SUPREME COURT NOMINEE REPORT: JUDGE BRETT KAVANAUGH

Chicago Council of Lawyers

August 31, 2018

INTRODUCTION AND EXECUTIVE SUMMARY

The Chicago Council of Lawyers is a non-partisan public interest bar association that is dedicated to improving the quality of justice in the legal system by advocating for the fair and impartial administration of justice. The Council advocates for courts that are effective, accountable, and equitable so the justice system serves the interest of the marginalized and the powerful alike.

For nearly 50 years, the Council has played an integral role in educating the public about the judicial system, including providing evaluations and recommendations to voters on the qualifications of judicial candidates in Cook County, as well as statements on the qualifications of nominees to the federal bench. The Council has also periodically vetted federal judicial candidates for Republican and Democratic Senators, and has published evaluations of sitting judges in the Chicago federal courts, including the United States Court of Appeals for the Seventh Circuit and the Northern District of Illinois.

In its policy work, the Council is engaged in efforts of systemic reform with emphasis on fair and equal access to justice, especially for marginalized groups and other vulnerable populations within our court system. This work runs the gamut of the legal system, including criminal justice reform, access to justice, child support and family law issues, civil liberties, police accountability, and immigration court reform. In all its efforts, the Council strives to promote social justice, equality, and a fair system of justice that is open and accessible to everyone.

The Council has not traditionally published reports or recommendations regarding the qualifications of candidates to the Supreme Court of the United States. However, it feels compelled to depart from its traditional practice regard to the nomination of Judge Brett Kavanaugh to replace the retiring Justice Anthony Kennedy. This vacancy arises at a critical moment for the Court, and the country.

The Council recommends that the Senate not confirm Judge Kavanaugh to the Supreme Court of the United States. It reaches this conclusion for three principal reasons.

First, Judge Kavanaugh has approached his role as a judge not as a neutral arbiter of disputes, but as an activist who advances the law toward particular outcomes.

Second, through his past writings and statements, Judge Kavanaugh has demonstrated that he will advance his agenda at the expense of the impartiality and independence that we expect to see in a candidate for any judicial position, especially to the Supreme Court. In addition, throughout the nomination process, the White House and outside vetters have plainly communicated that Judge Kavanaugh was advanced precisely because he satisfies a number of "litmus tests" with regard to important substantive issues that are of great concern to the entire country, including the protection of reproductive rights, the Affordable Care Act, sensible gun control, and protection of consumers and the environment.

Third, the direction in which Judge Kavanaugh can be expected to move the law is deeply concerning to the Council in a variety of respects—including limitations on the access to the legal system, on executive power, and on the ability of government to promote and protect the interests of the marginalized and vulnerable.

Without question, Judge Kavanaugh has an impressive resume and considerable intellect. However, the Council has serious concerns about how he would perform the role of Associate Justice. As such, the Council opposes Judge Kavanaugh's nomination.

CRITERIA USED IN THIS EVALUATION

In its evaluation of state judicial candidates, the Council employs the following criteria for a judge's ability to serve on the relevant court:

- fairness, including sensitivity to diversity and bias
- legal knowledge and skills (competence)
- integrity
- experience
- impartiality
- diligence
- judicial temperament
- respect for the rule of law
- independence from political and institutional influences
- professional conduct
- character
- community service.

Although in evaluating candidates for state judicial office, the Council does not evaluate candidates based on their substantive views of political or social issues, such considerations are inevitable and indeed necessary in evaluating Supreme Court nominees. The Supreme Court has a uniquely powerful and unavoidably political function, as the only court that is subordinate to no other and as the ultimate adjudicator of critical questions of constitutional law that affect every corner of the American legal landscape. The Court's decisions have a transformative effect on the rule of law and scope of executive power, as well as outsized effects on marginalized groups—groups that have traditionally been a focus of the Council's reform work. For this reason, this evaluation departs from the Council's usual practice and accounts for the normative and substantive outcomes foreshadowed by the nominee in these critical areas.

Additionally, while all of the above criteria remain important considerations for the nominee to any judicial office, including the Supreme Court of the United States, because the Supreme Court occupies a distinctive place in our justice system, some criteria warrant greater weight than others when examining Judge Kavanaugh's nomination. Certain characteristics that are critical to a state trial judge—such as temperament, character, and community service—are comparatively less important for a Supreme Court nominee than criteria—impartiality, respect for the rule of law, lack of bias, and sensitivity to diversity—that are necessary to ensure a legal system that is fair and accessible to all. Therefore, this evaluation places a greater emphasis on the latter.

Finally, as a public-interest bar association representing a constituency of members concerned with social justice and fair, accessible courts, the Council's assessment focuses on whether Judge Kavanaugh is likely to approach the role of Supreme Court Justice as a fair and neutral adjudicator of disputes, with sensitivity to diversity and the interests of marginalized groups. Furthermore, to

the extent Judge Kavanaugh's track record indicates that he will support and rule in favor of outcomes that the Council finds contrary to its stated values–the protection of marginalized groups and access to justice–the Council considers these outcomes in its position on the candidate. Such considerations are essential to a full evaluation of Judge Kavanaugh's nomination, given the importance of the issues at stake, the position of the Supreme Court in our judicial hierarchy, and the lifetime appointment of federal judges.

JUDGE KAVANAUGH'S BACKGROUND

Judge Kavanaugh has the long and substantial resume one would expect of a nominee to the Supreme Court. He is a graduate of Yale College and Yale Law School. Following law school, he clerked for Third Circuit Judge Walter King Stapleton, Ninth Circuit Judge Alex Kozinski, and Supreme Court Justice Anthony M. Kennedy. He then completed a prestigious one-year fellowship with the office of the Solicitor General, after which he was tapped to work as Associate Council in the Office of Independent Counsel Kenneth Starr. There, he was the principal author of the *Starr Report*, which detailed the Monica Lewinsky–Bill Clinton and Vince Foster investigation. He worked for George W. Bush in the legal aftermath of the 2000 presidential election, after which he attained positions in the Office of White House Counsel, Alberto Gonzales, and in the White House itself, as Assistant to the President and White House Staff Secretary. In 2006, he was appointed as a federal judge on the United States Court of Appeals for the District of Columbia Circuit—following a lengthy confirmation battle.

