September 3, 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:

On behalf of the Constitutional Accountability Center, I am writing to express concerns about Judge Brett Kavanaugh's nomination to the United States Supreme Court.

The Constitutional Accountability Center ("CAC") was founded in 2008 as a public interest law firm, think tank, 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 a law firm, CAC chooses the best cases to bring our ideas about the Constitution into court and secure victories in the U.S. Supreme Court, lower federal courts, and state supreme courts that comport with Constitution's text, history, and values. As a think tank, we produce original scholarship on the text and history of the Constitution, distilling the best legal and historical scholarship to help Americans better understand our Constitution and inform how modern debates about its meaning should be resolved. And, as an action center, we promote the Constitution as a progressive document, written by revolutionaries and amended by those who prevailed in the most tumultuous social upheavals in our nation's history—including Reconstruction, Suffrage, and the Civil Rights movement. Through litigation, scholarship, and advocacy, we seek lasting victories rooted in the text, history, and values of our Constitution.

When crafting our Constitution, the Founders created a system of checks and balances meant to deter corruption, both real and perceived. They intentionally created three co-equal branches of government to prevent the concentration of corruptible power in one body and to shield law and policy from the whims of short-lived political passions. With the federal Legislature and Executive in the hands of one political party, and particularly with an Executive—President Donald Trump—who has demonstrated a repeated lack of respect for the Constitution and the rule of law, it is more imperative than ever for the stability of our government that the federal Judiciary remain independent and serve as a check on the other branches. For the Judiciary to remain so, judicial nominees, at all levels, must demonstrate this independence as one prerequisite for being confirmed by the Senate.

Constitutional Accountability Center

theusconstitution.org

1200 18th Street NW, Suite 501, Washington, D.C. 20036
Phone: 202-296-6889 | Fax: 202-296-6895

The President's months of touting his litmus tests for a Supreme Court justice, his numerous comments disparaging federal judges who do not rule in his favor, his authoritarian and unconstitutional executive actions, as well as his status as an unindicted co-conspirator in a felony committed by his personal attorney, have all placed a profound burden on Judge Brett Kavanaugh. At his confirmation hearing, Judge Kavanaugh must provide forthright answers when questioned about the President's statements and actions. He should not be permitted to hide behind his current or potential office. Judge Kavanaugh must prove to the American people that, if confirmed, he will serve as an independent check on the elected branches, especially when they violate constitutional and statutory protections, including protections against corruption; he will not be a rubber stamp for the U.S. Chamber of Commerce and other big business interests; and he will 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. His record on these issues is cause for concern.

As a judge on the U.S. Court of Appeals for the District of Columbia Circuit, Judge Kavanaugh has routinely sided with corporations and employers, and against the government, interest groups, employees, and consumers, even when the latter had the text of the law and precedent on their side. He has often done 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. These opinions and dissents, detailed in the attached report, "Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?," lends proof to the Trump White House's boast upon the President's announcement of his nomination that "Judge Kavanaugh protects American businesses." But to those of us who are focused on fair and equal justice for all, his consistent support for corporate interests over the rights of individuals is particularly troubling when coupled with the fact that the Roberts Court, with the conservative Justices leading the charge, has ruled in favor of positions taken by the U.S. Chamber of Commerce 70 percent of the time.[1]

Judge Kavanaugh also has received acclaim from his supporters for being a jurist who resolves constitutional disputes by relying primarily on the text of the provision in question as understood at the time of its drafting. However, to be a true originalist, a jurist must demonstrate a commitment to the text and history of the *whole* Constitution, including the transformative Amendments passed in the wake of the Civil War, not just the parts he or she likes. As explained in the attached Issue Brief, "Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?," Judge Kavanaugh's record raises grave concerns that he will not follow the whole Constitution's text, history, and values—in particular, the sweeping guarantees of equality contained in transformative Amendments ratified in the 19th and 20th centuries.

Finally, the American people are entitled to Supreme Court Justices who will protect the Constitution, adhere to mainstream legal thought, and serve as an independent check on the President and Congress. Particularly at a time when the Executive displays disregard and even disdain for the judiciary, the rule of law, the Constitution and the values it enshrines, the American people are dependent upon the Senate to thoroughly examine the records of judicial nominees to ensure that, if confirmed, those nominees will be independent, fair, and faithful to the law rather than a political agenda. Therefore, it is unfortunate Chairman Grassley scheduled the hearing

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[1] *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/.

before hundreds of thousands of records from Judge Kavanaugh's tenure at the White House during the George W. Bush Administration could be made public.

For the foregoing reasons, I ask on behalf of CAC that before passing judgment on his nomination that you fulfill your constitutional duty by closely scrutinizing the judicial philosophy and full record of Supreme Court nominee Judge Brett Kavanaugh.

Sincerely,

Elizabeth B. Wydra
President

wydra@theusconstitution.org
Phone: 202-296-6889 | Twitter: @ElizabethWydra

cc: All Members, Senate Judiciary Committee

CONSTITUTIONAL ACCOUNTABILITY CENTER

Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?

BY ASHWIN P. PHATAK[†]

AUGUST 2018

I. Introduction

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh to fill the Supreme Court vacancy created by Justice Anthony Kennedy's retirement.[1] After doing so, the White House "immediately played up [Judge Kavanaugh's] pro-business, anti-regulation record."[2] In an email to supporters, the White House highlighted that "Judge Kavanaugh protects American businesses," that he "helped kill President Obama's most destructive new environmental rules," and that he "led the effort to rein in . . . independent agencies . . . ."[3] And in a memorandum to the press, the White House touted that Judge Kavanaugh had overruled federal agencies no less than 75 times in cases addressing clean air regulations, consumer protections, and a host of other issues.[4]

Many commentators have agreed that if confirmed, Judge Kavanaugh "could further cement the [high] court's pro-business tilt."[5] For example, the *New York Times* editorial board opined that Judge Kavanaugh will "aggressively" give "big business a leg up on workers, unions, consumers and the

[†] Ashwin P. Phatak is Appellate Counsel at the Constitutional Accountability Center.

[1] President Donald J. Trump Announces Intent To Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States, The White House (July 9, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/.

[2] Lorraine Woellert, *Trump Asks Business Groups for Help Pushing Kavanaugh Confirmation*, Politico (July 9, 2018), https://www.politico.com/amp/story/2018/07/09/brett-kavanaugh-business-groups-trump-705800.

[3] *Id.*

[4] Matthew Goldstein, *Brett Kavanaugh Likely To Bring Pro-Business Approach to Supreme Court*, N.Y. Times (July 10, 2018), https://www.nytimes.com/2018/07/10/business/kavanaugh-supreme-court-business-regulation.html.

[5] *Id.*

1200 18th Street NW, Suite 501, Washington, D.C. 20036
Phone: 202-296-6889 | Fax: 202-296-6895

environment."[6] One labor attorney warned: "This court will go from a reliably pro-business court to being solidly pro-business. It will be an uphill battle for employees to win many cases, if Judge Kavanaugh gets confirmed. He looks for ways to rule for employers."[7] In short, Judge Kavanaugh is widely believed to be "a friend of business."[8]

If Judge Kavanaugh is as friendly to business interests as the White House has promised, he would only reinforce the already pro-business majority at the Supreme Court. While corporations and business should certainly win their fair share of cases when the law is on their side, they fare *disproportionately* well at the Court, as exemplified by the increasing success of the U.S. Chamber of Commerce in its Supreme Court litigation. Since 2010, the Constitutional Accountability Center (CAC) has tracked the Supreme Court activities of the Chamber of Commerce and released empirical studies documenting a sharp increase in the Chamber's success rate since the start of the Roberts Court.[9] CAC has shown that the Chamber now wins the vast majority of its cases: 70% during the Roberts Court,[10] compared to 56% during the late Rehnquist Court and 43% during the late Burger Court.[11] Furthermore, there is a sharp ideological divide on the Roberts Court in favor of the Chamber, with the Court's conservatives almost always ruling in favor of the Chamber in closely decided cases.[12]

This Issue Brief analyzes Judge Kavanaugh's jurisprudence on issues relevant to business and corporate interests on the U.S. Court of Appeals for the D.C. Circuit, the court on which Judge Kavanaugh has sat for over twelve years. The Brief discusses many of Judge Kavanaugh's opinions in several different issue areas: workers' rights, employee protections, independent agencies, *Chevron* deference, environmental regulations, multinational corporate liability, and anti-competitive business practices. Across these different issue areas, a common theme emerges: Judge Kavanaugh routinely sides with businesses and employers, and against the government, interest groups, employees, and consumers. Moreover, he has often done so in dissent, staking out positions that his colleagues—sometimes even conservative colleagues—were unwilling to join. Thus, Judge Kavanaugh has demonstrated a pro-business jurisprudence that is often outside the mainstream of the appellate court on which he currently serves. Based on this record, there is significant reason to worry that Judge Kavanaugh, if he is confirmed, will continue the Court's trend toward improperly favoring the interests of big businesses over all Americans.

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[6] N.Y. Times Editorial Board, *Brett Kavanaugh Will Fit Right In at the Pro-Corporate Roberts Court*, N.Y. Times (July 22, 2018), https://www.nytimes.com/2018/07/22/opinion/brett-kavanaugh-supreme-court.html.

[7] Erin Mulvaney, *Brett Kavanaugh 'Looks for Ways to Rule for Employers'*, Nat'l L.J. (July 12, 2018), https://www.law.com/nationallawjournal/2018/07/12/brett-kavanaugh-looks-for-ways-to-rule-for-employers/.

[8] Natasha Bach, *Why Trump Supreme Court Nominee Brett Kavanaugh Is Business's New Best Friend*, Fortune (July 10, 2018), http://fortune.com/2018/07/10/brett-kavanaugh-scotus-nominee-business/.

[9] *See Corporations and the Supreme Court*, Constitutional Accountability Center, https://www.theusconstitution.org/series/chamber-study/.

[10] *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/.

[11] *See* Doug Kendall, The Chamber and the Court, Constitutional Accountability Center (Dec. 21, 2010), https://www.theusconstitution.org/news/the-chamber-and-the-court/.

[12] Frazelle, *supra* note 10.

II. Workers' Rights and the NLRB

The D.C. Circuit hears many appeals from decisions of the National Labor Relations Board (NLRB), an independent agency that enforces federal labor laws regarding unions and unfair labor practices. In case after case, Judge Kavanaugh has sided with employers against their employees in these types of cases—and often he has done so in dissent from his colleagues, suggesting his pro-business bent may be beyond the mainstream.

For example, in *Agri Processor v. NLRB*, Judge Kavanaugh dissented from a majority opinion holding that undocumented workers are "employees" under the National Labor Relations Act (NLRA) and can therefore benefit from the Act's protections.[13] Judge Kavanaugh's dissent would have ensured that such employees remain outside the protection of the law, rendering them unable to unionize and vulnerable to employer abuse. Moreover, his position was not required by the text of the statute. As the majority opinion noted, "we hew closely to the text of the NLRA," which does not exempt undocumented workers, "while the dissent seeks to abandon [the text] altogether."[14] Judge Kavanaugh's dissent also conflicted with the Supreme Court's decision in *Sure-Tan v. NLRB*, which held that because "undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee' [under the NLRA]."[15] Even Judge Karen L. Henderson, widely considered a conservative jurist, concurred with the majority opinion and counseled that "we must follow *Sure-Tan*'s interpretation until the Supreme Court otherwise directs or the Congress expressly limits the term's scope."[16] Judge Kavanaugh believed otherwise.

In many opinions, Judge Kavanaugh has sought to alter doctrines intended to protect workers. For example, in *Southern New England Telephone v. NLRB*, Judge Kavanaugh cabined the long-standing rule under the NLRA that employees have a right to wear union-associated clothing at work,[17] deciding that the employer in that case—AT&T—could forbid its employees from wearing certain union t-shirts while working "when the company reasonably believes the message may harm . . . its public image."[18] He held this despite the fact that AT&T permitted workers to remain on the job while wearing other shirts with "questionable messages," like "Support your local hookers."[19]

Similarly, in *Venetian Casino Resort v. NLRB*, Judge Kavanaugh wrote a majority opinion holding that a casino's requests that police officers issue criminal citations to union protesters—a move that violates the NLRA—was protected by the First Amendment.[20] To reach this conclusion, Judge Kavanaugh significantly expanded a doctrine that protects companies' ability to petition the government without running afoul of labor laws. Under this doctrine, "conduct that constitutes a direct petition to

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[13] 514 F.3d 1, 10 (D.C. Cir. 2008).

[14] *Id.* at 7 (internal quotes omitted).

[15] 467 U.S. 883, 892 (1984).

[16] *Agri*, 514 F.3d at 10 (Henderson, J., concurring).

[17] 793 F.3d 93, 94 (D.C. Cir. 2015).

[18] *Id.* at 95.

[19] *Id.*

[20] 793 F.3d 85, 87 (D.C. Cir. 2015).

government, but would otherwise violate the Act, is shielded from liability by the First Amendment."[21] While the doctrine traditionally refers to activities like companies' outreach to legislators on policy issues, Judge Kavanaugh's opinion stretches the concept of a "petition to government" well beyond that traditional context to protect the casino's requests for police to cite and intimidate union organizers.

In other cases, Judge Kavanaugh has used strained textual arguments to reach anti-worker results. In *Verizon New England v. NLRB*, the NLRB had concluded that Verizon workers could post union signs in their parked cars, even though they had waived their right to picket in a collective bargaining agreement.[22] Judge Kavanaugh disagreed, concluding that the union's waiver of workers' "picketing" rights extended to the presence of signs in parked cars. As a dissenting judge pointed out, however, the confrontational aspect inherent in picketing is entirely lacking when signs are left in parked cars.[23] The dissenting judge was also "unaware of any decision considering employees to be engaged in picketing even while in the workplace carrying out their normal functions."[24] In short, Judge Kavanaugh's reading of "picket" in his majority opinion construed the contractual language as favorably as possible for Verizon and against its employees.

