



CONSTITUTIONAL
ACCOUNTABILITY CENTER



September 13, 2018

The Honorable Charles E. Grassley
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
U.S. Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I wrote to you last week on behalf of the Constitutional Accountability Center (“CAC”) to express concerns about Judge Brett Kavanaugh’s nomination to the United States Supreme Court.¹ CAC is a non-profit think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution’s text, history, and values. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests.

As litigators, and as defenders of the Constitution and the rule of law, CAC has a vested interest in nominations to the federal courts; and there are no nominations more important than those to the Supreme Court, the one court designed by the Framers to be the final governmental arbiter of constitutional liberties and protections. The American people are entitled to Supreme Court Justices who will not only safeguard the rights and liberties protected by the Constitution, but also serve as an impartial, independent check on the President and Congress. It is with these considerations in mind that we reviewed the nomination of Judge Brett Kavanaugh.

When President Trump nominated Judge Kavanaugh, he and supporters of the nomination touted Judge Kavanaugh as an originalist. To live up to the name, originalists—and CAC considers itself among them—must be faithful to the text, history, and values of the whole Constitution, including the many Amendments that have, over time, pushed our country further along the arc of progress. These Amendments, among other things, removed the stain of slavery from our nation’s charter, guaranteed equal protection of the law to all persons, guaranteed the right to vote free from discrimination based on race and gender, and eradicated the poll tax so that the right to vote does not depend on a person’s economic status. To have a justice on the Supreme Court who takes seriously this arc of progress which is written into the words of our Constitution and uses it as his or her guiding principle in deciding the cases of national import that reach the Supreme Court is something CAC would celebrate—even if that nominee is not necessarily the one that we would have chosen. To determine whether Judge Kavanaugh was such a nominee, we undertook a thorough examination of his record and watched closely his statements during his confirmation hearings.

¹ See, Letter from CAC to Chairman Grassley & Ranking Member Feinstein on the Nomination of Judge Brett Kavanaugh to the U.S. Supreme Court (Sept. 3, 2018), *available at* <https://www.theusconstitution.org/wp-content/uploads/2018/09/CAC-Pre-Hearing-Testimony.pdf>.

Unfortunately, after studying Judge Kavanaugh's record on constitutional issues, we became concerned about what that record suggested—specifically, that he might be a selective originalist who would turn a blind eye to the Constitution's text, history, and values when construing the Constitution's many broadly worded guarantees of equality and individual rights.² In CAC's view, a selective originalist gives pride of place only to parts of the Constitution, while ignoring the latter, more progressive Amendments that prohibit states from infringing on individual rights, protect substantive fundamental rights and equality, and give Congress broad powers to help realize these constitutional promises. This runs contrary to CAC's belief that constitutional interpretation should begin with a careful analysis of constitutional text and history, including the text and history of parts of the Constitution that enshrine progressive values.

We also studied Judge Kavanaugh's record on business issues, and that study raised further concerns. Our analysis demonstrated Judge Kavanaugh routinely sided with corporations and employers, and against employees, consumers, and others, even when it required him to distort the text of the law and ignore binding precedent.³ We were worried, that if confirmed, Judge Kavanaugh would continue the Supreme Court's trend toward improperly favoring the interests of big business over all Americans.⁴

Judge Kavanaugh's duty to be forthright and candid during his confirmation hearing was particularly important because of the extraordinary actions of the President who nominated him. President Donald Trump established litmus tests for his nominations to the Supreme Court, made numerous comments disparaging federal judges who do not rule in his favor, abused the power of his office, and is now an unindicted alleged co-conspirator in a felony committed by his personal attorney. Consequently, there was a cloud of suspicion before Judge Kavanaugh was even nominated, and thus a profound burden placed on him to demonstrate that, if confirmed, he would serve as an independent check on the elected branches when they violate the law, including limits on corruption in the executive branch; would not be a rubber stamp for the U.S. Chamber of Commerce and other big business interests; and would be open-minded, fair, and guided by the text, history, and values of the whole Constitution—not just by the parts he prefers, or by a right-wing political agenda.