Judge Kavanaugh's credentials suggest he possesses the intellect, acumen, and experience one would expect of a nominee to the country's highest judicial office. His resume also indicates, however, that he may have particular allegiances to partisan political interests and certain judicial outcomes. Of course, previous partisan political work is not unheard of among judicial candidates, including Supreme Court candidates, nor is it disqualifying. The Council nonetheless believes it critical to examine Judge Kavanaugh's past opinions, public statements, and conduct to determine how Judge Kavanaugh would perform as a Supreme Court Justice.

JUDGE KAVANAUGH'S USE OF HIS JUDICIAL OFFICE TO PROMOTE SPECIFIC OUTCOMES

Judge Kavanaugh's record as a member of the United States Court of Appeals for the District of Columbia Circuit suggests that Judge Kavanaugh lacks the necessary impartiality and fealty to the rule of law required of a Supreme Court justice. In particular, Judge Kavanaugh's colleagues on the D.C. Circuit and outside observers have routinely noted instances in which his opinions ignored precedent, apparently strayed beyond or misrepresented the record, or reached issues not presented to the court in an apparent attempt to drive the law toward his desired results. Given the almost unchecked power of the Supreme Court in our judicial system, this record strongly indicates that Judge Kavanaugh will use his appointment to push the law in a direction he favors.

Judge Kavanaugh's cavalier treatment of precedent and stare decisis

Stare decisis, meaning "standby the thing decided" is a legal doctrine that recognizes that litigants and the public generally come to rely on courts abiding by their prior decision. As Justice Kagan put it in a majority opinion joined by Justices Scalia and Kennedy, *stare decisis* "promotes the

evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entertainment, Inc.*, 135 S. Ct. 2401, 2409 (2015).

Justice Kavanaugh could jeopardize this evenhanded, predictable, and consistent development of the law. A brief assessment of Judge Kavanaugh's opinions at the D.C. Circuit reveals an idiosyncratic and possibly startling view of the principle of *stare decisis*. Judge Kavanaugh's writings, like his testimony before the Senate Judiciary Committee in 2006, suggest that he believes *stare decisis* to mean nothing more than "the rule established by a superior court." For instance, Judge Kavanaugh wrote not of *stare decisis*, but of "vertical *stare decisis*" or "absolute vertical *stare decisis*." *See United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013 ("[I]f a lower court ever has doubt about the predictive utility of a single opinion from a splintered Supreme Court decision, this opinion-by-opinion methodology is a foolproof way to reach the correct result in the lower court's subsequent decisions. Again, that is really just common sense in a system of ***absolute vertical stare decisis***." (emphasis added)); *Winslow v. Federal Energy Regulatory Commission*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) ("***Vertical stare decisis***—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.' U.S. Const. art. III, § 1." (emphasis added)). Meanwhile, no other judge in the federal reporters has ever used the expression "absolute vertical *stare decisis*" save for a single quotation citing a Judge Kavanaugh opinion; and no other judge in the D.C. Circuit has ever used the expression "vertical *stare decisis*"—except when quoting Judge Kavanaugh.

In practice, *stare decisis* may have little to no bearing on the votes of a Supreme Court Justice Kavanaugh, even in instances in which decisions are long-standing and have induced considerable public reliance. At a time when Judge Kavanaugh will be a decisive vote in a number of vital matters, his treatment of *stare decisis* provides ample reason for concern: Over the course of his twelve years at the D.C. Circuit, his opinions are, in fact, riddled with his colleague's criticisms—from conservatives and liberals alike—that Judge Kavanaugh has failed to pay due respect to precedents of both the Supreme Court (vertical *stare decisis*) and the D.C. Circuit (horizontal *stare decisis*).[1] This further suggests that if afforded the opportunity, Judge Kavanaugh would use a Supreme Court appointment to undo existing jurisprudence.

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[1] *See, e.g.*, *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (several concurrences criticizing Judge Kavanaugh for disregarding precedent); *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir.), *cert. denied*, 137 S. Ct. 2250 (2017) (Rogers, J.) (affirming blocked merger of health insurance companies and criticizing Judge Kavanaugh's dissent for "appl[ying] the law as he wishes it were, not as it currently is"); *Sissel v. U.S. Department of Health & Human Services*, 760 F.3d 1 (D.C. Cir. 2014) (Rogers, J.) (vehemently disagreeing with Judge Kavanaugh's reading of Supreme Court precedent); *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1211 (D.C. Cir. 2014) (Rogers, J.) (criticizing Judge Kavanaugh for "[i]gnoring this court's precedent regarding congressional purpose and intent and stretching [another decision] beyond its moorings"); *Texas v. EPA*, 726 F.3d 180, 194 (D.C. Cir. 2013) (Rogers, J.) (criticizing dissent for "ignor[ing] the statutory text as well as the law of the circuit"); *United States v. Burwell*, 690 F.3d 500, 518 (D.C. Cir. 2012) (Brown, J.) (criticizing Judge Kavanaugh for failing to adhere to *stare decisis* on sentencing guidelines for machine gun-wielding defendant); *National Federation of Federal Employees–IAM v. Vilsack*, 681 F.3d 483, 490 n.5 (D.C. Cir. 2012) (Rogers, J.) (criticizing

As discussed below, this fact, in conjunction with Judge Kavanaugh's expressed views on particular issues, augurs deeply concerning results to the Council and to those who share its values. For this reason, the Senate should not accept any demurrals from Judge Kavanaugh at his confirmation hearings to follow "settled law," as he appears to treat little law as settled or binding.