Judge Kavanaugh has also written several separate opinions questioning pro-worker decisions by the NLRB. In *Island Architectural Woodwork v. NLRB*, a D.C. Circuit panel concluded that a company had violated the law when the company and its spinoff refused to "apply the terms of [the company's] collective bargaining agreement to [its spinoff]" despite the employees for the spinoff doing "the same work, on the same equipment, in the same building" "under the leadership of the daughter of [the company's] President and CEO."[25] Judge Kavanaugh dissented. He would have let the spinoff operate as a non-union shop despite its close connection with the company simply because they were not technically controlled by the same entity. The majority opinion rejected this formalistic approach, instead recognizing that the company had created the spinoff in order to hire non-union labor and "was not a separate and independent employer, but merely [the company's] alter ego."[26]

In another case, Judge Kavanaugh used a partial dissent to stake out a different anti-union position. In *Midwest Division–MMC v. NLRB*, the NLRB concluded that a hospital's peer review board violated the NLRA when it summoned two nurses for possible disciplinary sanctions, but denied their requests for union representation during this process and for additional information about the review board.[27] Though the majority overturned the NLRB's decision on representation, it did so on the narrow ground that employees do not have a right to union representation in *non-mandatory* investigatory hearings.[28] Judge Kavanaugh would have ruled much more broadly: that rights to union representation "do *not* apply in peer review committee interviews" as a categorical matter because such committee interviews

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[21] *Id.* at 87.

[22] 826 F.3d 480 (D.C. Cir. 2016).

[23] *Id.* at 492 (Srinivasan, J., dissenting).

[24] *Id.*

[25] 892 F.3d 362, 366 (D.C. Cir. 2018).

[26] *Id.*

[27] 867 F.3d 1288, 1292-93 (D.C. Cir. 2017).

[28] *Id.* at 1293.

are not disciplinary processes.[29] In terms of information, Judge Kavanaugh dissented from the majority's holding that the hospital must share information about "the Committee's structure, purpose, and functions" and "the nature of the [specific] allegations" with the nurses before their hearing.[30] Judge Kavanaugh would have held that "the Union's need for that information is minimal at best," and that "the hospital possesses a strong interest in protecting the confidentiality of the peer review process."[31]

Judge Kavanaugh's antipathy towards workers' rights extends beyond the private sector. In *American Federation of Government Employees v. Gates*, Judge Kavanaugh upheld Department of Defense regulations that severely curtailed employees' access to collective bargaining. His opinion held that the "National Defense Authorization Act grants [the Department] temporary authority to curtail collective bargaining for . . . civilian employees."[32] A dissenting judge criticized his opinion as "empower[ing] [the Secretary of Defense] to abolish collective bargaining altogether—a position with which even the Secretary disagrees."[33] Moreover, Judge Kavanaugh upheld the regulations despite the authorizing statute's express textual provision that the Department "ensure that employees may organize [and] bargain collectively."[34]

Finally, Judge Kavanaugh also opposed efforts by workers and unions to ensure that union officers act responsibly. In *International Union, Security, Police and Fire Professionals of America v. Faye*, Judge Kavanaugh dissented from a majority opinion that concluded the Labor-Management Reporting and Disclosure Act provided an implied cause of action to unions to recover against a corrupt officer.[35] Based on a cramped reading of the Act's text, Judge Kavanaugh would have discounted on-point precedent and held that although union members may sue corrupt union officers, "unions [themselves] do not possess a federal cause of action to sue their officers for breaches of fiduciary duties."[36]

III. Employee and Workplace Protections

Outside the realm of collective bargaining, Judge Kavanaugh has been no friend to employees seeking to enforce workplace protections regarding safety and non-discrimination. In a prominent case, *SeaWorld v. Perez*, Judge Kavanaugh dissented from a majority opinion upholding an Occupational Safety and Health Agency (OSHA) decision to fine SeaWorld for violating workplace safety rules after an orca killed an employee during a water performance.[37] The majority upheld those fines on the ground that SeaWorld knew that its protections for trainers working with orcas were insufficient. Judge

[29] *Id.* at 1304 (Kavanaugh, J., concurring in part and dissenting in part).

[30] *Id.* at 1300 (majority opinion).

[31] *Id.* at 1304 (Kavanaugh, J., concurring in part and dissenting in part).

[32] 486 F.3d 1316, 1318 (D.C. Cir. 2007) (emphasis omitted).

[33] *Id.* at 1331 (Tatel, J., dissenting in part).

[34] *Id.* (internal quotes omitted).

[35] 828 F.3d 969 (D.C. Cir. 2016).

[36] *Id.* at 983.

[37] 748 F.3d 1202 (D.C. Cir. 2014).

Kavanaugh dissented and would have ruled in favor of SeaWorld because working with large animals—like "football [or] . . . stock car racing"—comes with a certain necessary amount of danger.[38] Judge Kavanaugh's dissent repeatedly claimed that SeaWorld could not be held responsible for the "hazards posed by the normal activities intrinsic to an industry."[39] The majority opinion accused Judge Kavanaugh of "[i]gnoring this court's precedent regarding congressional purpose and intent" with respect to workplace safety statutes and with "stretching" relevant OSHA precedent "beyond its moorings."[40] The majority further criticized Judge Kavanaugh's focus on policy considerations, "hypotheticals," and generalizations about the "sports and entertainment industries" at the expense of legal reasoning.[41]

In *Howard v. Chief Administrative Officer*, Judge Kavanaugh dissented from a majority opinion which permitted a black congressional staffer to file a race discrimination claim against the Office of the Chief Administrative Officer.[42] Judge Kavanaugh's dissent would have made it significantly harder for congressional staffers to bring employment discrimination suits in federal court. In his view, the Constitution requires that a suit end as soon as a court concludes that "the employer's asserted reason for the [employment] decision involves legislative activity protected by the Speech or Debate Clause."[43] Though the majority opinion demonstrated how the staffer could have stated a claim without discussing legislative activity protected by the Clause, Judge Kavanaugh would have allowed government employers to quash suits so long as their "stated reason for the employment decision is the plaintiff's performance of legislative activities."[44]

Judge Kavanaugh also sought to make it harder for government employees doing national security work to challenge employment discrimination. In *Rattigan v. Holder*, a black Jamaican FBI employee alleged that his superiors illegally retaliated against his reports of race and national origin discrimination by flagging him for a security clearance investigation.[45] Dissenting from a majority opinion permitting the suit, Judge Kavanaugh concluded that the suit faced the "insurmountable bar" of requiring the judiciary to "second-guess the FBI's [national security-related] decision[s]."[46] The majority, however, held that controlling precedent "shields from [judicial] review only those security decisions made by the FBI's Security Division, not the actions of thousands of other FBI employees."[47] The majority read the national security exemption narrowly in order to "preserv[e] to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."[48] Judge Kavanagh did not.

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[38] *Id.* at 1217 (Kavanaugh, J., dissenting).

[39] *Id.* at 1219.

[40] *Id.* at 1211 (majority opinion).

[41] *Id.* at 1212.

[42] 720 F.3d 939, 939, 943 (D.C. Cir. 2013).

[43] *Id.* at 955 (Kavanaugh, J., dissenting).

[44] *Id.* at 957.

[45] 643 F.3d 975, 979 (D.C. Cir. 2011), *judgment vacated*, 2011 WL 4101538 (D.C. Cir. Sept. 13, 2011).

[46] *Id.* at 992 (Kavanaugh, J., dissenting).

[47] *Id.* at 983 (majority opinion).

[48] *Id.* at 984.

Finally, Judge Kavanaugh has concluded that federal civil rights laws do not protect certain government employees, allowing them to be fired based on race, sex, disability, or age. In *Miller v. Clinton*, Judge Kavanaugh dissented from a majority opinion holding that a State Department employee fired on his sixty-fifth birthday could bring an Age Discrimination in Employment Act (ADEA) claim.[49] Judge Kavanaugh expansively interpreted language from a separate law, the Basic Authorities Act, which provides that State Department contracts are to be formed "without regard to such statutory provisions as relate to the negotiation, making, and performance of contracts and performance of work . . . ."[50] He believed this language expressly authorized the State Department to require employees to retire at age 65, notwithstanding the ADEA. While the majority opinion acknowledged that the Basic Authorities Act might be ambiguous as to whether government employees were covered, it adopted the "less surprising and more natural reading of the statutory text" to hold that employees like Miller are covered by the ADEA, Title VII, and the Americans with Disabilities Act, noting that "[w]henever Congress has decided to exempt either groups of U.S. citizens or specified circumstances from the coverage of those [civil rights] statutes, it has done so clearly."[51]

To be sure, Judge Kavanaugh has not always ruled against workers. For example, in *New York-New York v. NLRB*, Judge Kavanaugh upheld the NLRB's decision that contract employees should receive the same protections as direct employees when they distribute union handbills on employer property.[52] In *Kravis Center v. NLRB*, Judge Kavanaugh affirmed an NLRB ruling that held that the Kravis Center violated the NLRA by unilaterally changing the scope of its employees' bargaining unit and by withdrawing recognition from the union.[53] And in *International Internship Program v. Napolitano*, Judge Kavanaugh wrote for a unanimous panel in holding that the statutes and regulations supporting the Q-1 visa scheme require that alien workers employed on such visas be paid and receive wages equivalent to those of domestic workers.[54] Moreover, in a concurrence in *Ayissi-Etoh v. Fannie Mae*, Judge Kavanaugh explained his view that being called the n-word once by a supervisor can establish a racially hostile work environment.[55] But these cases are exceptions to the rule. Again and again, Judge Kavanaugh has written opinions ruling against workers and employees and in favor of corporations and employers—often where neither the text of the law nor precedent required such an outcome—and many of these opinions placed him in dissent from and out of step with his colleagues.

IV. Independent Agencies

Independent agencies include entities as varied as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Reserve, and the Consumer Financial Protection Bureau

[49] 687 F.3d 1332 (D.C. Cir. 2012).

[50] 22 U.S.C. § 2669(c).

[51] *Id.* at 1352.

[52] 676 F.3d 193 (D.C. Cir. 2012).

[53] 550 F.3d 1183 (D.C. Cir. 2008).

[54] 718 F.3d 986 (D.C. Cir. 2013).

[55] 712 F.3d 572, 579-81 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

(CFPB), and they serve a critical role in regulating businesses and marketplaces. In particular, 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.[56] Judge Kavanaugh, however, has repeatedly expressed hostility toward independent agencies, questioning their constitutionality and whether they are sufficiently accountable to the President.

For instance, Judge Kavanaugh wrote an opinion holding that the CFPB's leadership structure is unconstitutional because its single director is removable only for cause.[57] This position was ultimately rejected by the *en banc* D.C. Circuit, which noted that "[t]he Supreme Court eighty years ago sustained the constitutionality of the independent Federal Trade Commission, a consumer-protection financial regulator with powers analogous to those of the CFPB," and that "[t]he Court has since reaffirmed and built on that precedent."[58] In a dissent from the *en banc* opinion expressing his view that the CFPB's structure was unconstitutional, Judge Kavanaugh also expressed skepticism about the constitutionality of *all* independent agencies, calling into question the constitutionality of dozens of agencies. He described independent agencies as "a headless fourth branch of the U.S. Government" that "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."[59]

Judge Kavanaugh also criticized the Supreme Court's seminal decision in *Humphrey's Executor v. United States*, which upheld the constitutionality of independent agencies over 80 years ago.[60] According to Judge Kavanaugh:

> The reasoning of *Humphrey's Executor* is inconsistent with the reasoning in the Court's prior decision in *Myers*. . . . The *Humphrey's Executor* decision subsequently has received significant criticism. . . . Moreover, the reasoning of *Humphrey's Executor* is in tension with the reasoning of the Supreme Court's recent decision in *Free Enterprise Fund*.[61]

That was not the first time that Judge Kavanaugh expressed his concerns with the long-standing *Humphrey's Executor* doctrine. In an earlier case regarding the constitutionality of the removal provisions governing the Public Company Accounting Oversight Board, Judge Kavanaugh stated in a dissent that *Humphrey's Executor* "ha[s] 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

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[56] *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935).

[57] *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

[58] *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 77 (D.C. Cir. 2018).

[59] *PHH Corp.,* 839 F. 3d at 6.

[60] 295 U.S. at 626-32.

[61] *PHH Corp.*, 881 F.3d at 194 n.18 (Kavanaugh, J., dissenting from denial of rehearing en banc). In fact, the Supreme Court actually *reaffirmed* the continuing validity of *Humphrey's Executor* in *Free Enter. Fund*. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 479 (2010) ("Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

with prior precedents . . . ."[62] Though he stated that the Court "cannot, need not, and do[es] not re-litigate" *Humphrey's Executor* in that case,[63] his criticisms of *Humphrey's Executor* were hardly veiled.[64]

Judge Kavanaugh has also questioned the accountability of independent agencies. In particular, he has noted that "there is an argument that has been made that courts should be more wary of regulations adopted by independent agencies because those have not been supervised by the President in the way that our constitutional structure would suggest."[65] This idea of a special skepticism toward regulations enacted by independent agencies is not a part of administrative law and would be a dramatic change, reducing the power of independent agencies to enact regulations designed to help and protect the American people.

In short, if confirmed, there is reason to think that Judge Kavanaugh would conclude that *all* independent agencies violate the Constitution. Even if he did not precipitate such an extreme and dramatic break from existing precedent and practice, he would nonetheless likely vote to minimize the power of independent agencies in more incremental but still revolutionary ways. This would be a sea change in administrative law with profound real-world consequences for the American people.

V. *Chevron* Deference and the Government's Ability to Regulate

Judge Kavanaugh's attack on independent agencies is not the only way in which he threatens to change the law in ways that would limit the federal government's ability to function properly. Judge Kavanaugh has also expressed significant hostility toward a decades-old doctrine, *Chevron* deference, which is 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 more. *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."[66] Courts routinely rely on *Chevron* in upholding regulations promulgated by agencies as varied as the National Labor Relations Board, the Environmental Protection Agency (EPA), and the Occupational Safety and Health Commission. Judge Kavanaugh, however, has written

[62] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 696-97 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *affirmed in part and reversed in part*, 561 U.S. 477 (2010).