Unfortunately, during his confirmation hearing, Judge Kavanaugh obfuscated his views and failed to assuage our concerns about his willingness to enforce the whole Constitution. Furthermore, he provided answers that could not be squared with the text and history of the Constitution. There is too much doubt that Judge Kavanaugh will be faithful to the whole Constitution or will treat all Americans fairly when he's asked to weigh their legal rights against the interests of big business. **As a result, CAC cannot endorse the confirmation of Judge Kavanaugh to the U.S. Supreme Court and urges the Senate to vote NO on his confirmation.**

² David H. Gans, *Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?* (Aug. 2018), <https://www.theusconstitution.org/wp-content/uploads/2018/08/Supreme-Court-Nominee-Brett-Kavanaugh-Will-He-Respect-The-Whole-Constitution.pdf>.

³ Ashwin P. Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (Aug. 2018), <https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf>.

⁴ Our ongoing study of the U.S. Chamber of Commerce's success before the Supreme Court has shown that the Court's pro-business majority has ruled in favor of the Chamber in 70% of the merits cases in which it has filed since Chief Justice John Roberts' confirmation to the Supreme Court in 2005. See, *Corporations and the Supreme Court: CAC's long-term study of the U.S. Chamber of Commerce and its record before the Roberts Court*, <https://www.theusconstitution.org/series/chamber-study/> (last visited Sept. 12, 2018).

1. AN ORIGINALIST?

As previously stated, an originalist must be faithful to the text, history, and values of the whole Constitution, including the Amendments that have, over time, pushed our country further along the arc of progress. During his opening statement, Judge Kavanaugh described his judicial philosophy as follows: “a judge must interpret statutes . . . [and] the [C]onstitution as written, informed by history and tradition and precedent.”⁵ While he did not specifically note the importance of the Amendments in discussing his method of legal interpretation, he did later exalt the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—deeming them “the most important amendments . . . in the Constitution in many respects because [they] brought the promise of racial equality that had been denied at the time of the original Constitution into the text of the Constitution.”⁶ CAC could not agree more.

Although Judge Kavanaugh has described himself as an originalist,⁷ his pre-hearing record, as we have shown, raises concerns about whether he will enforce the text, history, and values of the whole Constitution. Regrettably, Judge Kavanaugh’s testimony at his confirmation hearing did not dispel those concerns. While Judge Kavanaugh, at times, gave excellent answers to questions about certain constitutional provisions and constitutional precedents of the Supreme Court, his unwillingness to address other provisions and cases heightened the concerns about his fidelity to the entire Constitution.

Not surprisingly, a number of Senators sought to elicit Judge Kavanaugh’s jurisprudential views of landmark Supreme Court rulings protecting fundamental rights. This is a legitimate line of questioning of a Supreme Court nominee, and recent nominees to the Court have regularly answered such questions.⁸ But in response to Senators’ questions about some of the most important constitutional rulings by the Court in the past 65 years, Judge Kavanaugh was very selective in his replies, agreeing with some, but refusing to answer questions about others. There was no principled rule separating the cases he praised, and those he refused to discuss.

For example, when asked by Senator John Cornyn about cases in which the Supreme Court overturned precedent, Judge Kavanaugh responded with *Brown v. Board of Education*,⁹ which overturned *Plessy v. Ferguson*.¹⁰ Judge Kavanaugh testified that “*Plessy* was wrong the day it was decided. It was inconsistent with text and meaning of the 14th Amendment which guaranteed equal protection.”¹¹ According to him, *Brown* was “the single greatest moment in Supreme Court history”;¹² he found the opinion to be both “inspirational” and “powerful”;¹³ and he unequivocally declared the decision to be “correct.”¹⁴ Indeed, he went even further, rightfully

⁵ Politico Staff, *Full text: Brett Kavanaugh confirmation hearing opening statement*, POLITICO (Sept. 4, 2018, 4:49 PM ET), <https://www.politico.com/story/2018/09/04/full-text-brett-kavanaugh-confirmation-hearing-opening-statements-806420>.