Judge Kavanaugh's outcome-based jurisprudence

The Council's analysis of Judge Kavanaugh's written opinions indicates that he has at times neglected or outright misconstrued the factual record to arrive at what appears to be his desired conclusion. And again, his colleagues on the D.C. Circuit—both conservative and liberal—have criticized him for this approach.

For example, dissenting in *United States v. Burwell*, Judge Kavanaugh lambasted the en banc majority for concluding that a robber was subject to a sentencing enhancement for deploying a machine gun. 690 F.3d at 527–53 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting). Judge Henderson, concurring, noted the "eye-popping" record evidence Judge Kavanaugh had to ignore to reach this implausible perspective, including "a circular *75-round drum magazine*," that demonstrated the "gun aficionado" defendant knew the weapon he used was a machine gun. *Id.* at 518 (Henderson, J., concurring).

Similarly, in *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir.), *cert. denied*, 137 S. Ct. 2250 (2017), the federal government, eleven states, and the District of Columbia sued to block a merger between two of the four largest health insurance companies. The district court found that the merger was anticompetitive and would harm consumers, and Judges Rogers and Millett affirmed. Writing in dissent, Judge Kavanaugh concluded that savings from the merger would exceed increased costs, and that these savings would be passed on to employers (*i.e.*, the consumers of health insurance) and their workers. Judge Rogers criticized Judge Kavanaugh's dissent for:

- "appl[ying] the law as he wishes it were, not as it currently is";
- relying on "expert testimony of fantastical cost savings" that "fall to pieces in a stiff breeze";
- "bas[ing] sweeping conclusions" on "unspecified evidence";
- "offer[ing] a series of bald conclusions and mischaracteriz[ing] the court's opinion";
- failing to "evinc[e] any real awareness of the record beyond the testimony of Anthem's expert and consultants";
- making "no meaningful effort to engage with the district court's factual findings"; and

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Judge Kavanaugh for "paint[ing] with a broad brush without regard to precedent from the Supreme Court, and this court"); *Agri Processor Co. v. National Labor Relations Board*, 514 F.3d 1 (D.C. Cir. 2008) (Tatel, J.) (petitioner's argument, supported by Judge Kavanaugh in dissent, "ignores both the Act's plain language and binding Supreme Court precedent"); *Federal Trade Commission v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (Tatel, J.) ("In his zeal to reach the merits and preempt the FTC," Judge Kavanaugh had "ignore[d] both circuit precedent and section 13(b).").

- ignoring "inconvenient facts" that "do not jibe with the dissent's superficial, thirty-thousand-foot view of this case."

Judge Millett also criticized Judge Kavanaugh's dissent. The conclusion that cost savings would be passed to consumers, she observed, "flies in the face of the factual record," because "a number of damaging internal Anthem documents detailed the company's efforts and specific business options for actively preventing those savings from being passed through to customers and instead capturing the money for itself." Similarly, in *Federal Trade Commission v. Whole Foods Market, Inc.*, 548 F.2d 1028 (D.C. Cir. 2008), Judge Tatel, writing for a majority that preliminary enjoined a merger between the nations' two largest organic supermarket companies, criticized Judge Kavanaugh's dissent for, among other things, "glossing over" important distinctions and "ignoring" evidence.

Additionally, Judge Kavanaugh often strays from the issues presented in a particular dispute in order to resolve questions not raised in a case. As examples:

- In *Cablevision Systems Corp. v. Federal Communications Commission*, 597 F.3d 1306 (D.C. Cir. 2010), Judge Kavanaugh dissented from a denial of a cable company's petition to review an FCC rule designed to promote competition in the market for video programming, concluding that the market was no longer monopolistic and that the rule thus violated the First Amendment. The majority opinion, authored by Judge Sentelle and joined by Judge Griffith, criticized Judge Kavanaugh for "decid[ing] an issue of constitutionality which petitioner does not even set forth as an issue in the case and to which it refers only obliquely." Longstanding Supreme Court jurisprudence teaches that constitutional issues should not be decided unless it is absolutely necessary to do so, yet Judge Kavanaugh has actively sought out the opportunity to weigh in on such issues even when not asked to do so.
- In *Agri Processor Co. v. National Labor Relations Board*, 514 F.3d 1 (D.C. Cir. 2008), Judge Kavanaugh dissented and argued that undocumented aliens are not "employees" under the National Labor Relations Act in spite of an existing Supreme Court decision holding that they were. As the majority opinion noted, in reaching this conclusion, Judge Kavanaugh reasoned that an amendment to a *different* statute had undone the Supreme Court's ruling based on a portion of that ruling not cited by the parties. This analysis led the majority to criticize Judge Kavanaugh's dissent for "creat[ing] its own rule."
- In *Emily's List v. Federal Election Commission*, 581 F.3d 1 (D.C. Cir. 2009), Judge Kavanaugh struck down certain limitations on election fundraising and spending by non-profits under the First Amendment, based on a constitutional analysis and holding that *explicitly* went beyond the relief sought by the plaintiff.[2] This aggressive approach laid the

[2] In a 2016 interview, Judge Kavanaugh stated, without prompting, that the Supreme Court might also want to consider revisiting its precedents upholding limitations on "soft money" contributions to candidates.

groundwork for the Supreme Court's decision in *Citizens United*, which opened the floodgates of corporate money into electoral politics.[3]

Judge Kavanaugh also has a habit of writing separate opinions in cases to advance particular legal theories. This includes such unusual steps as, for example, dissenting from a denial of rehearing in *Priests for Life v. U.S. Department of Health and Human Services*, 808 F.3d 1, 16–17 (D.C. Cir. 2015), to opine that requiring religious employers to complete certain forms to obtain an exemption to the Affordable Care Acts contraception mandate substantially burdens the employers' exercise of religion. Similarly, in *Midwest Division–MMC, LLC v. National Labor Relations Board*, 867 F.3d 1288 (D.C. Cir. 2017), a majority joined by Judge Kavanaugh held that union workers had not been deprived of rights to union representation, the narrowest ground on which the case could be resolved. Nonetheless, Judge Kavanaugh wrote a separate concurrence saying he would have gone further and held that there were no representation rights for the hearings in question, in effect providing an advisory opinion on what he *would* hold under different factual circumstances. Through the use of separate opinions, Judge Kavanaugh appears to be seeding the ground for outcomes he favors in future disputes that are not yet before the court.