[63] *Free Enter. Fund,* 537 F.3d at 697.

[64] *See generally* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1472 (2009) (noting that although independent agencies have been held constitutional, "what is constitutional is not always wise" and "there is reason to doubt whether the elaborate system of numerous independent agencies makes full sense today").

[65] Brett M. Kavanaugh, Lecture, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 731 (2014).

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

that *Chevron* deference is "an atextual invention by courts" that is "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[67]

For that reason, it is little surprise that Judge Kavanaugh has recommended limiting the authority that administrative agencies have traditionally exercised in enacting reasonable business regulations. For example, in a dissent from the denial of rehearing *en banc* in a case about the Obama Administration's net neutrality rules,[68] Judge Kavanaugh advocated for expanding the so-called "major rules" doctrine, whereby "major agency rules of great economic and political significance"[69] cannot be premised on an "ambiguous grant of statutory authority."[70] Notably, Judge Kavanaugh's articulation of the "major rules" doctrine is particularly broad. Rather than simply suggesting that agencies do not receive deference from courts when they address major questions (as Chief Justice Roberts has suggested[71]), 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."[72]

To determine whether a rule is major, courts should look, in Judge Kavanaugh's view, to "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue"—as he styled it, a "'know it when you see it'" approach.[73] This broad and flexible articulation of the "major rules" doctrine, if adopted by the Supreme Court, would allow courts to prevent agencies from enacting regulations across a wide array of areas.

Applying his heightened "major rules" doctrine, Judge Kavanaugh would have held that the Obama Administration's net neutrality rule was a major rule because it affected "every Internet service provider, every Internet content provider, and every Internet consumer," had a large financial impact, and because "Congress and the public have paid close attention to the issue."[74] Furthermore, he would have held that Congress did not clearly authorize the FCC to issue the net neutrality rule because the statute is

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[67] Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation Judging Statutes*, 129 Harv. L. Rev. 2118, 2150 (2016); *see id.* at 2151 ("We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope.").

[68] "Net neutrality" is the principle that Internet service providers (like Comcast or Verizon) must treat all Internet data equally and not discriminate or charge consumers different amounts based on the content of the data.

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

[70] *Id.* at 421.

[71] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *see* Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSblog (June 28, 2018), http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/ ("Kavanaugh's major-rules doctrine goes even further than the 'major-questions doctrine' described by Roberts in *King v. Burwell*."). In *King v. Burwell*, the Chief Justice held that "question[s] of deep 'economic and political significance' that [are] central to [a] statutory scheme" do not receive *Chevron* deference. 135 S. Ct. at 2489 (quoting *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). However, an agency's rule can prevail if the Court determines that the agency's interpretation is the best reading of the statute. 135 S. Ct. at 2489 ("[O]ur task is to determine the correct reading of [the statute].").

[72] *U.S. Telecom Ass'n.*, 855 F.3d at 418.

[73] *Id.* at 422-23.

[74] *Id.* at 423.

ambiguous as to whether Internet service is a telecommunications service.[75] But he could not convince his colleagues on the D.C. Circuit, the majority of whom voted not to rehear the panel decision upholding the rule as a permissible reading of the statute under *Chevron*.[76]

This was not the first time Judge Kavanaugh would have used the "major rules" doctrine to strike down important government regulations on industry. In *Coalition for Responsible Regulation v. EPA*, Judge Kavanaugh dissented from the denial of rehearing *en banc*, writing that he would have vacated an EPA rule that included greenhouse gases within the statutory definition of "air pollutant" for purposes of pre-construction permits for power plants.[77] Judge Kavanaugh lamented that the "EPA's interpretation will impose enormous costs on tens of thousands of American businesses, with corresponding effects on American jobs and workers," and opined that the court should not "lightly conclude that Congress intended such major consequences absent some indication that Congress meant to do so."[78] In short, Judge Kavanaugh would have overturned EPA regulations defining the term "air pollutant" to include greenhouse gases—an interpretation *mandated* by the Supreme Court for another part of the Clean Air Act[79]—because Congress did not explicitly define the term "air pollutant" to include greenhouse gases. Though accepting that "[t]he task of dealing with global warming is urgent and important," Judge Kavanaugh still would have struck down the rule on the belief that "undue deference or abdication to an agency carries its own systemic costs."[80]

VI. Environmental Regulations

Judge Kavanaugh has routinely sided with industry over the government's efforts to protect the environment, while concomitantly siding with the government over environmental groups seeking stricter environmental regulations. As discussed above, one major example is his dissent from the denial of rehearing *en banc* where he explained that he would have struck down an EPA rule seeking to regulate greenhouse gas emissions from power plants.[81] But that case is just the tip of the iceberg. In case after

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[75] *Id.* at 424-25.

[76] *Id.* at 382 (order per curiam). Judge Kavanaugh's dissent in that case is all the more remarkable given that it is in tension with Supreme Court precedent to the contrary. In *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, the Supreme Court had "no difficulty concluding that *Chevron* applie[d]" to the agency's decision to classify cable broadband as an information service rather than a telecommunications service because the statute's "silence" on the matter left the FCC "discretion to fill the consequent statutory gap." 545 U.S. 967, 982, 997 (2005). As Judge Tatel remarked in his concurrence in *U.S. Telecom Ass'n*, "[t]o affirm the FCC's statutory discretion to select between [telecommunications and information services] was necessarily to countenance the agency's treatment of cable broadband as a telecommunications service" because those were the only two choices available to the agency. 855 F.3d at 384 (Tatel, J., concurring in the denial of rehearing en banc).

[77] 2012 WL 6621785, at *14 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[78] *Id.* at 18.

[79] *See Mass. v. EPA*, 549 U.S. 497, 529 (2007) ("air pollutant" includes "all airborne compounds of whatever stripe," including greenhouse gases).

[80] 2012 WL 6621785, at *22 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[81] *Id.* at *14 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

case, whether in the majority or often in dissent, Judge Kavanaugh has taken a position against environmental regulations.

First, in *EME Homer City Generation, L.P. v. EPA*, Judge Kavanaugh wrote a majority opinion striking down the EPA's Transport Rule, an important regulation that required industries in upwind states that caused poor air quality in downwind states to reduce their emissions of pollutants.[82] Although the Clean Air Act broadly requires States to prohibit polluters "from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any . . . ambient air quality standard,"[83] Judge Kavanaugh employed a cramped reading of this text to hold that the EPA's rule—which considered the cost to each State to reduce pollution—was unlawful because it could require states to reduce emissions by more than their own contributions to a downwind State's nonattainment.[84] The Supreme Court overturned Judge Kavanaugh's decision in a 6-2 opinion joined by both Chief Justice Roberts and Justice Kennedy.[85] The Supreme Court reasoned that the Clean Air Act "does not require EPA to disregard costs and consider exclusively each upwind State's physically proportionate responsibility for each downwind air quality problem."[86] Moreover, the Court criticized Judge Kavanaugh for not "fac[ing] up to th[e] problem" that "interstate air pollution" is "not . . . simple," and that "where . . . upwind States contribute pollution to more than two downwind receptors, proportionality becomes all the more elusive."[87] The Supreme Court concluded that the EPA's rule "is a permissible, workable, and equitable interpretation" of the Clean Air Act.[88]

Judge Kavanaugh has also been a strong proponent of requiring agencies like the EPA to take into consideration the cost to industries and corporations when crafting environmental rules, a business-friendly position rarely explicitly required by statute. For example, Judge Kavanaugh dissented in *Mingo Logan Coal Co. v. EPA*, in which the majority approved EPA's revocation of a Clean Water Act permit for a coal company to "excavate the tops of several West Virginia mountains, extract exposed coal and dispose of the excess soil and rock in three surrounding valleys containing streams"[89] because it "would result in 'unacceptable adverse effect[s]' to the environment."[90] Judge Kavanaugh believed that the EPA did not take into proper consideration the cost to the coal company and its shareholders of revoking the permit, even though the statute did not explicitly require consideration of costs. In his view, "EPA considered *the benefits to animals* of revoking the permit," but it never considered "the negative financial impacts on [the coal company's] owners and shareholders, including those who relied on the permit . . . ."[91] The majority, by contrast, refused to consider the argument that the EPA failed to

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[82] 696 F.3d 7, 11-12 (D.C. Cir. 2012).

[83] 42 U.S.C. § 7410(a)(2)(D)(i).

[84] 696 F.3d at 11.

[85] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014).

[86] *Id.* at 1610.

[87] *Id.* at 1605.

[88] *Id.* at 1610.

[89] 829 F.3d 710, 713 (D.C. Cir. 2016).

[90] *Id.* (quoting 33 U.S.C. § 1344(c)).

[91] *Id.* at 731-732 (Kavanaugh, J., dissenting).

consider the cost to its shareholders because the coal company failed to make that argument either before the EPA or in the district court.[92]

Similarly, in *White Stallion Energy Ctr., LLC v. EPA*, Judge Kavanaugh dissented in part from a majority decision which upheld an EPA rule promulgating emissions standards for a number of listed hazardous air pollutants emitted by coal- and oil-fired electric plants.[93] The majority held that the Clean Air Act's instruction that the EPA issue emissions limits that are "appropriate" did not require it to consider costs to the industry.[94] Judge Kavanaugh disagreed, opining that the word "appropriate" unambiguously required the agency to consider costs. He lamented that the majority's holding would "likely knock a bunch of coal-fired electric utilities out of business and require enormous expenditures by other coal and oil-fired electric utilities . . . ."[95] While Judge Kavanaugh's view was later approved by the Supreme Court,[96] that only underscores the extent to which Judge Kavanaugh's confirmation would cement a Supreme Court majority skeptical of the EPA's authority to regulate.

By contrast, Judge Kavanaugh has been much more deferential to agencies when environmental groups challenge their rules. In *Natural Resources Defense Council v. EPA*, for example, Judge Kavanaugh wrote an opinion upholding an EPA rule increasing the maximum emissions level for particulate matter from 0.04 lb/ton to 0.07 lb/ton for cement manufacturing plants.[97] In doing so, he agreed with the EPA's reading of the statute, allowing it to consider whether a "proposed emission level[] would be cost-effective" to the cement producing industry, over environmental groups' objections that the EPA should consider only whether "'the standard is too expensive for industry to achieve.'"[98] Notably, Judge Kavanaugh was extraordinarily deferential to the agency in a case where environmental groups were challenging its rule-making, holding that "even if EPA's reading is not the better reading, we conclude that it is still at least a reasonable reading given the various potential meanings of 'cost' in this context."[99] This contrasts with the lack of deference he afforded the EPA in *Mingo Logan Coal Co.* and *White Stallion Energy Center, LLC* when the EPA was challenged by industry players.

This deference to agencies over environmental groups' objections extends beyond the EPA. In *Hoopa Valley Tribe v. FERC*, Judge Kavanaugh upheld the Federal Energy Regulatory Commission's (FERC's) refusal to impose conditions on a hydroelectric plant to preserve a river's trout fishery—specifically, minimum flow requirements and regulations on the rate at which water levels rise or fall due to project operations.[100] The Hoopa Valley Tribe had challenged those regulations because they "h[e]ld[] fishing

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[92] *Id.* at 719-20 (majority opinion).

[93] 748 F.3d 1222, 1222, 1229 (D.C. Cir. 2014).

[94] *Id.* at 1237-39.

[95] *Id.* at 1264 (Kavanaugh, J., dissenting). Judge Kavanaugh went on: "Telling someone that costs will be considered in a regulatory step that occurs *after* they have already had to pay an exorbitant amount and may already have been put out of business is not especially reassuring." *Id.*

[96] *Mich. v. EPA*, 135 S. Ct. 2699 (2015).

[97] 749 F.3d 1055, 1057-58 (D.C. Cir. 2014).

[98] *Id.* at 1060-61 (quoting Pet'rs Br. 34).

[99] *Id.* at 1061.

[100] 629 F.3d 209, 210-11 (D.C. Cir. 2010).

rights in the Klamath River and subsist[ed] in part on the River's trout."[101] Judge Kavanaugh held that FERC was correct in applying a standard that required it to revoke an existing license only when there were "unanticipated, serious impacts" on fishery resources, and that the Court could not second-guess the agency's decision concluding that trout were "thriving" despite "some adverse effects."[102]

Judge Kavanaugh's part-time deference to agencies does not extend, however, to the government's attempts to tighten environmental regulations as it receives new scientific information. For example, in *Mexichem Fluor, Inc. v. EPA*, Judge Kavanaugh held that the EPA acted outside its statutory authority when it removed hydrofluorocarbons (HFCs) from the list of safe substitutes that manufacturers may use to replace ozone-depleting substances.[103] The EPA argued that its rule change was permissible under the Clean Air Act, which "allows [the] EPA to 'change the listing status of a particular substitute' based on 'new information'"—in this case, the "[e]merging research" that HFCs "contribute to climate change."[104] Judge Kavanaugh disagreed. Employing a cramped reading of the statutory term "replace," Judge Kavanaugh held that once the EPA determined a substance was a safe substitute, it could not change its mind for companies already using that substitute even if new information showed that substitute to have harmful effects.[105] A dissenting judge criticized the majority's "extreme" interpretation as making "the agency . . . powerless to tell [a] product manufacturer that it could no longer use [a] more risky substitute," which would "undermine[] Congress's intent to 'reduce overall risks to human health and the environment' in a manner 'to the maximum extent practicable.'"[106]

Finally, Judge Kavanaugh has favored the EPA over state and local environmental permitting agencies when they have attempted to enforce stricter requirements than the EPA. In *Sierra Club v. EPA*, the D.C. Circuit, in an opinion by one of the court's relatively conservative jurists, Judge Thomas Griffith, struck down the EPA's prohibition on state and local permitting agencies supplanting statutory monitoring requirements.[107] As the majority explained, the EPA's prohibition on supplementary monitoring requirements would "mean[] that some permit programs currently in place do not comply with [Title V of the Clean Air Act] because the [EPA] failed to fix inadequate monitoring requirements before new permits issued, and prohibited state and local authorities from doing so."[108] Unpersuaded, Judge Kavanaugh dissented and took the position that "the statute grants EPA the authority to determine whether state and local permitting authorities can impose additional monitoring requirements."[109] This case is just another example of Judge Kavanaugh selectively siding with the government when it takes an anti-environment stance.

