, 134 S. Ct. at 2442 n.6 (quoting Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *15–18 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc)).<br><br>"Agencies are not free to 'adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'"<br>*Id.* at 2446 (quoting *Coal. for Responsible Regulation*, 2012 U.S. App. LEXIS 25997, at *16 (Kavanaugh, J., dissenting from denial of rehearing en banc)). |
| Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) (Scalia, J.) | Majority opinion by Justice Scalia held plaintiff fell within class of plaintiffs authorized to sue for false advertising under Lanham Act as its interests fell within "zone of interests" protected by statute and its injuries were proximately caused by defendant's actions. | The terms statutory standing and prudential standing are "misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.,* the court's statutory or constitutional *power* to adjudicate the case.'"<br>*Lexmark Int'l*, 134 S. Ct. at 1388 (quoting Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 642–43 (2002)) (citing Grocery Mfrs. Assn. v. EPA, 693 F.3d 169, 183–85 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)). |
| Silvester v. Becerra, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari) | In dissent from denial of certiorari, Justice Thomas argued Court should have granted review in case involving Second Amendment handgun law because lower courts failed to give Second Amendment right sufficient protection. | "[T]he Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny. Several jurists disagree with this approach, suggesting that courts should instead ask whether the challenged law complies with the text, history, and tradition of the Second Amendment."<br>*Silvester*, 138 S. Ct. 945, 947–48 (first citation omitted) (citing, among other opinions, Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). |
| Luis v. United States, 136 S. Ct. 1083 (2016) (Thomas, J., concurring in judgment) | In opinion concurring in the judgment, Justice Thomas concluded pre-trial restraint of legitimate assets that defendant needed to obtain counsel violated Sixth Amendment. | "Pretrial freezes of untainted forfeitable assets did not emerge until the late 20th century. '[T]he lack of historical precedent' for the asset freeze here is '[p]erhaps the most telling indication of a severe constitutional problem.'"<br>*Luis*, 136 S. Ct. at 1099 (2016) (quoting Free Enter. Fund v. PCAOB, 561 U.S. 477, 505–06 (2010) (quoting Free Enter. Fund v. PCAOB, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting))). |

| Supreme Court Opinion | Authoring Justice's Position | Citation(s) to Judge Kavanaugh |
|---|---|---|
| Jackson v. City & Cty. of San Francisco, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari) | In dissent from denial of certiorari, Justice Thomas, joined by Justice Scalia, argued Court should have granted review in case involving Second Amendment handgun law because lower courts failed to give Second Amendment right sufficient protection. | "Since our decision in *Heller,* members of the Courts of Appeals have disagreed about whether and to what extent the tiers-of-scrutiny analysis should apply to burdens on Second Amendment rights.<br>*Compare* Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) ('We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny'), *with id.* at 1271 (Kavanaugh, J., dissenting) ('In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny')." *Jackson*, 135 S. Ct. at 2801 (Thomas, J., dissenting from denial of certiorari). |

**Source:** Congressional Research Service.

**Notes:** Table was compiled by searching the text of all Supreme Court opinions for the indicated time period in LEXIS for the phrase "Kavanaugh, J." or "Judge Kavanaugh," and reports all Supreme Court citations to Judge Kavanaugh's separate opinions (i.e., dissenting or concurring in whole or in part) that appeared in this search. To avoid ambiguity, the table includes every Supreme Court case involving a citation to Judge Kavanaugh's separate opinions, regardless of the nature of the citation. Because majority opinions are typically not cited with explicit reference to the authoring judge, this table does not include citations to Judge Kavanaugh's majority opinions.

***As reported on LEXIS.** The table is dependent on the coding of the LEXIS database.

**Table A-5. Supreme Court Opinions (Majority, Concurrences, and Dissents) Citing D.C. Circuit Judges' *Separate* Opinions***