In public statements he has expressed affirmation for Justice Scalia, among others, for his professed exercise of judicial restraint. Yet Judge Kavanaugh's jurisprudence is maximalist in its approach, seeking out opportunities to move the law in a particular direction in future cases. As discussed in further detail below, given this proclivity to pre-decide issues, Judge Kavanaugh should not be permitted during his confirmation hearings to do as other candidates have and disclaim the ability to comment on particular cases that may come before the Court. Rather, the burden of proof should be on Judge Kavanaugh to demonstrate that he will in fact approach each case impartially. Given Judge Kavanaugh's penchant to opine on issues that are not before him and the fact that the opinions he is offered appear to be a critical reason underlying his nomination, the Senate ought not accept a refusal to provide substantive answers to substantive questions.

JUDGE KAVANAUGH'S RECORD ON KEY LEGAL ISSUES

Public statements from the President, conservative activists, and Judge Kavanaugh's former clerks all suggest that his nomination has resulted in large part from the views he holds and has expressed on a number of fundamentally important issues that will come before the Supreme Court. A number of these views reflect an agenda that is radical and alarming to the Council. Several of the substantive areas are discussed herein.

Judge Kavanaugh has demonstrated clear opposition to abortion rights

President Donald Trump has stated many times that he would nominate individuals to the Supreme Court who are opposed to abortion rights. During the 2016 campaign, when asked whether he wanted to see the overruling of *Roe v. Wade*, he responded: "Well, if we put another two or three justices on [the Supreme Court], that's really what's going to be—that will happen and that will happen ***automatically*** in my opinion because I'm putting pro-life justices on the Court." Candidate Trump even went so far as to release short lists of conservative judges and legal scholars he would

[3] *See* Albert W. Alschuler, "Brett Kavanaugh, the Man Who Created the Super PAC," *Washington Post* (Aug. 20, 2018).

consider nominating to the Supreme Court. Although Judge Kavanaugh was not on the initial list, he was on a subsequent, similarly-vetted list. In the July 3, 2018, *National Review*, one of Judge Kavanaugh's former clerks wrote that "no court-of-appeals judge in the nation has a stronger, more consistent record" of "enforcing restrictions on abortion."

Judge Kavanaugh's position on the D.C. Circuit, with its distinctive jurisdiction—embracing none of the 50 states and focusing largely on matters of federal policy and the administrative state—has given him few opportunities to rule in cases affecting the individual right to seek and obtain a legal and safe abortion. But there can be little doubt as to Judge Kavanaugh's views on abortion: He would almost certainly vote to restrict the right and, if given the opportunity, to overturn *Roe v. Wade*.

First, in the sole case Judge Kavanaugh heard involving abortion rights, the 2017 case *Garza v. Hargan*, he sat on a divided panel that issued an unsigned opinion preventing an unaccompanied 17-year-old in the custody of the federal government's refugee resettlement office from traveling to obtain an abortion. The full D.C. Circuit, en banc, vacated that decision days later in a 6–3 vote, and the 17-year-old obtained an abortion the next day. In a written dissent, Judge Kavanaugh accused the majority of "a radical extension of the Supreme Court's abortion jurisprudence": recognition of a "new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand." 874 F.3d 735, 752 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting). "Abortion on demand" is a well-known "dog whistle" for those opposed to abortion rights.[4] Judge Kavanaugh used the phrase three times in his nine-page dissent. As fellow D.C. Circuit Judge Patricia Millett wrote in her separate opinion, "Abortion on demand? Hardly. . . . That sure does not sound like 'on demand' to me. Unless Judge Kavanaugh's dissenting opinion means the demands of the Constitution and Texas law. With that I would agree." *Id.* at 737 (Millett, J. concurring).

Second, Judge Kavanaugh has praised Justice Byron White and Justice William Rehnquist—the only dissenting justices in *Roe v. Wade*—as judicial role models. During his 2004 confirmation hearing, then-nominee Kavanaugh deflected questions about whether he would be a jurist in the "mold" of Justice Scalia or Justice Thomas. He instead offered to discuss a "role model," Justice Byron White. And in 2017, he gave a speech to the American Enterprise Institute, a conservative think tank, entitled "The Constitutional Statesmanship of Chief Justice William Rehnquist."

When asked questions about abortion rights at his confirmation hearing to the Supreme Court, Judge Kavanaugh will likely insist that he has not prejudged the outcome of any case that may come before the Court on abortion. But there is little to no reason to believe him when he does, and the Senate should demand substantive answers on the subject.

Judge Kavanaugh would imperil the Affordable Care Act

As with reproductive rights, the President has explicitly stated that his appointees to the Supreme Court "will do the right thing unlike Bush's appointee John Roberts on ObamaCare." On July 3, 2018, one of Judge Kavanaugh's former law clerks published an article entitled "Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful," and made the case that Judge Kavanaugh

[4] Linda Greenhouse, "A Kavanaugh Signal on Abortion?," *N.Y. Times* (July 18, 2018).

passed President Trump's test.[5] His record on the D.C. Circuit confirms that his appointment to the Supreme Court would threaten the Affordable Care Act and jeopardize the health care of millions of Americans.