Of course, over his long tenure, Judge Kavanaugh has occasionally affirmed the EPA's attempts to regulate industry. For example, in *National Mining Assocation v. McCarthy*, Judge Kavanaugh wrote a

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[101] *Id.* at 210.

[102] *Id.* at 212-13.

[103] 866 F.3d 451, 454 (D.C. Cir. 2017).

[104] *Id.* at 456.

[105] *Id.* at 459.

[106] *Id.* at 468 (Wilkins, J., concurring in part and dissenting in part).

[107] 536 F.3d 673, 674 (D.C. Cir. 2008).

[108] *Id.* at 677.

[109] *Id.* at 681 (Kavanaugh, J., dissenting).

majority opinion holding that the EPA's Enhanced Coordination Process that regulated surface coal mining was consistent with the EPA's authority under the Clean Water Act, and that its Final Guidance to States on this issue was not a final agency action and thus could not be reviewed by the courts at the time.[110] Similarly, in *American Trucking Assocations, Inc. v. EPA*, Judge Kavanaugh wrote a majority opinion holding that California's rule limiting emissions from in-use non-road engines, like a truck's on-board refrigeration unit, did not violate the Clean Air Act.[111] However, as described above, these cases are exceptions to a much broader pattern of favoring industry interests over the EPA's efforts to protect the environment.

VII. Multinational Corporate Liability

Judge Kavanaugh has repeatedly sought to insulate multinational corporations from liability for their misdeeds abroad. For example, in *Doe v. Exxon Mobil Corporation*, eleven Indonesian villagers alleged that Indonesian military forces committed murder, torture, sexual assault, battery, false imprisonment, and other torts against them while guarding Exxon's facilities, and that Exxon was aware of these human rights abuses yet did nothing to stop them.[112] After the district court refused to dismiss the state-law tort claims on political-question grounds, the D.C. Circuit—in an opinion by Judge David Sentelle, widely considered a conservative jurist—held that the court did not have jurisdiction to hear an interlocutory appeal of a political-question defense, and would not grant an order of mandamus overturning the district court's order.[113]

Judge Kavanaugh dissented, expressing a broad view about when foreign policy concerns should prevent individuals from suing corporations for their misdeeds abroad. According to Judge Kavanaugh, because the plaintiffs would have to "prove that members of the Indonesian military engaged in acts of violence in Indonesia against Indonesian citizens," and because the State Department suggested that "this litigation would harm U.S. foreign policy interests," the plaintiffs' claims should be barred.[114] And he would have held this despite the exceedingly high bar for invoking the remedy of mandamus—"only upon a showing that the petitioner's right is 'clear and indisputable,' and that 'no other adequate means to attain the relief' exist."[115] The Court rejected Judge Kavanaugh's position, and the tort claims proceeded.

The case reached the D.C. Circuit again a few years later, and—again over Judge Kavanaugh's dissent—the Court permitted claims against Exxon Mobil under the Alien Tort Statute (ATS) for violations of customary international law to proceed. The Court held that the ATS does not "support corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of

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[110] 758 F.3d 243, 246-47 (D.C. Cir. 2014).

[111] 600 F.3d 624, 625 (D.C. Cir. 2010).

[112] 473 F.3d 345, 346 (D.C. Cir. 2007).

[113] *Id.* at 345, 357.

[114] *Id.* at 364 (Kavanaugh, J., dissenting).

[115] *Id.* at 367 (quoting *In re Sealed Case*, 141 F.3d 337, 339 (D.C. Cir. 1998)).

nations," and concluded that the victims did not lack prudential standing to bring their tort claims, among other things.[116]

In a sweeping dissent, Judge Kavanaugh offered four different reasons he would have protected Exxon Mobil from liability for these claims. First, Judge Kavanaugh would have concluded that the ATS simply "does not apply to conduct that occurred in foreign nations."[117] Second, he would have held that "the ATS does not apply to claims against corporations."[118] Third, he would have prohibited ATS claims for torture and extrajudicial killing to go forward against a corporation because the analogous Torture Victim Protection Act "does not allow corporate liability or aiding and abetting liability."[119] Fourth, he would have once again dismissed the ATS suit because "the Executive Branch reasonably explain[ed] that the suit would harm U.S. foreign policy interests."[120] Unfortunately for the victims in these cases, the Supreme Court has agreed in 5-4 decisions that the ATS does not apply to foreign corporations,[121] and that the ATS does not apply "even where the claims touch and concern the territory of the United States" unless "with sufficient force to displace the presumption against extraterritorial application."[122] Thus, Judge Kavanaugh would further entrench a majority at the Supreme Court that has shielded corporations from liability under the ATS for human rights violations.

VIII. Competition in the Marketplace

Finally, Judge Kavanaugh has issued a number of opinions that side with corporate interests against regulatory agencies seeking to curb anti-competitive business practices. For instance, in an early opinion in *National Fuel Gas Supply Corp. v. FERC*, Judge Kavanaugh struck down a FERC rule which would have required gas pipelines to provide equal and open access to information to all processors, gatherers, producers, distributors, and traders of natural gas, thus avoiding the anti-competitive practice of pipelines granting their own affiliates special preferences.[123] Judge Kavanaugh refused to accept FERC's worries about the "threat of undue preferences," and instead adopted the gas industry's view that "vertical integration creates efficiencies for consumers" and that FERC could not produce enough evidence of abuse to rebut this presumption.[124]

Judge Kavanaugh has also dissented from opinions that sought to prevent anti-competitive business practices. In *Federal Trade Commission v. Whole Foods Market, Inc.*, the D.C. Circuit held that the Federal Trade Commission (FTC) was entitled to a preliminary injunction to block the merger of Whole

[116] *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *judgment vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

[117] *Id.* at 72 (Kavanaugh, J., dissenting in part).

[118] *Id.*

[119] *Id.* at 73.

[120] *Id.*

[121] *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1386, 1407 (2018).

[122] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 108, 124-25 (2013).

[123] 468 F.3d 831, 834 (D.C. Cir. 2006).

[124] *Id.* at 839-840.

Foods and Wild Oats—two premium, natural, and organic supermarkets—on the theory that the merger would create monopolies in the high-end grocery store markets in multiple cities.[125] Judge Janice Rogers Brown, widely considered a conservative jurist, wrote for the majority and concluded that for a core group of consumers who demand natural and organic food products, other supermarkets were not sufficient substitutes for grocery stores like Whole Foods and Wild Oats, and within this sub-market of the broader grocery store market the merger of these companies would allow them to raise prices on consumers.[126] As the Court explained: "The FTC put forward economic evidence . . . showing directly how [premium, natural, and organic supermarkets] discriminate on price between their core and marginal customers, thus treating the former as a distinct market."[127]

Judge Kavanaugh dissented, refusing to accept that natural and organic supermarkets could constitute a separate market for purposes of deciding whether the merger was anticompetitive.[128] In so holding, Judge Kavanaugh appeared to be more sympathetic to the interests of "antitrust regulators and practitioners" and "potentially merging companies" than consumers who would face higher prices.[129]

Similarly, in *United States v. Anthem, Inc.*, Judge Kavanaugh dissented from a majority opinion that upheld the United States' blocking of a proposed merger between two health insurance companies, Anthem and Cigna.[130] In doing so, Judge Kavanaugh evinced a strikingly rosy view of what a merger of two health insurance companies would mean for consumers. He believed that because insurance companies act as purchasing agents for employers, allowing the two companies to merge would create "a more powerful purchasing agent than Anthem and Cigna operating independently" which in turn would allow them "to negotiate *lower* provider rates on behalf of its employer-customers" with "cost savings that would be passed through directly to the employer-customers."[131] However, a concurring judge retorted that the record suggested that "customers would be paying less because they would be getting less in the form of a degraded Cigna product," and noted the fact that "internal Anthem documents detailed the company's efforts and specific business options for actively *preventing* [any] savings from being passed through to customers and instead capturing the money for itself."[132] Notwithstanding this evidence, Judge Kavanaugh would have overturned the district court's decision to permanently enjoin the merger—and he would have done this despite the deferential abuse-of-discretion standard of review.[133]

Finally, Judge Kavanaugh has also opposed the government's effort to create rules that maintain competition in anti-competitive industries—for example, the cable television industry. In *Cablevision Systems Corp. v. FCC*, Judge Kavanaugh dissented from the D.C. Circuit's decision to affirm an FCC rule prohibiting exclusive contracts between cable operators and cable affiliated programming networks—in

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[125] 548 F.3d 1028, 1032 (D.C. Cir. 2008) (opinion of Brown, J.).

[126] *Id.* at 1039-41.

[127] *Id.* at 1041.

[128] *Id.* at 1051 (Kavanaugh, J., dissenting).

[129] *Id.* at 1063.

[130] 855 F.3d 345, 348 (D.C. Cir. 2017).

[131] *Id.* at 372 (Kavanaugh, J., dissenting).

[132] *Id.* at 369-370 (Millett, J., concurring).

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

other words, preventing an operator like Comcast from withholding affiliated networks like Comcast SportsNet Philadelphia from competitors like satellite television providers.[134] The FCC concluded that "in many areas consumers continue overwhelmingly to subscribe to cable," that "[c]able operators tend to cluster regionally," and that "[b]ecause of this . . . a single geographic area can be highly susceptible to near-monopoly control by a cable company."[135] Based on this, the FCC "concluded that vertically integrated cable companies would enter into competition-harming exclusive contracts if the exclusivity prohibition were allowed to lapse."[136] Judge Kavanaugh rejected all of this, concluding that "[c]able operators no longer possess bottleneck monopoly power," and that the FCC's rule was therefore "no longer necessary to further competition . . . ."[137] Moreover, he would have struck down the FCC's rule under the First Amendment, despite the petitioners having failed to make a specific, as-applied challenge in their briefs.[138]

IX. Conclusion

As this Issue Brief has shown, time and again Judge Kavanaugh has sided with corporate and business interests even when consumers, workers, and regulatory agencies had the text of the law and precedent on their side. He has done so across a range of issues, and he has often done so in dissent, staking out positions that are even friendlier to big business than those of some of his conservative colleagues on the D.C. Circuit. As the Senate continues to consider his nomination, Senators should ask him about this record. The American people should know whether Judge Kavanaugh's confirmation will further cement the pro-business majority at the Supreme Court, and whether he will be a champion of big businesses or all Americans for the decades he could potentially serve on the Court.

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[134] 597 F.3d 1306, 1307-10 (D.C. Cir. 2010).

[135] *Id.* at 1309.

[136] *Id.* at 1313. This was especially so because "the four largest cable operators are . . . vertically integrated with six of the top 20 national networks, some of the most popular premium networks, and almost half of all regional sports networks." *Id.* at 1314.

[137] *Id.* at 1316 (Kavanaugh, J., dissenting).

[138] *Id.* at 1312 (majority opinion).

CONSTITUTIONAL ACCOUNTABILITY CENTER

Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?

BY DAVID H. GANS[†]

AUGUST 2018

Introduction

In announcing Judge Brett Kavanaugh's nomination to the Supreme Court, President Trump billed him as a jurist who will enforce the Constitution as written.[1] Luminaries of the conservative legal movement have lined up to support him, claiming that he "would move the Court in the direction of textualism and originalism."[2] A review of his record—both his opinions and other writings—casts serious doubt on this claim. Judge Kavanaugh's record suggests that he is a selective originalist, who unfortunately has turned 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. During his tenure on the D.C. Circuit, he has taken a dim view of a number of critical constitutional protections, while stretching the rules of precedent to vastly expand others. Judge Kavanaugh therefore will have a heavy burden to meet when he testifies before the Senate Judiciary Committee, which will soon consider his nomination to the United States Supreme Court. He will have to demonstrate that he is willing to enforce the *whole* Constitution—both the Founding document and the Amendments that made our Constitution more protective of freedom, equality, and democracy—not just the parts that match his conservative political beliefs.

[†] David H. Gans is Director of the Human Rights, Civil Rights & Citizenship Program at the Constitutional Accountability Center.

[1] *See Trump Announces Brett Kavanaugh as Supreme Court Nominee: Full Video and Transcript*, N.Y. Times (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/trump-supreme-court-announcement-transcript.html

[2] Randy Barnett, @RandyEBarnett, Twitter (July 9, 2018, 9:11 PM), https://twitter.com/randyebarnett/status/1016505091241709568

Our Constitution is, in its most vital respects, a progressive document. At a time when monarchies reigned in much of the world, our Constitution's Framers created a democratic system based on the sovereignty of "We the People" and a system of checks and balances to better secure liberty and prevent any one branch from aggrandizing its power. The Framers created the Article III judiciary to vindicate individual rights and prevent abuse of power by the government, recognizing that "[t]here is no other body that can afford such a protection."[3] In the Bill of Rights, our Constitution requires that the federal government respect fundamental rights and ensure fair legal treatment for all persons, citizens and noncitizens alike.

However, our original Constitution was far from perfect; it sanctioned slavery and permitted massive violations of fundamental rights by state governments. But the Amendments ratified in the wake of the Civil War, often termed America's Second Founding,[4] eliminated these blights on our Constitution.[5] The Thirteenth Amendment abolished slavery; the Fourteenth Amendment guaranteed birthright citizenship to all persons born or naturalized in the United States and wrote into the Constitution sweeping new guarantees that required state and local governments to respect the liberty, dignity, and equality of all persons; and the Fifteenth Amendment guaranteed the right to vote free from racial discrimination. All three of these Second Founding Amendments gave Congress broad enforcement power to make these new constitutional guarantees real. In the 20th century, a host of other Amendments broadened the right to vote and made our system of government more democratic. Each of these voting rights Amendments—like the Second Founding Amendments—explicitly gave enforcement power to Congress.