For Separate Lower Court Opinions Issued Between May 31, 2006 and July 9, 2018

| D.C. Circuit Judge | Number of Times Separate Opinions Have Been Cited by Supreme Court | Supreme Court Citations to D.C. Circuit Judge |
|---|---|---|
| Brett M. Kavanaugh (2006–Present) | 8 | Silvester v. Becerra, 138 S. Ct. 945, 947–48 (2018) (Thomas, J., dissenting from denial of certiorari)<br>Luis v. United States, 136 S. Ct. 1083, 1099 (2016) (Thomas, J., concurring in judgment)<br>Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015) (Scalia, J.) (citing D.C. Circuit opinion below)<br>Jackson v. City & Cty. of S.F., 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari)<br>Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 n.6, 2446 (2014) (Scalia, J.)<br>Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 n.4 (2014) (Scalia, J.)<br>Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (Roberts, C.J.)<br>Free Enter. Fund v. PCAOB, 561 U.S. 477, 488, 500, 505, 507 n.10 (2010) (Roberts, C.J.) |
| Judith W. Rogers (1994–Present) | 4 | EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 158–99, 1601 (2014) (Ginsburg, J.)<br>Kiyemba v. Obama, 563 U.S. 954, 955 (2011) (Breyer, J., statement respecting certiorari)<br>Noriega v. Pastrana, 559 U.S. 917, 925 (2010) (Thomas, J., dissenting from denial of certiorari)<br>Boumediene v. Bush, 549 U.S. 1328, 1331, 1333 (2007) (Breyer, J., dissenting) |
| David S. Tatel (1994–Present) | 3 | Zivotovsky v. Kerry, 135 S. Ct. 2076, 2091, 2095 (2015) (Kennedy, J.)<br>Veasey v. Perry, 135 S. Ct. 9, 12 (2014) (Ginsburg, J., dissenting from motion for stay)<br>United States v. Home Concrete & Supply, 566 U.S. 478, 500–01 (2012) (Kennedy, J., dissenting) |
| Karen L. Henderson (1990–Present) | 2 | Collins v. Virginia, 138 S. Ct. 1663, 1678 n.5 (2018) (Thomas, J., concurring)<br>Boumediene v. Bush, 553 U.S. 723, 789 (2008) (Kennedy, J.) |
| Thomas B. Griffith (2005–Present) | 1 | Veasey v. Perry, 135 S. Ct. 9, 12 (2014) (Ginsburg, J., dissenting from motion for stay) |
| Merrick Garland (1997–Present) | 0 | |

**Source:** Congressional Research Service.

**Notes:** Table was compiled by searching the text of all Supreme Court opinions in LEXIS during the indicated time period for "[judge name], J." or "[judge name], C.J." or "Judge [name]" and reports all Supreme Court citations to a particular judge's *separate* opinion (i.e., dissenting or concurring in whole or in part) which appeared in this search. To avoid ambiguity, the table includes every Supreme Court case with a citation to a listed judge's separate opinion, regardless of the nature of the citation. Because majority opinions are typically

not cited with explicit reference to the authoring judge, this table does not include citations to the listed judges' majority opinions. To ensure consistency, the cited lower court opinion had to be published within the period in which Judge Kavanaugh served, from the date after he assumed office as a D.C. Circuit judge (May 31, 2006) through the date of his nomination to the Supreme Court (July 9, 2018). *See also supra* note 114.

***As reported on LEXIS.** The table is dependent on the coding of the LEXIS database.

**Table A-6. Supreme Court Opinions (Majority, Concurrences, and Dissents) Citing Federal Appellate Court Judges' *Separate* Opinions***