⁶ *Confirmation Hearing on the Nomination of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 5, 2018) [hereinafter *September 5 Hearings*], (statement of Judge Kavanaugh in conversation with Sen. Cornyn), available at <https://www.youtube.com/watch?v=x9fHsoqAkLU>.

⁷ *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Lee) (statement of Judge Kavanaugh in conversation with Sen. Kennedy).

⁸ See *infra* at notes 24, 25.

⁹ 347 U.S. 483 (1954).

¹⁰ 163 U.S. 537 (1896).

¹¹ *September 5 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Cornyn).

¹² *Id.*

¹³ *Id.*

saying that *Brown* merely “corrected [*Plessy*] on paper. It’s still decades and we’re still seeking to achieve racial equality. The long march for racial equality is not over.”¹⁵

We appreciate this recognition, particularly given that several of President Trump’s nominees to lower court federal judgeships have refused to agree with the holding of this seminal 1954 Supreme Court civil rights case.¹⁶

However, Judge Kavanaugh’s references to *Brown* stand in sharp contrast to his refusal or failure to state whether he agreed with, or thought the Court got the text and history of the Constitution right, in *Griswold v. Connecticut*,¹⁷ *Eisenstadt v. Baird*,¹⁸ *Roe v. Wade*,¹⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁰ *Lawrence v. Texas*,²¹ and *Obergefell v. Hodges*.²² In these cases, the Supreme Court held that the Constitution protects fundamental rights going to the heart of personal liberty and autonomy—reproductive freedom (including the right to use contraceptives and the right to choose abortion), sexual intimacy between consenting adults, and marriage equality for same sex partners. Judge Kavanaugh’s refusal to affirm his agreement with any of these foundational rulings makes him an outlier among recent Supreme Court nominees.

When asked about these cases, Judge Kavanaugh merely described them as precedents of the Supreme Court,²³ which, of course, is also true of *Brown*. Even Chief Justice John Roberts, at his own Supreme Court confirmation hearing, testified that he agreed with the Court’s ruling in *Griswold*,²⁴ while Justice Samuel Alito, at his hearing, stated that he agreed with the ruling in *Eisenstadt*.²⁵ But Judge Kavanaugh would not state his agreement with any of the cases that make up an important fabric of American law: the last half century of constitutional precedents beginning with *Griswold* that protect the full scope of liberty for all in accordance with constitutional text and history.

Furthermore, in discussing some legal issues, he has been very specific in his language, using potential signals—dog whistles—to likeminded conservatives aware of what such terms connote: “racial spoils system” for

¹⁴ *Confirmation Hearing on the Nomination of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 6, 2018) [hereinafter *September 6 Hearings*], (statement of Judge Kavanaugh in conversation with Sen. Klobuchar), available at <https://www.youtube.com/watch?v=4vGW0oEilPg>.

¹⁵ *September 5 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Cornyn).

¹⁶ Perry Grossman and Dahlia Lithwick, *Mimes in Robes: Trump’s judicial nominees are now refusing to answer any questions about what it is they actually believe*, *Slate* (Apr. 26, 2018, 5:46 PM), <https://slate.com/news-and-politics/2018/04/why-it-matters-that-trumps-judicial-nominees-refuse-to-answer-questions-about-brown-v-board.html>.

¹⁷ 381 U.S. 479 (1965).

¹⁸ 405 U.S. 438 (1972).

¹⁹ 410 U.S. 113 (1973).

²⁰ 505 U.S. 833 (1992).

²¹ 539 U.S. 558 (2003).

²² 135 S. Ct. 2584 (2015).

²³ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Harris); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Feinstein); *September 6 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Coons).

²⁴ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 207 (Sept. 13, 2005) (statement of Chief Justice John G. Roberts, Jr. in conversation with Sen. Kohl).