Both in his writings and his opinions, Judge Kavanaugh has exalted the Constitution's structure over the Amendments that have been added to the Constitution over the course of more than two centuries. Kavanaugh has discounted the Constitution's "majestic generalities" and celebrated the "nitty-gritty details of specific government structure" in the original Constitution over the broadly worded guarantees of individual rights added by the Bill of Rights, the Second Founding Amendments, and other

[3] 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliott ed. 1836) (statement of John Marshall); *see generally* David H. Gans, *The Keystone of the Arch: The Text and History of Article III and the Constitution's Promise of Access to Courts,* (2016), https://www.theusconstitution.org/think_tank/the-keystone-of-the-arch-the-text-and-history-of-article-iii-and-the-constitutions-promise-of-access-to-courts.

[4] *The Second Founding,* The Atlantic, https://www.theatlantic.com/projects/the-second-founding/ (last visited July 31, 2018),

[5] *See* David H. Gans and Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause* (2008) https://www.theusconstitution.org/think_tank/the-gem-of-the-constitution/); David H. Gans & Douglas T. Kendall, *The Shield of National Protection: The Text and History of Section 5 of the Fourteenth Amendment* (2009), https://www.theusconstitution.org/think_tank/the-shield-of-national-protection-the-text-history-of-section-5-of-the-fourteenth-amendment/; David H. Gans, *Perfecting the Declaration: The Text and History of the Equal Protection Clause of the Fourteenth Amendment* (2011), https://www.theusconstitution.org/think_tank/perfecting-the-declaration-the-text-and-history-of-the-equal-protection-clause-of-the-fourteenth-amendment/).

amendments.[6] For Kavanaugh, the Constitution's structure is "where our liberty is really protected,"[7] a view that ignores that many parts of our Constitution are designed to protect liberty by preventing the abuse of power by state governments in addition to federal structured protections. Not surprisingly, virtually all of Judge Kavanaugh's opinions that discuss the Constitution's text and history concern the Constitution's structure,[8] and even in those opinions, Judge Kavanaugh often gets the text and history wrong, taking a view of the Constitution's structure that turns our foundational charter on its head. Kavanaugh's jurisprudence would tip the scales of our systems of checks and balances decisively in favor of an all-powerful executive.

Where Judge Kavanaugh does not purport to rely on constitutional text and history, he looks to precedent, but he often interprets prior Supreme Court decisions to move the law sharply to the right. He has sought to vastly expand protections for some rights, while permitting the government to run roughshod over others. These results may please conservatives, but they are badly out of step with the Constitution's text, history, and values. Indeed, even his conservative colleagues have chided him about his approach to precedent. As Judge Janice Rogers Brown pointedly reminded Judge Kavanaugh, "[*s]tare decisis* means nothing if we are only bound by those cases with which we already agree. Like it or not, we cannot ignore Supreme Court precedent."[9] Given this record, Judge Kavanaugh has a heavy burden to convince the Senate that he is a judge who will be faithful to the entire Constitution if he is confirmed to a seat on the Supreme Court.

This Issue Brief unfolds as follows. Part I examines Judge Kavanaugh's jurisprudence on constitutional structure, examining his views on both presidential and congressional power. Judge Kavanaugh has written that text matters, but in many of his rulings, he has dramatically expanded the powers of the President, while narrowing the broad scope of the powers granted to Congress to solve national problems. Part II examines Judge Kavanaugh's record in cases interpreting the protections contained in the Bill of Rights; here, he has applied precedent to whittle down certain rights, while expanding others. In First and Second Amendment cases, Judge Kavanaugh has applied precedent to give corporations and the wealthy new sweeping free speech protections and gun owners broad protections against reasonable gun regulation. By contrast, he has proven a consistent pro-government vote in Fourth Amendment cases and has offered an extremely cramped view of the right to choose abortion, emptying the established undue burden standard of any real content.

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[6] Panel, *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 Geo. Wash. L. Rev. 1889, 1900 (2012) [hereinafter Dialogue]; Lecture, Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist,* 2 (September 18, 2017) [hereinafter From the Bench] ("It is sometimes said that the Constitution is a document of majestic generalities. I view it differently."), *available at* http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

[7] Dialogue, *supra*, at 1900-01; Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014) [hereinafter Our Anchor] ("The primary protection of individual liberty in our constitutional system comes from the separation of powers in the Constitution . . . .").

[8] *See, e,g.*, *Free Enter. Fund v. Pub. Co. Account. Oversight Bd.*, 537 F.3d 667, 685-715 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part and rev'd in part*, 561 U.S. 477 (2010); *In re Aiken County*, 645 F.3d 428, 438-48 (D.C Cir. 2011) (Kavanaugh, J., concurring); *Sissel v. U.S. Dep't of Health and Hum. Servs.,* 799 F.3d 1035, 1049-65 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164-200 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

[9] *Emily's List v. FEC*, 581 F.3d 1, 33 (D.C. Cir. 2009) (Brown, J., concurring in part).

I. Judge Kavanaugh and Constitutional Structure

A. The Powers of the President

1. Independent Agencies

Judge Kavanaugh has written a number of opinions condemning independent agencies as an extra-constitutional fourth branch of government. He has repeatedly expressed his disagreement with decades of Supreme Court precedent upholding the power of Congress to create independent agencies and to impose limits on the President's removal power.

In 2008, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, Judge Kavanaugh wrote a sweeping dissenting opinion attacking the constitutionality of the Public Company Accounting Oversight Board (PCAOB), an independent agency whose members were removable for cause by the Securities and Exchange Commission (SEC).[10] In his dissent, Kavanaugh insisted that the Board's structure could not be squared with the "text and original understanding" of Article II because, in his view, "the President possesses the power . . . to remove officers of the Executive Branch *at will*."[11] Kavanaugh conceded that "the subject of removing officers in the Executive Branch 'was not discussed in the Constitutional Convention,'"[12] but he found that beside the point. The vesting of executive power in the President, he claimed, meant that "a single President possesses the entirety of the 'executive power' . . . and the entire authority to take care that the laws be faithfully executed," including an unfettered power to remove officers at will.[13]

Kavanaugh's interpretation of Article II's Vesting Clause flew in the face of the Supreme Court's decisions in *Humphrey's Executor v. United States*[14] and *Morrison v. Olson*,[15] both of which upheld for-cause removal limitations. According to Kavanaugh, those cases should be read as narrowly as possible because they "represent[ed] what up to now have been the outermost constitutional limits on permissible congressional restrictions on the President's removal power."[16] Any "questions about the scope of those precedents" had to be resolved "in light of and in the direction of the constitutional text and constitutional history."[17] He voted to strike down PCAOB's structure on the grounds that "double for-cause removal provisions . . . completely strip the President's ability to remove PCAOB members . . . and combine to eliminate any meaningful Presidential control over the PCAOB."[18]

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[10] *Free Enter. Fund*, 537 F.3d at 685 (Kavanaugh, J., dissenting).

[11] *Id.* at 692 (emphasis added).

[12] *Id.* at 691 (quoting *Myers v. United States*, 272 U.S. 52,109-110 (1926)).

[13] *Id.* at 689.

[14] 295 U.S. 602 (1935).

[15] 487 U.S. 654 (1988).

[16] *Free Enter. Fund*, 537 F.3d at 698 (Kavanaugh, J., dissenting).

[17] *Id.*

[18] *Id.* at 697.

In his dissent, Judge Kavanaugh also would have held that the Board's structure violated the Appointments Clause. He argued that the members of the PCAOB were principal officers, who had to be appointed by the President and confirmed by the Senate, because the SEC lacked the power to "remove[] *at will*" Board members or "to manage the ongoing conduct of, Board inspections, investigations, and enforcement actions."[19]

In a 5-4 ruling, the Supreme Court reversed the D.C. Circuit's decision. Although the Court agreed with Kavanaugh's attack on double for-cause removal, it did so without calling into question longstanding Supreme Court precedent permitting Congress to ensure that independent agencies, in fact, enjoy some independence from presidential control. As Chief Justice Roberts put it, "While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way."[20] The majority remedied this defect by excising the removal provisions, making "the Board removable by the Commission at will" and leaving "the President separated from Board members by only a single level of good-cause tenure."[21] By a 9-0 vote, the Court rejected Kavanaugh's Appointments Clause analysis, concluding that "the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'"[22]

This is not the only case in which Judge Kavanaugh has attacked independent agencies. To the contrary, during his tenure, Judge Kavanaugh has done so repeatedly. In a 2009 case, *Securities Exchange Commission v. Federal Labor Relations Authority*, Kavanaugh wrote "separately to point out the constitutional oddity of a case pitting two agencies in the Executive Branch against one another."[23] Under Article II, he wrote, "a single President controls the Executive Branch" and thus "legal or policy disputes between two Executive Branch agencies are typically resolved by the President . . . without judicial intervention."[24] A suit between two agencies, he wrote, was "in tension with the constitutional structure designed by the Framers," and resulted from the fact that, in *Humphrey's Executor*, the "Supreme Court approved of independent agencies, at least in some circumstances," allowing them to function as "a kind of extra-constitutional Fourth Branch."[25]

In a 2011 ruling, *In re Aiken County*, Judge Kavanaugh wrote separately to question *Humphrey's Executor* once again, writing that "[o]ne would think . . . that the President would be able to direct the interpretation of law and exercise of discretion by all agencies in the Executive Branch," given that Article II vests in the President "not some of the executive power, but all of it."[26] He bemoaned that "[b]ecause of *Humphrey's Executor*, the President to this day lacks day-to-day control over large swaths of

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[19] *Id.* at 709.

[20] *Free Enter. Fund*, 561 U.S. at 514.

[21] *Id.* at 509.

[22] *Id.* at 510 (quoting U.S. Const., art II, § 2, cl. 2).

[23] *Sec. Exch. Comm'n v. Fed. Lab. Rel. Board*, 568 F.3d 990, 996 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

[24] *Id.* at 997.

[25] *Id.*

[26] 645 F.3d at 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

regulatory policy and enforcement in the Executive Branch."[27] He viewed the decision as a politically motivated departure from the Constitution, "best explained by the fact that it was decided in 1935 on what became known as Roosevelt's 'Black Monday,'" which was "one in a line of decisions . . . by a Supreme Court seemingly bent on resisting President Roosevelt and his New Deal policies."[28] He lamented that "*Humphrey's Executor* survived" and "lives on," while other cases of that era "have long since been discarded as relics of an overly activist anti-New Deal Supreme Court."[29]

In 2018, in *PHH v. Consumer Financial Protection Bureau*, Judge Kavanaugh dissented from a 7-3 *en banc* D.C. Circuit ruling upholding the constitutionality of the leadership structure of the Consumer Financial Protection Bureau (CFPB).[30] He would have held that an independent agency headed by a single director—even though removable by the President for cause—could not be squared with Article II, which, he insisted, "speak[s] with unmistakable clarity about who controls the executive power."[31] Despite the fact that for-cause removal provisions had been upheld in *Humphrey's Executor* and *Morrison*, and had been the remedy imposed in *Free Enterprise Fund*, Judge Kavanaugh insisted that the President had the right to remove the CFPB's director at will. He claimed that "[t]he CFPB's concentration of enormous power in a single unaccountable, unchecked Director poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty."[32] Further, he asserted, the CFPB's structure "represents a gross departure from settled historical practice. Never before has an independent agency exercising substantial executive authority been headed by just one person."[33] The Supreme Court's past precedents were all distinguishable in Judge Kavanaugh's view. "Neither *Humphrey's Executor* nor any later case gives Congress blanket permission to create independent agencies that depart from history and threaten individual liberty."[34]

The centerpiece of Judge Kavanaugh's attacks on independent agencies is his view that Article II's text speaks with "unmistakable clarity" about the President's right to remove subordinate executive branch officers.[35] That claim is overstated. As Judge Kavanaugh's dissent in *Free Enterprise Fund* conceded, "the subject of removing officers in the Executive Branch 'was not discussed in the Constitutional Convention,'"[36] and as Chief Justice Rehnquist made the point in *Morrison*, such a "rigid" view "depends upon an extrapolation from general constitutional language" which "is more than the text will bear."[37] In his many opinions on the subject, Judge Kavanaugh has yet to grapple with Founding-era history, which, as the *PHH* majority recognized, demonstrates that "[c]ongressional alertness to the distinctive danger

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[27] *Id.* at 442.

[28] *Id.* at 441-42.

[29] *Id.* at 442.

[30] *PHH*, 881 F.3d at 164. (Kavanaugh, J., dissenting).

[31] *Id.*

[32] *Id.* at 166.

[33] *Id.*

[34] *Id.* at 195.

[35] *Id.* at 164.

[36] 537 F.3d at 691 (Kavanaugh, J., dissenting) (quoting *Myers,* 272 U.S. at 109-10).

[37] *Morrison*, 487 U.S. at 690 n.29.

of political interference with financial affairs, dating to the founding era, began the longstanding tradition of affording some independence to the government's financial functions."[38] Indeed, since the early days of the Republic—when the First Congress created the Treasury Department and made it independent from the President in a number of respects[39]—Kavanaugh's extreme view of presidential power has never been the law. Kavanaugh's opinions on executive power ignore critical aspects of the Constitution's text, history, and values.

Judge Kavanaugh plainly disagrees with many of the Supreme Court's precedents in this area. Off the bench, he has argued that the Supreme Court's decision in *Morrison* has "been effectively overruled," but he "would put the final nail in."[40] There is little doubt that, if he is confirmed, he would urge overruling *Morrison* as well as many other important precedents in this area.

2. Presidential Non-Enforcement and Immunity

Judge Kavanaugh would likely vote to expand presidential power in other ways as well. In dicta Judge Kavanaugh has argued that, notwithstanding the duty the Take Care Clause imposes on the President to "faithfully execute[]" the "Laws,"[41] there are some circumstances in which the President may refuse to enforce laws passed by Congress. In his dissent from *Seven-Sky v. Holder*, in which the D.C. Circuit upheld the Affordable Care Act (ACA), Judge Kavanaugh argued that the courts might never have to decide the ACA's constitutionality because "the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional."[42] Kavanaugh wrote, "[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional."[43] In dicta, Judge Kavanaugh has also claimed that the President can limit the enforcement of statutes he disagrees with. He has claimed that "[t]he President may decline to prosecute or may pardon because of the President's own constitutional concerns about a law *or* because of policy objections to the law, among other reasons."[44] In fact, he claims, "[o]ne of the greatest *unilateral* powers a President possesses under the Constitution . . . is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior."[45] He has called "the President's prosecutorial discretion and pardon powers" an "independent protection for individual citizens against

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[38] 881 F.3d at 91.