Judge Kavanaugh's votes in cases under the Affordable Care Act, if they had attracted more adherents on the D.C. Circuit, would have undermined the objectives of that law to extend healthcare to millions of Americans. These cases include *Priests for Life v. U.S. Department of Health and Human Services*, in which Judge Kavanaugh dissented from the Court of Appeals' denial of rehearing en banc, which upheld the panel decision that, to obtain a religious exception to the contraception coverage mandate, religious employers may be required to complete certain forms. Judge Kavanaugh asserted that completing such forms substantially burdened the employers' exercise of religion—even if the employers were "misguided in thinking that this scheme . . . makes them complicit in facilitating contraception or abortion."

In a different Affordable Care Act case, Judge Kavanaugh again dissented, voting to dismiss for lack of jurisdiction in *Susan Seven-Sky v. Holder* on the grounds that the Anti-Injunction Act barred the petitioner's challenge to tax penalties for failure to obtain individual health insurance. To be sure, Judge Kavanaugh wrote that courts should be "cautious about prematurely or unnecessarily *rejecting* the Government's Commerce Clause argument" because the law was enacted "after a high-profile and vigorous national debate" to achieve the "vital policy objectives" of "provid[ing] all Americans with access to affordable health insurance and quality health care." Nonetheless, as his former clerk observed, Judge Kavanaugh's opinion was a "roadmap" for the Supreme Court Justices who would have held the Affordable Care Act unconstitutional.[6]

Judge Kavanaugh has used the Second Amendment to preclude reasonable gun control

In *Heller v. District of Columbia*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to bear arms and struck down regulations in the District of Columbia all but prohibiting the possession of a handgun. Writing for the majority, Justice Scalia seemed to wish to assuage readers that the scourge of gun violence that plagued Washington, D.C., and many other urban areas nationwide would not be left unchecked: "The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns." *Id.* at 636. And in *MacDonald v. City of Chicago*, 561 U.S. 742 (2010), which incorporated *Heller*'s individual right to bear arms against the states, Justice Alito's majority opinion reassured that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id.* at 785.

Yet when the *Heller* case returned to the D.C. Circuit in 2011, Judge Kavanaugh dissented to contend that the gun regulations the panel *had* upheld—an assault weapon ban and handgun registration requirements—were yet unconstitutional under *Heller* and *MacDonald*. *See Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

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[5] Justin Walker, "Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful," *The Federalist* (July 3, 2018)

[6] Walker, "Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful."

In his time on the D.C. Circuit, Judge Kavanaugh has rarely sided with criminal defendants, but notably has done so when the defendants' interests are aligned with the interests of gun advocates. For instance, as noted above, in *United States v. Burwell*, Judge Kavanaugh dissented from the en banc majority, which concluded that a robber was subject to a sentencing enhancement for deploying a machine gun, despite harsh criticism from his colleagues.

As a Supreme Court Justice, Judge Kavanaugh would be able to leave his imprint on the Courts still-nascent Second Amendment jurisprudence. His record on the subject suggests that he would weaponize the Second Amendment to hold unconstitutional many reasonable measures to prevent gun violence. Judge Kavanaugh should be asked and required to answer questions about his views on the Second Amendment at his confirmation hearings.

Judge Kavanaugh has frequently sided against consumers, including taking extraordinary steps to rule in favor of powerful corporations

On the day Judge Kavanaugh's nomination was announced, the White House circulated a document to "industry stakeholders" that touted Judge Kavanaugh's record of overruling federal regulators—75 times in all—and pledged that he would "protect[] American businesses from illegal job-killing regulation."[7] As the White House promised, Judge Kavanaugh's judicial record—his opinions and, to an even greater extent, his dissents—reflects a strong tendency to side with business interests over consumers. One empirical study of 286 opinions has revealed that Judge Kavanaugh has "written almost entirely in favor of big business."[8] And the nation's oldest consumer watchdog also reviewed Judge Kavanaugh's "extensive record" and concluded that he is "in conflict with [its] mission to protect consumers and workers."[9]

These observations are borne out by Judge Kavanaugh's judicial record. For example, in cases challenging monopolies, Judge Kavanaugh has repeatedly sided with big business.

In *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir.), *cert. denied*, 137 S. Ct. 2250 (2017), the federal government, eleven states, and the District of Columbia sued to block a merger between two of the four largest health insurance companies. The district court found that the merger was anticompetitive and would harm consumers, and Judges Rogers and Millett affirmed. Writing in dissent, Judge Kavanaugh concluded that savings from the merger would exceed increased costs, and that these savings would be passed on to employers (*i.e.*, the consumers of health insurance) and their workers. The majority and concurring opinions noted that to reach his conclusion Judge Kavanaugh had to disregard existing precedents and portions of the factual record, including

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

[8] Adam Feldman, "The Next Nominee to the Supreme Court," *Empirical SCOTUS* (Dec. 7, 2017), https://empiricalscotus.com/2017/12/07/the-next-nominee.

[9] Press Release, "National Consumers League Deeply Concerned About Kavanaugh's Anti-consumer, Anti-labor Record," National Consumers League (July 12, 2018), http://www.nclnet.org/kavanaugh.

documents from Anthem itself admitting that it would not pass on any savings but instead seek to retain them itself.

Cablevision Systems Corp. v. Federal Communications Commission, 597 F.3d 1306 (D.C. Cir. 2010), a case involving consumer access to video programming content, is another decision in which Judge Kavanaugh dissented in the face of harsh criticism from his colleague that his conclusion was inconsistent with the facts and law. In the 1990s, local cable operators had a monopoly over access to video programming, owning not only the means of distribution (*i.e.*, cable), but also many of the video programming networks. To encourage competition, Congress passed a law that, in effect, required local cable operators to share content from their affiliated networks with all distributors (*e.g.*, satellite distributors), rather than entering into exclusive contracts. In 2007, the FCC extended this rule for five years, and a local cable operator challenged this decision. Judges Sentelle and Griffith—both Republican appointees to the bench—denied the company's petition for review. Judge Kavanaugh dissented, concluding that the market was no longer monopolistic and that the rule thus violated the First Amendment.