For Separate Lower Court Opinions Issued Between May 31, 2006 and July 9, 2018

| Circuit Judge | Number of Times Separate Opinions Have Been Cited by Supreme Court | Supreme Court Citations to Circuit Judge |
|---|---|---|
| Jeffrey S. Sutton, 6th Circuit (2003–Present) | 13 | Rowan Cty. v. Lund, 138 S. Ct. 2564, 2566 n.1 (2018) (Thomas, J., dissenting from denial of certiorari) |
| | | Epic Sys. Co. v. Lewis, 138 S. Ct. 1612, 1625–26, 1630 (2018) (Gorsuch, J.); *id.* at 1638 (Ginsburg, J., dissenting) |
| | | CNH Indus. N.V. v. Reese, 138 S. Ct. 761, 765 (2018) (per curiam) |
| | | Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017) (Thomas, J.) |
| | | Sheriff v. Gillie, 136 S. Ct. 1594, passim (2016) (Ginsburg, J.) |
| | | Elonis v. United States, 135 S. Ct. 2001, 2008 (2015) (Roberts, C.J.) |
| | | Kalamazoo Cty. Rd. Comm'n v. Deleon, 135 S. Ct. 783, 784 (2015) (Alito, J., dissenting from denial of certiorari) |
| | | Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting denial of certiorari) |
| | | Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 326 (2014) (Roberts, C.J., concurring) |
| | | Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 608 (2012) (Ginsburg, J., concurring in part and dissenting in part) |
| | | Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 63, 67 (2011) (Thomas, J.) |
| | | Skinner v. Switzer, 562 U.S. 521, 532 (2011) (Ginsburg, J.) |
| | | Bobby v. Bies, 556 U.S. 825, 829, 834 (2009) (Ginsburg, J.) |
| ***Brett M. Kavanaugh, D.C. Circuit (2006–Present)*** | 8 | Silvester v. Becerra, 138 S. Ct. 945, 947–48 (2018) (Thomas, J., dissenting from denial of certiorari) |
| | | Luis v. United States, 136 S. Ct. 1083, 1099 (2016) (Thomas, J., concurring in judgment) |
| | | Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015) (Scalia, J.) |
| | | Jackson v. City & Cty. of S.F., 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari) |
| | | Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 n.6, 2446 (2014) (Scalia, J.) |
| | | Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 n.4 (2014) (Scalia, J.) |
| | | Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (Roberts, C.J.) |
| | | Free Enter. Fund v. PCAOB, 561 U.S. 477, 488, 500, 505, 507 n.10 (2010) (Roberts, C.J.) |

| Circuit Judge | Number of Times Separate Opinions Have Been Cited by Supreme Court | Supreme Court Citations to Circuit Judge |
|---|---|---|
| Timothy B. Dyk, Federal Circuit (2000–Present) | 7 | Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting)<br>Perry v. MSPB, 137 S. Ct. 1975, 1985 n.7, 1987 (2017) (Ginsburg, J.)<br>Matal v. Tam, 137 S. Ct. 1744, 1754–55 (2017) (Alito, J.)<br>Impression Prods. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1531 (2017) (Roberts, C.J.)<br>Alice Corp. Pty. Ltd. v. CLS Bank, Int'l, 134 S. Ct. 2347, 2360 (2014) (Sotomayor, J., concurring)<br>Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 411–12 (2012) (Kagan, J.)<br>Bilski v. Kappos, 561 U.S. 593, *passim* (2010) (Kennedy, J.) |
| Pauline Newman, Federal Circuit (1984–Present) | 7 | SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1354 (2018) (Gorsuch, J.)<br>Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2140 (2016) (Breyer, J.)<br>Commil USA, LLC v. Cisco Sys., Inc., 135 S. Ct. 1920, 1926, 1929 (2015) (Kennedy, J.)<br>Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347, 2353–54 (2014) (Thomas, J.)<br>Limelight Networks, Inc. v. Akami Techs., Inc., 134 S. Ct. 2111, 2117 (2014) (Alito, J.)<br>Bilski v. Kappos, 561 U.S. 593, 601, 618 (2010) (cited in both majority opinion by Kennedy, J. and concurrence by Stevens, J.)<br>John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 147 (2008) (Ginsburg, J., dissenting) |
| James L. Dennis, 5th Circuit, (1995–Present) | 6 | Trevino v. Davis, 138 S. Ct. 1793, 1796 (2018) (Sotomayor, dissenting from denial of certiorari)<br>Wessinger v. Vannoy, 138 S. Ct. 952, 954 (2018) (Sotomayor, dissenting from denial of certiorari)<br>Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017) (per curiam)<br>Jordan v. Fisher, 135 S. Ct. 2647, 2650-51 (2015) (Sotomayor, dissenting from denial of certiorari)<br>Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2014) (per curiam)<br>Haynes v. Thaler, 133 S. Ct. 639, 639 (2012) (Sotomayor, J., respecting the grant of stay of execution) |
| Jerry E. Smith, 5th Circuit (1987–Present) | 6 | Abbott v. Perez, 138 S. Ct. 2305, 2316-17 nn.5, 9 (2018) (citing dissent in three-judge W.D. Tex. panel opinion)<br>Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013) (Kennedy, J.)<br>Henderson v. United States, 568 U.S. 266, 282 (2013) (Scalia, J., dissenting)<br>Perry v. Perez, 565 U.S. 388, 392 (2012) (per curiam)<br>Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 998 n.3 (2011) (Thomas, J., dissenting from denial of certiorari)<br>Regalado Cuellar v. United States, 553 U.S. 550, 555–56, 565–66 (2008) (Thomas, J.) |