[39] Brief Amici Curiae of Current and Former Members of Cong. In Support of Respondent at 8-9, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), https://www.theusconstitution.org/wp-content/uploads/2017/12/PHH_v_CFPB_DC_Cir_En_Banc_Amicus_Final-1.pdf.

[40] American Enterprise Institute, *Judge Brett Kavanaugh – The Court: Power, policy, and self government I* LIVE STREAM, YouTube (Mar. 31, 2016), https://youtu.be/GCtR0OyHiK8?t=50m40s.

[41] U.S. Const., art. II, § 3.

[42] *Seven-Sky v. Holder,* 661 F.3d 1, 50 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding on the merits).

[43] *Id. at* 50 n.43.

[44] *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013). Judge Randolph, who concurred in Judge Kavanaugh's majority opinion, pointedly declined to join this discussion, which was "unnecessary to decide the case." *Id.* at 267 (Randolph, J., concurring).

[45] *Id.* at 264 (opinion of Kavanaugh J.).

the enforcement of oppressive laws that Congress may have passed."[46] Although he has recognized that "the President must abide by statutory *prohibitions* unless the President has a constitutional objection to the prohibition,"[47] he would give the President substantial leeway not to enforce statutes regulating private individuals, such as the ACA.

Judge Kavanaugh also would likely vote to recognize presidential immunity from criminal prosecution while in office, hampering efforts to hold the President accountable for wrongdoing. In his non-judicial writings, Judge Kavanaugh has argued that "even in the absence of a congressionally conferred immunity, a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office."[48] Kavanaugh has argued that the "indictment and trial of a sitting President . . . would cripple the federal government, rendering it unable to function with credibility in either the international or domestic arenas."[49] In Kavanaugh's view, "[i]f the President does something dastardly, the impeachment process is available."[50] In sum, he thinks that "[n]o single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to Congress."[51]

Judge Kavanaugh has even raised questions about the correctness of the landmark, unanimous ruling in *United States v. Nixon*,[52] observing that the Supreme Court's decision in "*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."[53] Kavanaugh called this "a huge step" and asked whether "the tension of the time led to an erroneous decision."[54]

B. The Enumerated Powers of Congress

While Judge Kavanaugh's views of presidential power are expansive, his views of the powers of Congress are much more cramped.

Judge Kavanaugh has correctly recognized that "[t]he Constitution's Framers sought a national government that would be more effective than under the Articles of Confederation,"[55] but he has also incorrectly suggested that "[t]he Framers wanted it to be hard to pass legislation"[56] and celebrated Chief

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[46] *Id.*

[47] *Id.* at 259.

[48] Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 n.31 (2009).

[49] *Id.* at 1461.

[50] *Id.* at 1462.

[51] *Id.*

[52] 418 U.S. 683 (1974).

[53] *See* Mark Sherman, *Kavanaugh: Watergate Tapes Decision May Have Been Wrong,* AP (July 22, 2018), https://apnews.com/3ea406469d344dd8b2527aed92da6365/High-court-nominee-gets-started-answering-questions.

[54] *Id.*

[55] *Aiken County*, 645 F.3d at 439.

[56] *Our Anchor*, *supra*, at 1910.

Justice Rehnquist's efforts to "put[] the brakes on the Commerce Clause" and "prevent[] Congress from assuming a general police power."[57]

In *Seven-Sky v. Holder*, Judge Kavanaugh dissented from a 2-1 ruling upholding the constitutionality of the ACA's individual mandate. He thought the court lacked the power to hear the case under the Anti-Injunction Act, but also raised doubts about the constitutional validity of the ACA.

Judge Kavanaugh recognized that "[s]triking down a federal law as beyond Congress's Commerce Clause authority is a rare, extraordinary and momentous act," but suggested that the ACA may have crossed the line.[58] He expressed concern that "the majority opinion has green-lighted a significant expansion of congressional authority—and thus also a potentially significant infringement of individual liberty," observing that "there is no real limiting principle to [the court's] Commerce Clause holding."[59] He viewed the Affordable Care Act as a novel enactment, commenting that "[t]o uphold the Affordable Care Act's mandatory-purchase requirement, under the Commerce Clause, we would have to uphold a law that is unprecedented on the federal level in American history."[60] He also raised doubts over whether the individual mandate could be upheld under the Taxing Clause, explaining that "the current statute *may not* suffice under the Taxing Clause" because it "arguably does not just incentivize certain kinds of lawful behavior but also mandates such behavior."[61] "The Taxing Clause," he wrote, "has not traditionally authorized a legal prohibition or mandate, as opposed to just a financial disincentive or incentive."[62]

Ultimately, of course, in *National Federation of Independent Business v. Sebelius* (*NFIB*), the Supreme Court, in a 5-4 ruling written by Chief Justice Roberts, upheld the individual mandate under the Taxing Clause, but not under the Commerce Clause.[63] As Chief Justice Roberts wrote, "[t]he Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."[64]

Notably, since *NFIB*, Kavanaugh has had a hard time accepting that the Supreme Court, in fact, upheld the Affordable Care Act. Judge Kavanaugh has described *NFIB* as holding that neither "the Commerce, Necessary and Proper, or Tax Clauses support a mandate to purchase a product or service,"[65] claiming that "[t]he Chief Justice *agreed* with the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) on all the key constitutional and statutory issues raised about the individual mandate."[66] This odd

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[57] *From the Bench*, *supra*, at 15.

[58] *Id.* at 52.

[59] *Id.*

[60] *Id.* at 51.

[61] *Id.* at 48.

[62] *Id.* at 48-49.

[63] 567 U.S. 519 (2012).

[64] *Id.* at 574.

[65] *Our Anchor*, *supra*, at 1923.

[66] Brett M. Kavanaugh, *Fixing Statutory Interpretation,* 129 Harv. L. Rev. 2118, 2147 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)).

formulation misses or obscures the key fact—Roberts provided the fifth vote to uphold the ACA's constitutionality under the Taxing Clause.

II. Judge Kavanaugh and the Bill of Rights

In his decisions construing the Bill of Rights, Judge Kavanaugh has interpreted Supreme Court precedent to reach conservative results. At times, Judge Kavanaugh has insisted on a broad reading of Supreme Court precedent, insisting that "it is essential that we follow both the words and the music of Supreme Court opinions."[67] In other cases, he has urged a very narrow reading of applicable Supreme Court precedent, observing that "[t]he nature of our system of legal precedent is that later cases often distinguish prior cases based on sometimes slight differences."[68] Whether Kavanaugh interprets a precedent narrowly or broadly, he almost always moves the law sharply to the right.

This section looks at four different areas of law, two where Kavanaugh has consistently sought to drastically expand the scope of constitutional protections, particularly in favor of corporations,[69] and two where he has sought to scale them back to the detriment of individual liberty.

A. The First Amendment's Guarantee of Freedom of Speech

Judge Kavanaugh has issued a host of sweeping decisions interpreting the First Amendment, and his record suggests that he will be a reliable vote to "weaponiz[e] the First Amendment,"[70] inventing new ways for businesses to object to economic and regulatory policies they dislike. He has written important opinions on the reach of the First Amendment in three different areas: (1) campaign finance; (2) net neutrality and cable regulation; and (3) commercial disclosure. In each of these areas, Judge Kavanaugh has sought to push the law to the right, rewriting First Amendment principles to allow the wealthy to spend unlimited sums of money and to strike down economic regulation.

1. Campaign Finance

Even before the Supreme Court's decision in *Citizens United* gutted campaign finance law, Judge Kavanaugh made similar sweeping First Amendment arguments in favor of unlimited spending that sought to move the law in that direction. Early in his tenure, he made clear that the "most important sentence in the Court's entire campaign finance jurisprudence"[71] was the part of the 1976 ruling in *Buckley v. Valeo*[72] that said that the government "cannot restrict the speech of some so that others have

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

[68] *Indep. Inst. v. FEC*, 816 F.3d 113, 117 (D.C. Cir. 2016).

[69] This is in line with the pro-corporate bent reflected in his jurisprudence as a whole. *See* Ashwin Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (August 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf.

[70] *Janus v. Am. Fed'n of St., Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[71] *Emily's List*, 581 F.3d at 5.

[72] 424 U.S. 1 (1976).

equal voice or influence in the electoral process."[73] *Buckley*'s pronouncement that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others" is at the core of Kavanaugh's First Amendment jurisprudence.[74]

In *EMILY's List v. FEC*, a major 2009 ruling authored by Judge Kavanaugh, the D.C. Circuit struck down an FEC regulation limiting campaign spending by non-profit groups.[75] At the time, *McConnell v. FEC*,[76] the governing Supreme Court precedent, took a broad view of the government's role in limiting corruption, but Kavanaugh insisted that "the anti-corruption rationale is not boundless" and limited the government to redressing *quid pro quo* corruption,[77] a limitation *McConnell* had explicitly rejected.[78] In a sweeping opinion, Kavanaugh held that "non-profit groups may accept unlimited donations to their soft-money accounts" and "may spend unlimited amounts out of their soft-money accounts for election-related activities such as advertisements, get-out-the-vote efforts, and voter registration drives."[79] These results, Judge Janice Rogers Brown argued in a concurring opinion, "are in tension—perhaps irreconcilable tension—with *McConnell*."[80] While she was sympathetic to Judge Kavanaugh's view, she recognized that "[o]ur duty as an intermediate court is not to tell the Court what it ought to have said, but to abide by what it did say."[81]

EMILY's List did not go as far as *Citizens Unite*d did—only the Supreme Court had the power to overrule past precedent limiting corporate spending—but it opened the door to huge soft money contributions to political committees. Judge Kavanaugh recognized that "it might seem incongruous to permit non-profits to receive and spend large soft-money donations when political parties and candidates cannot."[82] But the answer to this disparity, he argued, was further deregulation. "If eliminating this perceived asymmetry is deemed necessary, the constitutionally permitted legislative solution is 'to raise or eliminate limits' on contributions to parties or candidates."[83]

Judge Kavanaugh's opinion in *EMILY's List* was particularly aggressive in its use of judicial review. It refused to decide the case on statutory grounds, as Judge Brown urged in her concurring opinion, and issued a ruling even more sweeping than the plaintiff had requested. As Judge Brown put it, "[t]he court, however, is not content just answering a gratuitous constitutional question. Its holding is broader than even the plaintiff requests. . . . Because EMILY's List's actual claims are not bold enough, the court *sua*

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[73] *EMILY's List*, 581 F.3d at 5.

[74] 424 U.S. at 48-49.

[75] 581 F.3d at 1.

[76] 540 U.S. 93 (2003).

[77] *EMILY's List*, 581 F.3d at 6.

[78] *McConnell*, 540 U.S. at 152.

[79] *EMILY's List*, 581 F.3d at 14.

[80] *Id.* at 39 (Brown, J., concurring in part).

[81] *Id.* at 38; *id.* at 39 ("Someday the Supreme Court may be persuaded to reconsider [its] approach. But that cannot be our task.").

[82] *Id.* at 19 (majority opinion)

[83] *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 743 (2008)).

sponte spins a more aggressive argument . . . ."[84] Rather than proceed incrementally, Kavanaugh sought to fashion a broad constitutional ruling.

Even Judge Kavanaugh's opinions rejecting challenges to campaign finance regulation have worked to move the law to the right. In 2010, in *RNC v. FEC*,[85] sitting on a three-judge district court, Judge Kavanaugh dismissed a challenge to the ban on soft money contributions to political parties, and the Supreme Court summarily affirmed. In the wake of *Citizens United*, the RNC had sought to overrule the part of *McConnell* that had upheld the ban on soft money contributions to political parties. Judge Kavanaugh agreed with the RNC that "*Citizens United* undermines any theory of limiting contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officers and candidates."[86] But he concluded that only the Supreme Court could overrule *McConnell*. "As a lower court," he wrote, "we do not believe we possess the authority to clarify or refine *McConnell* . . . or to otherwise get ahead of the Supreme Court."[87] Of course, if confirmed to the Supreme Court, Judge Kavanaugh could—and likely would—overrule decisions, such as *McConnell*, that have upheld certain campaign finance limitations.

In 2011, in *Bluman v. FEC*,[88] another ruling summarily affirmed by the Supreme Court, Judge Kavanaugh wrote the opinion for a three-judge district court upholding the federal ban on campaign giving and spending by foreign nationals, concluding that "it serves the compelling interest in limiting the participation of *non-Americans* in the activities of democratic self-government."[89] But, in dicta, Kavanaugh went out of his way to write a huge loophole into the ban, concluding that it "does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."[90] This means that foreign nationals can spend millions of dollars to influence our elections so long as they do not explicitly advocate on behalf of, or against, specific candidates. This part of *Bluman* looms large, as a Russian company indicted as part of the Mueller investigation is currently invoking Judge Kavanaugh's opinion to dismiss the charges against them.[91]

Judge Kavanaugh has also written opinions taking a narrow view of Supreme Court precedent upholding campaign finance disclosure laws. In 2016, in *Independence Institute v. FEC*, Judge Kavanaugh wrote a 2-1 opinion overturning the dismissal of plaintiff's as-applied challenge to federal disclosure requirements.[92] In Kavanaugh's view, a three-judge court should have been convened to hear plaintiff's claim that 501(c)(3) organizations have a right to air issue advertisements without disclosing their donors. Kavanaugh stressed that the Supreme Court's cases, which twice had rejected challenges to the identical disclosure requirement attacked by the plaintiff, do not "address whether a speaker's tax status

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[84] *Id.* at 31 (Brown, J., concurring in part).

[85] 698 F. Supp.2d 150 (D.D.C.) (three-judge court), *aff'd*, 561 U.S. 1040 (2010).