In *Federal Trade Commission v. Whole Foods Market, Inc.*, 548 F.2d 1028 (D.C. Cir. 2008), Judges Rogers and Tatel held that the lower court should have granted the FTC's motion to preliminarily enjoin a merger between the nation's two largest organic supermarket companies. Judge Kavanaugh dissented, and Judge Tatel criticized the dissent for "glossing over" important distinctions, "ignoring" evidence, and advancing "baffling" arguments. "In his zeal to reach the merits and preempt the FTC," Judge Tatel observed, the dissent had "ignore[d] both circuit precedent and section 13(b)."

Judge Kavanaugh has also voted to weaken agencies that protect consumers. In *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018), the D.C. Circuit, sitting en banc, held that the structure of the Consumer Financial Protection Bureau (CFPB) was constitutional. Judge Kavanaugh dissented, characterizing "independent agencies collectively" as "a headless fourth branch of the U.S. Government" that "pose a significant threat to individual liberty," and the CFPB specifically as a "wolf" that "comes as a wolf."

Here again, several judges authored concurrences criticizing Judge Kavanaugh's disregard for precedent. Judges Wilkins and Rogers criticized the dissent for "cast[ing] aspersions" on a case that "binds us, as an inferior court," and Judge Griffith stated that while he personally disagreed with the relevant Supreme Court precedents, the court was "bound to faithfully apply [them] to the question before us."

John Doe Co. v. Consumer Financial Protection Bureau, 849 F.3d 1129 (D.C. Cir. 2017), decided between the two *PHH* decisions, is another example of Judge Kavanaugh protecting big business. The case arose from a Government Accountability Office study finding that "income-stream-marketing businesses often target vulnerable clients such as our military veterans and the elderly, charging effective interest rates far in excess of state usury laws (up to 87% in some cases) and providing lump sum payouts that are roughly half the minimum required under federal law governing pensions." The CFPB issued a civil investigative demand on one such company, and the company responded by challenging the agency's constitutionality. The district court denied the company's preliminary injunction and, in a *per curiam* opinion, the D.C. Circuit denied its request for an injunction pending appeal. Judge Kavanaugh dissented, contending that "[t]he public

interest is not served by letting an unconstitutionally structured agency continue to operate . . . [a]nd in this circumstance, the equities favor the people whose liberties are being infringed"—that is, the liberties of the usurious company.

At a time when the country faces vast economic inequality it is imperative that the Senate ask Judge Kavanaugh tough questions about why his decisions overwhelmingly favor big business.

Judge Kavanaugh has routinely ruled in favor of police authority against claims of constitutional violations

On the D.C. Circuit, Judge Kavanaugh has voted to uphold every police search under his review, including eight criminal appeals in which he wrote an opinion for the court,[10] and eight more where he was on the panel and joined the majority without a separate opinion.[11] Simply put, in such case Judge Kavanaugh has never voted against law enforcement in his twelve years on the bench.

The most highly contested of those cases was *United States v. Askew*, 529 F.3d 1119, 1123 (D.C. Cir. 2008) (en banc), in which Judge Kavanaugh wrote a dissent from the en banc court's ruling. In *Askew*, the suspect was subjected to a *Terry* stop-and-frisk, on suspicion that he might have been involved in a nearby robbery. The officer unzipped the suspect's jacket—supposedly to aid witness identification of the suspect at a "show-up," by revealing the blue sweatshirt the suspect wore underneath. The officer hit a "lump." A second, fuller unzipping exposed a gun. The defendant moved to suppress the weapon evidence claiming that the unzipping was a warrantless "search" under the Fourth Amendment. The district court denied the motion, and the panel opinion by Judge Kavanaugh affirmed over a dissent by Judge Edwards. *United States v. Askew*, 482 F.3d 532 (D.C. Cir. 2007).

The D.C. Circuit vacated the panel decision en banc and reversed 7–4. The majority opinion by Judge Edwards held that "the police officer's actions cannot be justified here since there were no reasonable grounds for believing that the unzipping would establish or negate appellant's identification as the robber in question." It also rejected the alternative argument that the unzipping was a valid continuation of the original *Terry* stop. But Judge Kavanaugh would have found the unzipping valid: "the police may reasonably maneuver a suspect's outer clothing—such as removing a suspect's hat or sunglasses or unzipping a suspect's outer jacket—when, as here, doing

[10] *United States v. Burnett*, 827 F.3d 1108 (D.C. Cir. 2016); *United States v. Cardoza*, 713 F.3d 656 (D.C. Cir. 2013); *United States v. Glover*, 681 F.3d 411 (D.C. Cir. 2012); *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010) (dissenting from denial of rehearing en banc); *United States v. Washington*, 559 F.3d 573 (D.C. Cir. 2009); *United States v. Bullock*, 510 F.3d 342 (D.C. Cir. 2007); *United States v. Spencer*, 530 F.3d 1003 (D.C. Cir. 2008); *United States v. Askew*, 482 F.3d 532 (D.C. Cir. 2007), *rev'd en banc*, 529 F.3d 1119 (D.C. Cir. 2008).

[11] *United States v. Eshetu*, 863 F.3d 946 (D.C. Cir. 2017), *remanded on other grounds*, 2018 WL 3673907 (D.C. Cir. Aug. 3, 2018); *United States v. Watson*, 717 F.3d 196 (D.C. Cir. 2013); *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010); *United States v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010); *United States v. McCarson*, 527 F.3d 170 (D.C. Cir. 2008); *United States v. Reed*, 522 F.3d 354 (D.C. Cir. 2008); *United States v. Owusu-Sakya*, 255 F. App'x 528 (D.C. Cir. 2007); *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007).

so could help facilitate a witness's identification at a show-up during a *Terry* stop." *Askew*, 529 F.3d at 1163.