²⁵ *Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary*, 109th Cong. 318 (Jan. 10, 2006) (statement of Justice Samuel A. Alito in conversation with Chairman Specter).

affirmative action,²⁶ “abortion on demand” for abortion,²⁷ “abortion inducing drugs” for birth control,²⁸ and “existing precedent” for precedent that could be overturned.²⁹

As we noted in our issue brief *Supreme Court Nominee Brett Kavanaugh: Will He Respect the Whole Constitution?*, Judge Kavanaugh has stated that our liberty is primarily protected by the structure of the Constitution.³⁰ Constitutional structure certainly plays a part in protecting liberty, but it is merely one of the ways the Constitution safeguards liberty, and it does not account at all for the Constitution’s many limits on abuse of power by state governments contained in the original Constitution, the Fourteenth Amendment, and other part of our national charter. During his confirmation hearing, Judge Kavanaugh told the Senators that “separation of powers . . . [is] “the foundational protection of individual liberty,”³¹ and “[f]ederalism . . . helps further individual liberty,”³² a view that ignores the efforts of the Framers of the Fourteenth Amendment to ensure that states substantively respected fundamental principles of liberty. Federalism is a basic value, but it does not give states the license to run roughshod over the full range of fundamental rights and equality. Coupled with his refusal to say whether cases protecting the full scope of liberty were rightly decided, the need to oppose Judge Kavanaugh’s nomination started to become clear.

Judge Kavanaugh also failed to take advantage of an opportunity to assuage our concerns when asked by Senator Ben Sasse about the Declaration of Independence.³³ Judge Kavanaugh rightly stated that the Declaration of Independence itself is not law that is applied in courts, but that many protections in the Constitution stemmed from grievances our Founding Fathers included in the Declaration. However, he failed to note that the “set of principles [he] think[s] guide our beliefs: life, liberty, and the pursuit of happiness, all men are created equal, all people are created equal in our society,”³⁴ are enshrined in the Fourteenth Amendment. As the Reconstruction Framers recognized, the Fourteenth Amendment would be the “gem of the Constitution” because “it is the Declaration of Independence placed immutably and forever in our Constitution.”³⁵ The Fourteenth Amendment was designed to guarantee to all the “unalienable rights” to which the Declaration referred. Judge Kavanaugh, however, failed to honor this critical aspect of our Constitution’s text and history, and, as noted above, refused to express his agreement with a half-century of the Supreme Court’s jurisprudence protecting the full scope of liberty for all and fulfilling the Constitution’s guarantees.

²⁶ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Harris) (referencing Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, Wall Street Journal (Sep. 27, 1999), reproduced at https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf).

²⁷ *Id.*, (statement of Sen. Blumenthal) (referencing Kavanaugh’s dissent in *Garza v. Hagan*, 874 F.3d 735 (D.C. Cir. 2017)).

²⁸ *September 6 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Cruz).

²⁹ *September 5 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Blumenthal); *September 6 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Klobuchar); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Feinstein); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Leahy) (emphasis added)

³⁰ David H. Gans, *Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?* (Aug. 2018), <https://www.theusconstitution.org/wp-content/uploads/2018/08/Supreme-Court-Nominee-Brett-Kavanaugh-Will-He-Respect-The-Whole-Constitution.pdf>.

³¹ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Cruz).

³² *Id.*

³³ *September 6 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Sasse).

³⁴ *Id.*

³⁵ See Hon. Schuyler Colfax, “My Policy Revisited: Necessity of the Constitutional Amendment” (Aug. 7, 1866), in Cincinnati Commercial, Aug. 9, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 14 (1866).