[86] *Id.* at 158.

[87] *Id.* at 160.

[88] 800 F.Supp.2d 281 (D.D.C. 2011) (three-judge court), *aff'd*, 565 U.S. 1104 (2012).

[89] *Id.* at 290.

[90] *Id.* at 284.

[91] *See* Adam Smith, *Indicted Russian Company Uses Trump's Supreme Court Pick as Get Out of Jail Free Card,* Every Voice (July 18, 2018), *available at* https://everyvoice.org/featured/russia-kavanaugh.

[92] *Indep. Inst.*, 816 F.3d 113 (D.D.C. 2016).

or the nature of the nonprofit organizations affects the constitutional analysis of [the Bipartisan Campaign Reform Act's] disclosure requirement."[93] These minor differences, in Kavanaugh's view, made the issue an open one because "[t]he nature of our system of legal precedent is that later cases often distinguish prior cases based on sometimes slight differences."[94] In dissent, Judge Wilkins argued that the Institute's claim "is squarely foreclosed by . . . Supreme Court precedent," insisting that "the several immaterial factual distinctions" the Institute points to do not "transform its case into one presenting a substantial constitutional question."[95] Ultimately, a three-judge court held that the plaintiff's claims "founder on Supreme Court precedent,"[96] and the Supreme Court summarily affirmed.

2. Net Neutrality and Cable Regulation

Judge Kavanaugh has also employed an expansive reading of *Buckley* to strike down net neutrality and efforts to regulate the cable television industry.[97] In his view, *Buckley* means that "the First Amendment does not allow the Government to regulate the content choices of private editors just so that the Government may enhance certain voices and alter the content available to the citizenry."[98] As Judge Kavanaugh's record reflects, he would invoke *Buckley* broadly to strike down economic regulation aimed at internet and cable providers. He has argued that "the First Amendment contemplates a more 'laissez-faire regime'" and "greatly limits the Government's ability to interfere with speech in communication markets."[99]

In *U.S. Telecom Ass'n,* Judge Kavanaugh dissented from the D.C. Circuit's refusal to rehear *en banc* a ruling upholding the FCC's net neutrality rule, which required broadband internet service providers (ISPs) to allow its customers to access all or substantially all content on the internet without alteration or blocking.[100] Although the rule only applied to ISPs who held themselves out as providing access to all content, Judge Kavanaugh would have struck down the rule, insisting that "Internet service providers enjoy First Amendment protection of their rights to speak and exercise editorial discretion."[101] Judge Kavanaugh claimed that, rather than respect the First Amendment rights of ISPs, the net neutrality rule "compels" them "to supply an open platform for all would-be Internet speakers, and thereby diversify and increase the number of voices available on the Internet."[102] In Kavanaugh's view, this ran headlong

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[93] *Id.* at 116-17.

[94] *Id.* at 117.

[95] *Id.* at 118, 117 (Wilkins, J., dissenting).

[96] *Indep. Inst. v. FEC*, 216 F. Supp.3d 176, 185 (D.D.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 1204 (2017).

[97] *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1315-29 (D.C. Cir. 2010) (Kavanaugh, J., dissenting*); Comcast Cable Commc'ns., LLC v. FCC*, 717 F.3d 982, 987-94 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *U.S. Telecom. Ass'n v. FCC*, 855 F.3d 381, 417-35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[98] *Id.* at 432.

[99] *Cablevision*, 597 F.3d at 1327-28 (Kavanaugh, J., dissenting) (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 161 (1973) (Douglas, J., concurring)).

[100] 855 F.3d 381.

[101] *Id.* at 428 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[102] *Id.* at 432.

into *Buckley* and could not be justified "absent some market dysfunction."[103] Thus, he concluded "the Government must keep its hands off the editorial decisions of Internet service providers."[104]

This is a stunningly broad view, which would pervert the First Amendment and limit economic regulation of the communications industry. As Judge Sri Srinivasan wrote, "broadband ISPs would have a First Amendment entitlement to block and throttle content based on their own commercial preferences even if they had led customers to anticipate neutral and indiscriminate access to all internet content."[105] The First Amendment, he insisted, did not stand in the way of such regulation of economic conduct. "[B]roadband ISPs have no First Amendment entitlement to hold themselves out as indiscriminate conduits but then to act as something different."[106]

Judge Kavanaugh has pressed this same broad view of the First Amendment in cases involving governmental regulation of the cable industry.

In 2010, in *Cablevision Systems Corp. v. FCC*, the D.C. Circuit, in an opinion by Judge David Sentelle, upheld the FCC's decision to extend for five more years a statutory prohibition against exclusive contracts between cable operators and cable affiliated programming networks, finding the plaintiff had waived any constitutional claim.[107] "It is hardly necessary for us to decide an issue of constitutionality which petitioner does not even set forth as an issue in the case . . . ."[108] Judge Kavanaugh disagreed, and would have struck down the rule as a violation of the First Amendment, asserting that it forces cable operators "to sell to video programming distributors when they might otherwise choose not to do so" and "dampens their incentives to invest in new or existing programming networks."[109] Because of the emergence of a "radically changed and highly competitive marketplace," he insisted that "[t]he Government can no longer show that the ban on exclusive contracts further the interest in fair competition."[110] In his view, "when a market is competitive, direct interference with First Amendment free speech rights in the name of competition is typically unnecessary and constitutionally inappropriate."[111]

In a 2013 case, *Comcast Cable Communications v. FCC*, Judge Kavanaugh wrote separately to reiterate his broad reading of *Buckley*, insisting that applying a federal prohibition on discrimination against an unaffiliated video programming network "to a video programming distributor that lacks market power would violate the First Amendment as it has been interpreted by the Supreme Court."[112] Kavanaugh observed that "the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks," but he insisted that could not be

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[103] *Id.* at 433.

[104] *Id.* at 435.

[105] *Id.* at 393 (Srinivasan, J., concurring in the denial of rehearing en banc).

[106] *Id.*

[107] *Cablevision*, 597 F.3d at 1306.

[108] *Id.* at 1312.

[109] *Id.* at 1322 (Kavanaugh, J., dissenting).

[110] *Id.* at 1324, 1325.

[111] *Id.* at 1328.

[112] *Comcast*, 717 F.3d at 993 (Kavanaugh, J., concurring).

squared with what *Buckley* said "in one of the most important sentences in First Amendment history."[113] In his view, "the FCC's interference with Comcast's editorial discretion cannot stand."[114]

3. Commercial Disclosure

Judge Kavanaugh has also insisted that "the First Amendment imposes stringent limits on the Government's authority to . . . compel speech by private citizens and organizations," including in the context of commercial disclosure laws.[115]

In 2014, in *American Meat Institute v. U.S. Department of Agriculture*, the en banc D.C. Circuit, by a vote of 9-2, rejected a free speech challenge to Department of Agriculture regulations requiring country-of-origin labels on meat products.[116] Judge Kavanaugh agreed with the majority that "the First Amendment does not bar . . . longstanding and commonplace country-of-origin labeling requirements," but wrote separately to make clear that a demanding First Amendment test applies.[117]

First, Judge Kavanaugh emphasized that the "historical pedigree" of a disclosure regulation "is critical for First Amendment purposes."[118] He wrote that the "[g]overnment has long required commercial disclosures to prevent consumer deception and to ensure consumer health or safety" and that "[t]hose interests explain and justify the compelled commercial disclosures that are common and familiar to American consumers, such as nutrition labels and health warnings."[119] But he made clear that "it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information," calling that "a circular formulation" that "would be true of any and all disclosure requirements."[120] He voted to uphold the regulation in the case because of "the Government's historically rooted interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers."[121] But he never explained why a disclosure regulation has to be deeply rooted in history to pass constitutional muster.

Second, Judge Kavanaugh described the applicable standard of review in much tougher terms than the applicable Supreme Court precedents. As Kavanaugh conceded, under the Supreme Court's binding precedent in *Zauderer v. Office of Disciplinary Counsel*,[122] "[t]he disclosure must be purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government's interest."[123] The Supreme Court had insisted on a more forgiving standard of scrutiny because a commercial speaker's

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[113] *Id.* at 994.

[114] *Id.*

[115] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 30 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring).

[116] *Id.* at 18.

[117] *Id.* at 30.

[118] *Id.* at 32.

[119] *Id.* at 31.

[120] *Id.*

[121] *Id.* at 32.

[122] 471 U.S. 626 (1985).

[123] *Am. Meat Inst.*, 760 F.3d at 33 (Kavanaugh, J., concurring).

"constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal,"[124] but Kavanaugh sought to ratchet up the level of scrutiny. He emphasized that "*Zauderer* tightly limits mandatory disclosures to a very narrow class" and called the "*Zauderer* fit requirements" "stringent."[125] Some have insisted that commercial speech is deserving of more protection in this context,[126] but it is hard to read *Zauderer*, as Kavanaugh did, to impose a stringent test.

B. The Second Amendment's Right to Bear Arms

Judge Kavanaugh has interpreted the Supreme Court's decisions in *District of Columbia v. Heller*[127] and *McDonald v. City of Chicago*[128] to strip governments of the power to enact innovative gun regulations, insisting that the Supreme Court has said that "regulations on the sale, possession, or use of guns are permissible [only] if they are within the class of traditional, 'longstanding' gun regulations in the United States."[129] Newer approaches to reconciling the individual right protected by the Second Amendment with the interest in protecting community safety are, in Kavanaugh' view, unconstitutional, irrespective of the burden they place on gun owners. This is a radical reading of Supreme Court precedent, and it has no basis in the Constitution's text, history, and values. Indeed, no federal court of appeals has adopted this position.[130] As one judge recently commented, "[e]ach circuit to have considered this proposal has rejected it for . . . a sound reason: it is not what the Supreme Court said."[131]

In 2011, in *Heller v. District of Columbia*—a sequel involving a challenge to a 2008 D.C. law passed in the wake of the Supreme Court's 5-4 decision striking down D.C.'s handgun ban—the D.C. Circuit, in an opinion by Judge Douglas Ginsburg, upheld gun regulations banning certain assault weapons, including semi-automatic rifles, and requiring gun owners to register their firearms.[132] Judge Kavanaugh dissented, voting to strike down both regulations, claiming that the Supreme Court in *Heller* had said that "gun bans and regulations" must be "assess[ed] . . . based on text, history, and tradition, not by a

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[124] *Zauderer*, 471 U.S. at 651; *see also Nat'l Inst. of Fam. Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("[O]ur precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'").

[125] *Am. Meat Inst.*, 760 F.3d at 34 (Kavanaugh, J., concurring).

[126] *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 256 (2010) (Thomas, J., concurring in part) (expressing "willing[ness] to reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures").

[127] 554 U.S. 570 (2008).

[128] 561 U.S. 742 (2010).

[129] *Heller v. D.C.*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[130] *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 685-86 (6th Cir. 2016) (en banc); *Kolbe v. Hogan,* 849 F.3d 114, 131-34 (4th Cir. 2017) (en banc); *Binderup v. Atty Gen.l*, 836 F.3d 336, 344 (3d Cir. 2016) (en banc); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 88-97 (2d Cir. 2012); *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 700 F.3d 185, 193-98 (5th Cir. 2012); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Booker,* 644 F.3d 12, 22-25 (1st Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 700-04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-02 (10th Cir. 2010).

[131] *Mance v. Sessions*, 2018 WL 3544988 (5th Cir. July 20, 2018) (Higginson, J., concurring in the denial of rehearing en banc).

[132] 670 F.3d at 1244,

balancing test such as strict or intermediate scrutiny."[133] As he "read *Heller*," the "Court set forth fairly precise guidance," establishing "a test based wholly on text, history, and tradition."[134] In Kavanaugh's view, under *Heller*, "traditional and common gun laws in the United States remain constitutionally permissible."[135] But he argued that, under Heller, "outliers that are not traditional or common in the United States" were *per se* unconstitutional.[136] He claimed that the gun laws passed by D.C. fell into this class.

Kavanaugh's opinion is hard to square with what Justice Scalia actually wrote in *Heller*. Far from establishing any *per se* ban on gun laws—which would have been a virtually unprecedented constitutional rule—the Supreme Court in *Heller* went out of its way to make clear that D.C's handgun was invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[137] Justice Scalia rejected rational basis review, but otherwise did not specify how courts should adjudicate challenges to gun laws.[138] As Judge Douglas Ginsburg put it in his majority opinion, "[u]nlike our dissenting colleague, we read *Heller* straightforwardly. The Supreme Court there left open and untouched even by implication the issue presented in this case."[139] He explained, "[i]f the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then surely it would have said at least something to that effect. The Court did not say anything of the sort; the plaintiffs in this case do not suggest it did; and the idea that *Heller* precludes heightened scrutiny has eluded every circuit to address the question since *Heller* was issued."[140]

Under Kavanaugh's tortured reading of *Heller*, the government would be deprived of its broad power to craft reasonable gun regulations. Judge Kavanaugh insisted that "just because gun regulations are assessed by reference to history and tradition does not mean that governments lack flexibility or power to enact gun regulations."[141] But Kavanaugh voted to strike down D.C.'s ban on assault-weapons, insisting that the "government may not generally ban semi-automatic guns, whether semi-automatic rifles, shotguns, or handguns."[142] He also would have struck down D.C.'s registration requirement, claiming that "[r]egistration of all guns lawfully possessed by citizens in the relevant jurisdiction has not been traditionally required in the United States and, indeed, remains highly unusual today."[143] In Kavanaugh's expansive view, even the requirement that a gun owner register his gun or guns—with no restriction of any kind on the bearing of arms—runs afoul of the Second Amendment.

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[133] *Id.* at 1271 (Kavanaugh, J., dissenting).

[134] *Id.* at 1271, 1276.

[135] *Id.* at 1270.

[136] *Id.* at 1271.

[137] *Heller*, 554 U.S. at 628; *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from the denial of certiorari) ("This Court has not definitively resolved the standard for evaluating Second Amendment claims.").

[138] *Heller*, 554 U.S. at 628 n.27.

[139] *Heller*, 670 F.3d at 1266.

[140] *Id.* at 1265.