| Circuit Judge | Number of Times Separate Opinions Have Been Cited by Supreme Court | Supreme Court Citations to Circuit Judge |
|---|---|---|
| Carlos T. Bea, 9th Circuit (2003–Present) | 5 | Arizona v. United States, 567 U.S. 387, 394 (2012) (Kennedy, J.)<br>Cavazos v. Smith, 565 U.S. 1, 8 (2011) (per curiam)<br>Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 733 n.4 (2011) (Roberts, C.J.)<br>Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (Scalia, J.)<br>Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 608 (2009) (Stevens, J.) |
| Alice M. Batchelder, 6th Circuit (1991–Present) | 4 | Silvester v. Becerra, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari)<br>Burt v. Titlow, 571 U.S. 12, 17, 23 (2013) (Alito, J.)<br>Metrish v. Lancaster, 569 U.S. 351, 357 (2013) (Ginsburg, J.)<br>Clapper v. Amnesty Int'l USA, 568 U.S. 398, *passim* (2013) (Alito, J.) |
| Marsha S. Berzon, 9th Circuit (2000–Present) | 4 | Kisela v. Hughes, 138 S. Ct. 1148, 1159 (2018) (Sotomayor, J., dissenting)<br>Descamps v. United States, 570 U.S. 254, 266 (2013) (Kagan, J.)<br>Premo v. Moore, 562 U.S. 115, 131 (2011) (Kennedy, J.)<br>Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 662 (2007) (Alito, J.); *id*. at 685 (Stevens, J., dissenting) |
| Dennis G. Jacobs, 2d Circuit (1992–Present) | 4 | Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 776 (2018) (Ginsburg, J.)<br>Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (Scalia, J.)<br>Clapper v. Amnesty Int'l USA, 568 U.S. 398, 415 n.6 (2013) (Alito, J.)<br>Ricci v. DeStefano, 557 U.S. 557, 576 (2009) (Kennedy, J.) |
| Diane P. Wood, 7th Circuit (1995–Present) | 4 | Animal Sci. Prods. v. Hebei Welcome Pharm., Co., 138 S. Ct. 1865, 1873 (2018) (Ginsburg, J.)<br>Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1640–41 (2018) (Ginsburg, J., dissenting)<br>Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 691 (2010) (Ginsburg, J.)<br>Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 188–89 (2008) (Stevens, J.) |

**Source:** Congressional Research Service.

**Notes:** Table was compiled by searching the text of all Supreme Court opinions in LEXIS during the indicated time period for "[judge name], J." or "[judge name], C.J." or "Judge [name]" and reports all Supreme Court citations to each judge's separate opinions (i.e., dissenting or concurring in whole or in part) that appeared in this search, including separate opinions authored by these judges while sitting by designation on other courts (e.g., Judge Jerry E. Smith sitting by designation on the U.S. District Court for the Western District of Texas). To avoid ambiguity, the table includes every Supreme Court case involving a citation to a listed judge's separate opinion, regardless of the nature of the citation. Because majority opinions are typically not cited with explicit reference to the authoring judge, this table does not include citations to any of the listed judges' majority opinions. To ensure consistency, the cited lower court opinion had to be published within the period in which Judge Kavanaugh served, from the date after he assumed office as a D.C. Circuit judge (May 31, 2006) through the date of his nomination to the Supreme Court (July 9, 2018). *See also supra* note 114.

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## Author Information

Andrew Nolan, Coordinator
Section Research Manager

Caitlain Devereaux Lewis, Coordinator
Legislative Attorney

Christine J. Back
Legislative Attorney

Valerie C. Brannon
Legislative Attorney

Jared P. Cole
Legislative Attorney

Todd Garvey
Legislative Attorney

Ben Harrington
Legislative Attorney

Victoria L. Killion
Legislative Attorney

Stephen P. Mulligan
Legislative Attorney

Sarah Herman Peck
Legislative Attorney

Jay B. Sykes
Legislative Attorney

Linda Tsang
Legislative Attorney

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