Judge Kavanaugh's record and testimony turned a blind eye to the text, history, and values of the Reconstruction Amendments in other ways as well. He ignored the fact that the Framers of the Fourteenth Amendment were the originators of affirmative action.³⁶ As the hearing demonstrated, Kavanaugh has long attacked race-conscious efforts to help realize the Fourteenth Amendment's values of equality as constitutionally suspect, denouncing what he has called a "naked racial set-aside"³⁷ and a government-sponsored "racial spoils system."³⁸ During the hearing, he never recognized the sweeping enforcement power granted to Congress in the Thirteenth, Fourteenth, and Fifteenth Amendments. Indeed, when questioned about the Supreme Court's 2013 decision in *Shelby County v. Holder*, which gutted the Voting Rights Act, he pointed to the continued availability of the national prohibition on voting discrimination contained in Section 2, but refused to answer whether Section 2 is constitutional,³⁹ even though it has been upheld by the Supreme Court,⁴⁰ and has been called "an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting."⁴¹

Judge Kavanaugh's selective willingness to discuss the Constitution and constitutional precedents unfortunately leaves us with the doubts we had prior to his hearing as to whether he will be faithful to the entire Constitution. Indeed, Judge Kavanaugh's testimony leaves us with even greater concerns than we had going into the hearings.

2. A RELIABLE VOTE FOR BUSINESS?

As we noted in our issue brief, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?*, CAC's review of Judge Kavanaugh's record on the D.C. Circuit found that, as an appellate judge, he routinely sided with corporations and employers, and against employees, consumers, and others, even when the latter had the text of law and precedent on their side.⁴² He often did so in dissent, staking out positions that his colleagues—sometimes even conservative colleagues—were unwilling to join, suggesting his pro-corporate bent may be outside the mainstream. As an organization focused on fair and equal justice for all, we found his consistent support for corporate interests over the rights of individuals particularly troubling when coupled with the fact that the Roberts Court, with the conservative Justices leading the charge, has ruled in favor of the party supported by the U.S. Chamber of Commerce in 70 percent of the cases in which the Chamber filed a merits brief.⁴³ Unfortunately, Judge Kavanaugh said nothing during his confirmation hearing that quelled our concerns.

³⁶ Brief of Constitutional Scholars and Constitutional Accountability Center as Amici Curie In Support of Respondents, *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (No. 14-981).

³⁷ Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. Times (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html>.

³⁸ Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, Wall Street Journal (Sep. 27, 1999), reproduced at https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf.

³⁹ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Harris).

⁴⁰ *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).

⁴¹ *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (quoting S. Rep. 97-417, at 4 (1982)).

⁴² Ashwin P. Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (Aug. 2018), <https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf>.

⁴³ See Brian R. Frazelle, *A Banner Year for Business as the Supreme Court's Conservative Majority Is Restored | October Term 2017*, Constitutional Accountability Center (July 17, 2018), https://www.theusconstitution.org/think_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored/.

In fact, his statements concerning his environmental record were rather discouraging, as they misrepresented his rulings. When Senator Orrin Hatch asked Judge Kavanaugh to provide examples of cases in which he upheld environmental regulations duly authorized by Congress, he responded with several cases including *National Resources Defense Council v. EPA*⁴⁴ and *National Mining Association v. McCarthy*.⁴⁵ In *NRDC v. EPA*, Judge Kavanaugh actually ruled against safeguards to limit air pollution,⁴⁶ and the issues in *National Mining Association* were procedural, not substantive.⁴⁷

Judge Kavanaugh also stood by his labor record without providing satisfactory explanations for his rulings against workers. For example, his dissent in *Agri Processor v. NLRB*⁴⁸ conflicted with the text of the National Labor Relations Act and the Supreme Court's decision in *Sure-Tan v. NLRB*. Although *Sure-Tan* expressly established that undocumented workers "come within the broad statutory definition of 'employee,'"⁴⁹ Judge Kavanaugh continued to cite it as reason to deny undocumented workers the right to unionize.⁵⁰