[141] *Id.* at 1274 (Kavanaugh, J., dissenting).

[142] *Id.* at 1288.

[143] *Id.* at 1291.

C. The Fourth Amendment's Guarantee Against Unreasonable Searches and Seizures

In contrast with his First and Second Amendment jurisprudence, in Fourth Amendment cases, Judge Kavanaugh has repeatedly voted to scale back constitutional protections. Taking a page from Chief Justice Rehnquist's jurisprudence, Kavanaugh has ignored the critical role the Fourth Amendment plays in curbing governmental abuse of power. Rather than vindicate the Framers' goal of protecting privacy and security from abuse of power, Judge Kavanaugh has repeatedly voted to uphold governmental surveillance programs[144] and drug testing programs,[145] and to expand the authority of police officers to search suspects without probable cause.[146] In all of these ways, Kavanaugh's record turns a blind eye to the "obstacles" the Fourth Amendment places "in the way of a too permeating police surveillance," thwarting what Chief Justice Roberts has called a "central aim of the Framers."[147]

In 2008, in *United States v. Askew*, Judge Kavanaugh dissented from an *en banc* ruling holding that police officers violated the Fourth Amendment when they unzipped Paul Askew's jacket during a *Terry* stop.[148] A plurality of five members of the court held that "the police officer's unzipping of appellant's jacket went beyond what is necessary to protect the investigating officers or others nearby" and under binding Supreme Court precedent "amounted to precisely the sort of evidentiary search that is impermissible in the context of a *Terry* stop."[149] Judge Kavanaugh dissented, calling the officers' actions an example of "textbook compliance with the requirements of *Terry*."[150] He would have read dicta in a 1985 Supreme Court case to expand the scope of permissible *Terry* searches, urging that "[i]dentification procedures constituting searches are permitted during *Terry* stops so long as the procedures are reasonable under the circumstances."[151] But the D.C. Circuit declined to take this step, insisting that "this court is not free to reweigh the interests at issue to create the new and wholly unprecedented identification exception to the warrant and probable cause requirements."[152]

In 2010, in *United States v. Jones*, Judge Kavanaugh dissented from the D.C. Circuit's refusal to rehear *en banc* a panel decision holding that the government's use of warrantless GPS tracking violated the

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[144] *Klayman v. Obama*, 805 F.3d 1148, 1148-49 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

[145] *Nat'l Fed'n of Fed. Emps.—IAM v. Vilsack*, 681 F.3d 483, 499-502 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[146] *United States v. Askew*, 529 F.3d 1119, 1149-65 (D.C. Cir. 2008) (en banc) (Kavanaugh, J., dissenting).

[147] *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

[148] *Askew*, 529 F.3d at 1149 (Kavanaugh, J., dissenting). Under the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), when a police officer has a reasonable suspicion that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a protective search "to determine whether the person is in fact carrying a weapon." *Id.* at 24. But *Terry* did not permit a search for evidence, merely for weapons.

[149] *Askew*, 529 F.3d at 1123 (plurality opinion).

[150] *Id.* at 1154 (Kavanaugh, J., dissenting).

[151] *Id.* at 1161.

[152] *Id.* at 1127 (plurality opinion); *id.* at 1149 (Griffiths, J., concurring) ("As a court of appeals, we are in no position to create a new exception that would have far-reaching effects on how the police may properly investigate crime. Rather, we are bound by Supreme Court precedent, which in this case requires probable cause to support the unzipping of Askew's jacket.").

Fourth Amendment.[153] Judge Kavanaugh joined Judge Sentelle's dissenting opinion, which argued that the GPS tracking device attached to Jones's car did not violates any reasonable expectation of privacy. "The reasonable expectation of privacy as to a person's movements on the highway is . . . zero."[154] Judge Kavanaugh wrote separately, insisting that the *en banc* court should consider an "alternative and narrower, property-based Fourth Amendment argument," based on the fact that the police "intruded . . . on the defendant's personal property . . . to install the GPS device on the vehicle."[155] Kavanaugh did not decide whether Jones would have prevailed on that theory, instead calling it "an important and close question."[156] Ultimately, the Supreme Court voted to hear the case, and Justice Scalia's majority opinion accepted the property-based Fourth Amendment argument flagged by Judge Kavanaugh.[157]

In 2012, in *National Federation of Federal Employees v. Vilsack*, Judge Kavanaugh dissented from a 2-1 ruling striking down a random drug testing policy applicable to all employees working at Job Corps Civilian Conservation Centers operated by the U.S. Forest Service.[158] The majority held the program violated the Fourth Amendment, finding that mandatory drug testing of all employees, given a total "lack of evidence of a serious drug problem among Forest Service Job Corps staff," was a "solution in search of a problem."[159] Judge Kavanaugh would have struck the balance in favor of the government, concluding that "the government's strong interest in ensuring a drug-free workforce . . . outweighs the infringement of individual privacy associated with this drug testing program."[160]

In 2015, in *Klayman v. Obama*, which involved a constitutional challenge to the National Security Agency's mass collection of telephone records, the D.C. Circuit vacated a preliminary injunction against the program without reaching the merits.[161] Judge Kavanaugh concurred in the denial of rehearing *en banc*, writing separately to explain his conclusion that "the Government's metadata collection program is entirely consistent with the Fourth Amendment."[162] First, he argued that "[t]he Government's collection of telephony metadata from a third party . . . is not considered a search under the Fourth Amendment" under Supreme Court precedent.[163] Second, he argued, "the Government's metadata collection program readily qualifies as reasonable" because it "serves a critically important special need—preventing terrorist attacks on the United States."[164] In Kavanaugh's view, when the government is fighting terrorism, it can search and seize persons "without individualized suspicion."[165] This is a

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[153] *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010) (Sentelle, J., dissenting from the denial of rehearing en banc).

[154] *Id.* at 769.

[155] *Id.* at 770 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[156] *Id.* at 771.

[157] *United States v. Jones*, 565 U.S. 400, 404-13 (2012).

[158] Nat'l Fed'n of Fed. Emps., 681 F.3d 483 (D.D.C 2012).

[159] *Id.* at 498, 497.

[160] *Id.* at 502 (Kavanaugh, J., dissenting).

[161] *Klayman*, 805 F.3d at 1148.

[162] *Id.* (Kavanaugh, J., concurring in the denial of rehearing en banc).

[163] *Id.* at 1149.

[164] *Id.*

[165] *Id.*

sweeping view that could open the door to widespread government surveillance in the name of fighting terrorism.

Judge Kavanaugh also has taken a broad view of the qualified immunity doctrine. In 2016, in *Wesby v. District of Columbia*,[166] Judge Kavanaugh dissented from the D.C. Circuit's refusal to rehear *en banc* a ruling holding that D.C. officers were not entitled to qualified immunity in a false arrest case. In *Wesby*, Judge Kavanaugh stressed just how hard it is for a plaintiff to sue a police officer for damages in a false arrest case. "[I]n suits alleging a lack of probable cause to arrest, officers are not liable if they *arguably* had probable cause—that is, if the officer *reasonably could have believed* that there was probably cause to arrest."[167] This rule, Kavanaugh has stressed, "affords police officers room to make reasonable judgments about whether they have probable cause to make arrests. . . . [T]he doctrine protects all but the plainly incompetent or those who knowingly violate clearly established law."[168] Kavanaugh has described the "extra dose of judicial deference" qualified immunity gives to the police as a "manifestation of the law's general concern about retroactive punishment or liability."[169]

Ultimately, the Supreme Court reversed, vindicating Judge Kavanaugh's dissent,[170] but even some conservatives have argued that qualified immunity doctrine prevents courts from holding police officers accountable for abuse of power, and should be reconsidered.[171] Judge Kavanaugh's record suggests that, if confirmed, he is unlikely to be receptive to those arguments.

In sum, Judge Kavanaugh's record suggests he would be a reliable pro-government vote in a wide range of Fourth Amendment cases.

D. The Fifth Amendment's Protection of the Right To Choose Abortion and Other Fundamental Rights

Judge Kavanaugh has written that "when the constitutional text expressly protects an individual liberty . . . then the courts cannot subtract from that."[172] But in a number of areas, that is what he has done, following in the footsteps of Chief Justice William Rehnquist, whom he has called one of his judicial heroes.[173] Like Rehnquist—who dissented in *Roe v. Wade*[174] and spent the rest of his career trying to overrule that decision—Judge Kavanaugh has taken a cramped view of the Fifth Amendment's protection of substantive fundamental rights, expressing hostility to the protection of fundamental rights not specifically enumerated elsewhere in the Constitution. Indeed, Kavanaugh has celebrated Rehnquist's

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[166] 816 F.3d 96 (D.C. Cir. 2016).

[167] *Id.* at 106 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[168] *Id.* at 112; *see also Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (arguing that qualified immunity barred suit because "the First Amendment law on this point is not clear").

[169] *Wesby*, 816 F.3d at 105, 110 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[170] *D.C. v. Wesby,* 138 S. Ct. 577 (2018).

[171] *See, e.g.*, William Baude*, Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018).

[172] *Our Anchor*, *supra*, at 1927.

[173] *From the Bench*, *supra*, at 6.

[174] 410 U.S. 113 (1973).

dissent in *Roe* for its refusal to "recognize unenumerated rights,"[175] as well as later decisions, such as his majority opinion in *Washington v. Glucksberg*,[176] that put the brakes on what Kavanaugh termed "the free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."[177] Kavanaugh praised Rehnquist's approach in *Glucksberg* as an end-run around *Roe*. As he observed in a 2017 speech, "even a first-year law student could tell that *Glucksberg*'s approach to unenumerated rights was not consistent with the 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*."[178]

His own opinions reflect the same hostility to the Supreme Court's many precedents protecting a woman's right to choose abortion. Most recently, in *Garza v. Hargan*,[179] Judge Kavanaugh voted to give the Trump Administration the power to keep an unaccompanied 17-year old immigrant in custody to keep her from exercising her constitutional right to choose abortion. In that case, the *en banc* court held, 7-3, that the government cannot "categorically blockade exercise" of a 17-year old immigrant woman's "exercise of her constitutional right" simply because she was in federal custody.[180] As Judge Millet observed, "the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for unlawful entry be forcing a child to have a baby. The bedrock protections of the Fifth Amendment's Due Process Clause cannot be that shallow."[181] Kavanaugh bitterly disagreed, insisting that the *en banc* ruling "is ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."[182]

In Kavanaugh's view, this was "a radical extension of the Supreme Court's abortion jurisprudence," which failed to give due regard to the government's "permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion."[183] Taking an extremely narrow view of the Supreme Court's repeated holdings that a woman's right to choose abortion is part of the fundamental liberty that the Due Process Clause guarantees and of the protections afforded by the undue burden test announced in *Planned Parenthood v, Casey*, Kavanaugh would have held that "it is not an undue burden for the U.S. Government to transfer an unlawful immigrant minor to an immigration

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[175] *From the Bench*, *supra,* at 15.

[176] 521 U.S. 702 (1997). In *Glucksberg*, Chief Justice Rehnquist's opinion upheld the constitutionality of Washington's ban on assisted suicide, insisting that a right to assisted suicide was not deeply rooted in our nation's history and tradition because of the longstanding nature of these prohibitions. *Id.* at 723-28.

[177] *From the Bench*, supra, at 16.

[178] *Id.*

[179] *Garza v. Hargan*, 874 F.3d 735, 752-56 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting), *vacated on other grounds sub nom. Azar v. Garza*, 139 S. Ct. 1790 (2018).

[180] *Id.* at 737 (Millet, J., concurring).

[181] *Id.* at 737-38.

[182] *Id.* at 752 (Kavanaugh, J., dissenting). Kavanaugh's view ignored that the young woman had fully complied with Texas's stringent abortion laws, which hardly authorize "immediate abortion on demand." As Judge Millet observed, "J.D., like other minors in the United States who satisfy state-approved procedures, is entitled under binding Supreme Court precedent to choose to terminate her pregnancy. The court's opinion gives effect to that concession; it does not create a 'radical' 'new right' by doing so." *Id.* at 737 (Millet, J., concurring).

[183] *Id.* at 752 (Kavanaugh, J., dissenting).

sponsor before she has an abortion, so long as the transfer is expeditious."[184] As Judge Millet observed, Kavanaugh's crabbed reading of the undue burden standard would allow the government to "impose[] a flat prohibition on her reproductive freedom that [she] has no independent ability to overcome."[185] As this case reflects, Kavanaugh passed President Trump's anti-abortion litmus test with flying colors.

In other fundamental rights cases, Judge Kavanaugh has relied on Chief Justice Rehnquist's opinion in *Glucksberg* to reject fundamental rights claims. For example, in 2007, in *Doe v. District of Columbia*,[186] Judge Kavanaugh wrote the court's opinion rejecting a constitutional challenge to D.C.'s policy, which, in certain circumstances, allowed the government to perform surgery on intellectually disabled persons who had never been competent without their consent. Citing *Glucksberg*, Judge Kavanaugh wrote that "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.'"[187]

If confirmed, there is little doubt that Judge Kavanaugh would be hostile to the protection of fundamental rights and would vote to roll back *Roe* and other Supreme Court precedent protecting the full scope of liberty.

Conclusion

A Justice of the Supreme Court must be faithful to the entire Constitution; he or she cannot pick and choose based on their own predilections. But a review of Judge Kavanaugh's record demonstrates that he often does just that, interpreting precedent to reach conservative results in case after case. As his record shows, Judge Kavanaugh has sought to dramatically expand presidential power, while failing to respect Congress' broad powers to solve national problems. He has sought to vastly expand protections for some rights, while permitting the government to run roughshod over others. Judge Kavanaugh thus has a heavy burden to carry when he appears before the Senate Judiciary Committee: he must demonstrate his fidelity to the entire Constitution if he wants to be confirmed to the Supreme Court.

[184] *Id.* at 753.

[185] *Id.* at 739 (Millet, J., concurring).

[186] 489 F.3d 376 (D.C. Cir. 2007).

[187] *Id.* at 383 (quoting *Glucksberg*, 521 U.S. at 720-21).