Judge Kavanaugh's dissent questioned the majority's good faith and he crafted his own iteration of events justifying the search:

> The majority has had months to unpack and second-guess those split-second police decisions. The officers did not have that luxury. Events do not unfold in super slow motion in the real world in which police officers operate. Moreover, with respect, it's the majority's version of events that is implausible: The majority claims that the police completed a full frisk of Askew after Askew initially resisted, yet still somehow failed to discover the loaded .38 caliber gun at his waist. The majority's conclusion thus necessarily rests on an assumption that the officers here were dangerously incompetent. We see no basis, however, for such an assumption.

In light of this track record, the Senate should question Judge Kavanaugh about whether he could conceive of any circumstances under which he would see fit to vote against law enforcement. But Judge Kavanaugh's track record already gives the answer: no.

Judge Kavanaugh's opinions regarding the administrative state and executive power

Judge Kavanaugh is one of the leading proponents of a particularly extreme version of the "unitary executive" theory of the Presidency.[12] In essence, Judge Kavanaugh believes that all high level executive branch employees should be subject to dismissal by the President for any reason or no reason, and that semi-independent agencies like the CFPB, whose heads serve fixed terms and can only be fired for good cause, are unconstitutional violations of the Constitution's separation of powers. He has opined to that effect while sitting on the D.C. Circuit. *See PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

In the *PHH Corp.* case, Judge Kavanaugh initially wrote for a panel of the D.C. Circuit that the fact that the head of the CFPB could only be fired for cause was an unconstitutional constraint upon the President's Article II powers. *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (2016). When the panel decision was overruled en banc, Judge Kavanaugh dissented for largely the same reasons he had expressed in his initial panel opinion. *PHH Corp.*, 881 F.3d 75 at 164–201. Although Judge Kavanaugh distinguished the allegedly unconstitutional restriction on firing the head of the CFPB from similar restrictions on firing the members of multi-member boards running other semi-independent agencies, such as the FTC, the SEC, and many others, his

[12] *See generally*, Wikipedia, "Unitary Executive Theory", available at https://en.wikipedia.org/wiki/Unitary_executive_theory; Garrett Epps, "Constitutional Myth #3: The 'Unitary Executive' is a Dictator in War and Peace," *The Atlantic*, June 9, 2011, *available at* https://www.theatlantic.com/national/archive/2011/06/constitutional-myth-3-the-unitary-executive-is-a-dictator-in-war-and-peace/239627/; Ilya Somin, "Rethinking the Unitary Executive," *The Volokh Conspiracy*, https://reason.com/volokh/2018/05/03/rethinking-the-unitary-executive; John Harrison, "The Unitary Executive and the Scope of Executive Power", 126 Yale L.J. F. 374 (2016), https://www.yalelawjournal.org/forum/the-unitary-executive-and-the-scope-of-executive-power.

views raise significant questions as to whether he would continue to uphold those restrictions if he were to review them as a Supreme Court Justice. The CFPB and the other agencies play a crucial role in protecting consumers and constraining the excesses of powerful corporations and financial institutions.

Judge Kavanaugh also authored a litany of decisions and dissents expressing his view that the Environmental Protection Agency (EPA) had exceeded its statutory authority, including *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012) (en banc) (Kavanaugh, J., dissenting) (concluding the EPA's interpretation of the Clean Air Act to regulate carbon dioxide was "absurd"); *EME Homer City Generation, L.P. v. EPA*; *White Stallion v. Energy Center, LLC v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *rev'd*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting); and *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017). He took a similarly dim view of President Obama's FCC's decision to promulgate internet neutrality rules, dissenting in *United States Telecom Association v. Federal Communications Commission*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

But such positions on administrative law, while dangerous to the healthy functioning of a modern administrative state, pale in comparison to Judge Kavanaugh's extreme views on immunity from suit or even investigation for a sitting President.

Judge Kavanaugh's views on executive power and presidential immunity indicate a disregard for the rule of law and government accountability

Judge Kavanaugh's appointment to the Supreme Court has a potential to upset the checks and balances within our constitutional order. In particular, time and again Judge Kavanaugh has shown great deference to the Presidency to such extremes that it could threaten the rule of law. This tendency is greatly concerning during such a critical time for our nation.

Judge Kavanaugh's idiosyncratic views on executive power stem, in part, from his early experience working in and around the White House. In the 1990s, he was a key contributor to the freewheeling investigation of Independent Counsel Kenneth Starr. Among other things, he pressed Starr to confront President Bill Clinton with an ultimatum: resign the presidency with an apology to Starr, or face public, sexually explicit questioning. But after experience in President George W. Bush's administration in the 2000s, Kavanaugh concluded that the job was far too difficult to subject the president to investigation.

In two law review articles in 1998 and 2009, Kavanaugh made clear that he believes any special counsel serves at the pleasure of the President and must be subject to dismissal *at will and without cause* by the President in order to be constitutional.[13] Moreover, he reaffirmed those views in a 2016 speech to the American Enterprise Institute in which he indicated that he would overrule the Supreme Court case *Morrison v. Olson*, 487 U.S. 654 (1988), which upheld the constitutionality

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[13] Brett Kavanaugh, "The President and the Independent Counsel" 86 Georgetown Law Journal 2133 (July, 1998); Brett Kavanaugh, "Separation of Powers During the Forty-Fourth Presidency and Beyond," 93 Minnesota Law Review 1454 (2009).

of the now-lapsed independent counsel statute in the face of similar challenge.[14] It seems quite clear that if faced with a similar issue on the Supreme Court, a Justice Kavanaugh would hold that the President has a right to dismiss any special counsel or agency director for any reason.