Judge Kavanaugh also demonstrated his hostility toward independent agencies, which play a critical role in regulating businesses and marketplaces. Indeed, the independence of these agencies—that is, the fact that the heads of these agencies cannot be fired at will by the President, but only for good cause—allows them to enact reasonable business regulations without political interference or the undue influence of corporate interests. When Senator Amy Klobuchar and Senator Chris Coons asked him if *Humphrey's Executor v. United States*,⁵¹ the seminal Supreme Court decision that upheld the constitutionality of independent agencies over 80 years ago, was correctly decided, Judge Kavanaugh merely stated that "it's a precedent of the Supreme Court, and it's been reaffirmed many times."⁵² That answer stands in marked contrast to his response when Senator Coons followed up his question on *Humphrey's* with, "Was *Marbury v. Madison* well decided?," and Judge Kavanaugh responded, "Of course."⁵³ Judge Kavanaugh's refusal to express full-throated support for the 80-year-old *Humphrey's Executor* in the wake of having previously attacked it numerous times is cause for grave concern.⁵⁴

Judge Kavanaugh has also expressed significant hostility toward another decades-old doctrine, the *Chevron* doctrine, which has long been a cornerstone of administrative law and has long been central to the federal government's ability to regulate big businesses and protect consumers, the environment, workers, and others.⁵⁵ *Chevron* deference provides that courts will defer to an agency's interpretation of a statute when the "statute is silent or ambiguous with respect to the specific issue" so long as "the agency's answer is based on a permissible construction of the statute."⁵⁶ At his confirmation hearing, Judge Kavanaugh frankly acknowledged that he has

⁴⁴ 749 F. 3d 1055 (D.C. Cir. 2014).

⁴⁵ See 758 F. 3d 243 (D.C. Cir. 2014); *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Hatch).

⁴⁶ 749 F. 3d 1055 (D.C. Cir. 2014).

⁴⁷ Ana Unruh Cohen, *Questioning Kavanaugh's Environmental Record*, NRDC (Sept. 7, 2018), <https://www.nrdc.org/experts/ana-unruh-cohen/questioning-kavanaughs-environmental-record>.

⁴⁸ 514 F. 3d 1 (D.C. Cir. 2008)

⁴⁹ 467 U.S. 883, 892 (1984).

⁵⁰ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Durbin).

⁵¹ 295 U.S. 602 (1935).

⁵² *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Klobuchar).

⁵³ *September 5 Hearings*, (statements of Judge Kavanaugh and Sen. Coons).

⁵⁴ Ashwin P. Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (Aug. 2018), <https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf>.

⁵⁵ *Id.*

⁵⁶ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

concerns about the doctrine, noting that “the whole question of ambiguity has become a difficult inquiry . . . and I wrote a law review article . . . about that problem of judges disagreeing about ambiguity and how much is enough.”⁵⁷

Judge Kavanaugh has also supported expanding the so-called “major rules” doctrine, so that “major agency rules of great economic and political significance”⁵⁸ cannot be premised on an “ambiguous grant of statutory authority.”⁵⁹ At his confirmation hearing, Judge Kavanaugh described the rule as simply meaning that if a rule is “of major economic or social significance, you shouldn’t defer to the agency,”⁶⁰ but as a judge on the D.C. Circuit, he has gone much further. Rather than simply suggesting that agencies do not receive deference from courts when they address major questions (as Chief Justice Roberts has suggested⁶¹), Judge Kavanaugh’s version of the doctrine would prevent agencies from regulating at all as to major questions if “Congress has not clearly authorized the [agency] to issue the rule.”⁶²

As Senator Hirono said during Judge Kavanaugh’s confirmation hearing, “there is a pattern to [his] dissents and [his] pattern is that [he] do[es] not favor . . . regular people.” The American people deserve a judiciary where all litigants are treated equally. Judge Kavanaugh’s record and his performance at his confirmation hearing suggest he would put his thumb on the scale of justice in favor of big business, much to the detriment of consumers, employees, and others seeking to hold corporations accountable.

3. AN INDEPENDENT CHECK?

During his opening statement to the Senate Judiciary Committee, Judge Kavanaugh claimed, “I do not decide cases based on personal or policy preferences. I am not a pro-plaintiff or pro-defendant judge. I am not a pro-prosecution or pro-defense judge. I am a pro-law judge.”⁶³ This is the proper role of a judge—to apply the law dispassionately and equally to all, without allegiance to the President who nominated them or adherence to the political platform of the party associated with either that President or the majority of Senators who voted to confirm them.

Before the confirmation hearing even began, the burden on Judge Kavanaugh to demonstrate his independence was profound. After all, the President who nominated him had announced that he had litmus tests for Supreme Court justices, had made numerous comments disparaging federal judges who do not rule in his favor, had instituted authoritarian unconstitutional executive actions, and was an unindicted alleged co-conspirator in a

⁵⁷ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Klobuchar); see also *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Flake) (Kavanaugh reiterating that questions of statutory ambiguity are “a huge problem” and explaining that “that’s at the . . . heart of the concern I have about how certain cannons of statutory interpretation have been applied, including . . . Chevron”); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Kennedy) (Kavanaugh describing “certain broad conceptions of deference” as “a judicially orchestrated shift of power from the legislative branch to the executive branch”).

⁵⁸ *U.S. Telecom Ass’n v. FEC*, 855 F.3d 381, 419, (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)

⁵⁹ *Id.* at 421.

⁶⁰ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Kennedy).

⁶¹ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

⁶² *U.S. Telecom Ass’n*, 855 F.3d at 418.

⁶³ Politico Staff, *Full text: Brett Kavanaugh confirmation hearing opening statement*, POLITICO (Sept. 4, 2018, 4:49 PM ET), <https://www.politico.com/story/2018/09/04/full-text-brett-kavanaugh-confirmation-hearing-opening-statements-806420>.

felony committed by his personal attorney. Unfortunately, Judge Kavanaugh did not meet the burden that context placed on him because he failed to provide forthright answers to the questions Senators posed.

Among President Trump's litmus tests for a Supreme Court justice is one who would overturn *Roe v. Wade*, help end the Affordable Care Act, and expand gun rights.⁶⁴ When asked if he could commit to never overturning *Roe v. Wade*, Judge Kavanaugh declined to answer.⁶⁵ When asked if *Roe* was rightly decided, he would only say "it has been reaffirmed many times over the past 45 years. . . and most prominently, most importantly reaffirmed in *Planned Parenthood v. Casey* in 1992."⁶⁶ When asked about his dissent in *Seven-Sky v. Holder*—a challenge to the individual mandate of the Affordable Care Act—in which Judge Kavanaugh wrote that the president may decline to enforce a statute that regulates private individuals when he deems the statute unconstitutional, even if a court has held that statute constitutional,⁶⁷ Judge Kavanaugh deflected and would only discuss prosecutorial discretion.⁶⁸ Finally, during the hearing, Judge Kavanaugh repeated his extreme views of the Supreme Court's Second Amendment precedents, which he reads as prohibitions on all innovative gun laws, regardless of the burden they impose. At his confirmation hearing, Judge Kavanaugh did not say anything to dispel the notion that he was picked to satisfy the President's litmus tests.

President Trump has made numerous statements disparaging members of the federal judiciary when they do not rule in his favor. Senator Blumenthal cited 41 tweets attacking the judiciary, including specific insults to Justice Ruth Bader Ginsburg and Judge Gonzalo Curiel. Judge Kavanaugh refused to comment. Even when reminded that then-Judge Gorsuch condemned those attacks during his confirmation hearing—describing them as "disheartening and demoralizing,"⁶⁹ —Judge Kavanaugh refused to agree.⁷⁰ It is discouraging that Judge Kavanaugh did not stand up for his colleagues and the integrity of the judiciary in the face of attacks made by the President who nominated him.

Judge Kavanaugh also failed to make it clear that he would be willing to serve as a check on the President. When asked by Senator Flake if "a president should be able to use his authority to pressure executive or independent agencies to carry out directives for purely political purposes"—specifically referring to the President's attacks on Attorney General Jeff Sessions and the Justice Department—Judge Kavanaugh did not answer the question.⁷¹ When asked if a sitting President generally could be required to respond to a subpoena, Judge Kavanaugh refused to respond to a hypothetical question.⁷² When asked about a president having an "absolute right" to pardon himself, Judge Kavanaugh refused to provide a forthright response.⁷³ When asked if a sitting president could be indicted, Judge Kavanaugh claimed he has never taken a position on the constitutionality of indicting or

⁶⁴ Charles Cameron and Jonathan Kastlelec, *The litmus test for a Supreme Court nominee*, Vox (July 5, 11:50 AM ET), <https://www.vox.com/mischiefs-of-faction/2018/7/5/17532488/litmus-test-supreme-court-nominee>.

⁶⁵ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Blumenthal).

⁶⁶ *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Feinstein).

⁶⁷ *Seven-Sky v. Holder*, 661 F.3d 1, 21 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding on the merits).

⁶⁸ *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Blumenthal).

⁶⁹ Josh Dawsey and Seung Min Kim, *Gorsuch calls Trump's judge attacks 'demoralizing' and 'disheartening'*, POLITICO (Feb. 8, 2017, 5:15 PM ET, updated Feb. 8, 2017, 8:35 PM ET), <https://www.politico.com/story/2017/02/donald-trump-neil-gorsuch-judge-234812>.

⁷⁰ *September 6 Hearings*, (statement of Justice Kavanaugh in conversation with Sen. Blumenthal).

⁷¹ *September 5 Hearings*, (statements of Judge Kavanaugh and Sen. Flake).

⁷² *September 6 Hearings*, (statements of Judge Kavanaugh and Sen. Coons).

⁷³ *September 5 Hearings*, (statements of Judge Kavanaugh and Sen. Leahy).

investigating a sitting president.⁷⁴ When asked if he still believed that a president can fire at will a prosecutor criminally investigating him, Judge Kavanaugh was noncommittal, stating, “that was my view in 1998.”⁷⁵ And when asked if he had ever had a conversation with any lawyer at the firm of Kasowitz Benson Torres about Special Counsel Robert Mueller or his investigation into Russian interference in the 2016 presidential election, it took him two days to say no.⁷⁶ The suspicion that Judge Kavanaugh would not serve as an independent check on the President led Senator Blumenthal to ask him if he would recuse himself from “any of the issues involving his personal criminal or civil liability,”⁷⁷ to which Judge Kavanaugh demurred, responding “I need to be careful.”⁷⁸

For Judge Kavanaugh to satisfy the burden the President placed on him, he needed to be forthright in his answers. Instead, Judge Kavanaugh chose to avoid answering key questions that could have shed real light on the important issue of his independence from the President who has nominated and his ability to serve as a check on the other branches of government, whether congressional or executive.

CONCLUSION

Should Judge Kavanaugh be confirmed to a lifetime appointment as an Associate Justice, we sincerely hope that our concerns about him will prove to be wrong. If he is confirmed, we at CAC will present to Justice Kavanaugh the best originalist arguments, rooted in the text, history, and values of the Constitution, in support of constitutional rights, liberties, and structural protections that help make our nation more free, fair, and equal for all. For the history of our whole Constitution is one of progress over time, increased democratic participation, and the constant quest to make equality and justice a reality for all persons in this country. True and faithful originalists recognize this progressive arc and apply it to the constitutional questions before them. Should he be confirmed, we hope Justice Kavanaugh will do the same. Unfortunately, with the information before us at this point—and in a moment where the stakes could not be higher—we cannot be sure that a Justice Kavanaugh will faithfully apply the whole Constitution to preserve our fundamental rights and constitutional freedoms and must oppose his nomination to the Supreme Court.

Sincerely,



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cc: All Members, United States Senate

⁷⁴ *Id.*, (statements of Judge Kavanaugh and Sen. Coons).

⁷⁵ *Id.*

⁷⁶ *Id.* (statements of Judge Kavanaugh Sen. Harris); *September 6 Hearings*, (statements of Judge Kavanaugh and Sen. Blumenthal) (statements of Judge Kavanaugh and Sen. Harris).

⁷⁷ *September 5 Hearings*, (statement of Justice Kavanaugh in conversation with Sen. Blumenthal).

⁷⁸ *Id.*