In his law review articles, Judge Kavanaugh also urged Congress to adopt a statute that would bar any criminal investigation into the President's conduct until after the President had left office.[15]

Judge Kavanaugh would leave any oversight of a sitting President ***solely*** to Congress and the impeachment clause. If he were asked to consider the enforceability of a subpoena directed to the President, it is doubtful that he would find it enforceable, notwithstanding the precedent of the Nixon tapes case. Indeed, a news report suggests that Judge Kavanaugh has questioned the validity of that precedent.[16] Given the presence of other candidates who passed the litmus tests put forward by the president and his outside vetters, the choice of the candidate who is expressed such views on executive power is particularly troubling.

A significant portion of Judge Kavanaugh's record while a White House attorney remains hidden—the subject of considerable controversy during his prior confirmation hearings for his seat on the DC Circuit. Specifically, then-nominee Kavanaugh was asked whether he had been involved in any of the discussions about issues involving executive authority, such as the discussions about warrantless wire-tapping, detainees at Guantanamo Bay, torture, and use of military commissions rather than regular Article III federal courts. As a nominee, Judge Kavanaugh claimed he had no involvement in any such discussions. But in 2007, about a year after his nomination was approved as part of a package deal between the Republicans and Democrats in the Senate, additional information came to light suggesting that he had been in such discussions. The questions were serious enough that Senator Patrick Leahy eventually sent a letter to Attorney General Gonzales, requesting that he investigate whether Judge Kavanaugh had committed perjury during his confirmation hearings.[17]

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[14] *See* Brett Kavanaugh Interview, "Federal Courts and Public Policy," American Enterprise Institute, https://www.c-span.org/video/?407491-1/discussion-politics=supreme-court.

[15] 86 Geo. L.J. at 2156–61; 93 Minn. L.R. at 1460–61; *see also* Andrew Prookop, "Brett Kavanaugh wrote that presidents shouldn't be 'distracted' by criminal investigations," *Vox*, July 9, 2018, https://www.vox.com/2018/7/9/17551584; Aziz Huq, "The Unitary Executive Theory in the Shadow of High-Level Criminality," *Take Care Blog*, July 17, 2018, https://takecareblog.com/blog/the-unitary-executive-theory-in-the-shadow-of-high-level-criminality; Norman Eisen & Ryan Goodman, "Setting the Record Straight: Brett Kavanaugh's Views on Criminal Investigation of the President," *Just Security*, July 12, 2018, https://www.justsecurity.org/59356/setting-record-straight-brett-kavanaughs-views-criminal-investigation-president/; Norman Eisen & Ryan Goodman, "President Trump's Stain on Brett Kavanaugh and How to Remove It–Setting the Record Straight Part Two," *Just Security*, July 13, 2018, https://www.justsecurity.org/59402/president-trumps-stain-brett-kavanaugh-remove/.

[16] Mark Sherman, "Kavanaugh: Once Questioned Nixon Tapes Decision", *AP News*, July 22, 2018, *available at* https://apnews.com/829a730fb64f4c6489b2aa28fc4e09bc.

[17] *See generally* David Graham, "How Kavanaugh's Last Confirmation Hearing Could Haunt Him", *The Atlantic*, July 17, 2018 *available at*

Regardless of the extent of Kavanaugh's involvement in those Bush White House discussions, his clearly articulated view is that the President enjoys extremely broad powers, that the President is free to dismiss any special prosecutor for any reason or no reason, that the President's actions should be immune from criminal investigations while he is in office, and that the President's actions should not be subject to any oversight, other than impeachment by Congress. It would be unwise to ever appoint such a person to a Supreme Court charged with ensuring the rule of law, but especially unwise in our current circumstances. The prospect of a Justice Kavanaugh, who believes the President should be largely above the law, at a time when the President is currently under investigation by a special counsel, would corrode good government and the public trust. He is a dangerous nominee given President Trump's lack of respect for the rule of law and questionable commitment to democracy, integrity, and the best interests of the nation as a whole.

TRANSPARENCY IS CRITICAL: THE SENATE SHOULD NOT ACT WITHOUT COMPLETE INFORMATION ABOUT JUDGE KAVANAUGH'S RECORD AND VIEWS

Transparency about the record of a Supreme Court nominee is crucial so that Senate and the public have the best information available about the nominee. Regrettably, Republican leaders in Congress are pushing to have hearings and a confirmation vote on Judge Kavanaugh's nomination without disclosure of many of the records from Judge Kavanaugh's time in the White House. This is especially unnerving given that there is some indication that Judge Kavanaugh was less than forthcoming in his prior confirmation hearing in which he denied involvement in controversial Bush Administration practices, such as torture and the use of military commissions.

Chairman of the Senate Judiciary Committee Chuck Grassley requested that the National Archives provide documents created during Kavanaugh's time in in the Office of Legal Counsel. The National Archives responded that the request would total over 900,000 pages and could not be fulfilled until late October. Despite this fact, Republicans in the Senate are insisting on holding confirmation hearings in September and confirming Judge Kavanaugh by the beginning of the Supreme Court's October Term. Meanwhile, a legal team for former President Bush—staffed by a former aide to Kavanaugh—is reviewing documents authored by Kavanaugh and turning them over on a rolling basis, but only after vetting them. Republicans have not requested documents from Kavanaugh's time as President Bush's Staff Secretary, even though such documents almost certainly would shed light on Judge Kavanaugh's views on important subjects.

Nothing short of complete transparency is acceptable before a vote can be taken on a lifetime appointment to the most powerful court in the country. Judge Kavanaugh has a track record of aggressively approaching his role as an adjudicator to advance the law in a particular direction. Many of the results advanced by Judge Kavanaugh are deeply concerning to the Council, and, we expect, large portions of the public. For this reason, it is critical that the Senate and the public receive complete information regarding Judge Kavanaugh's views. Additionally, as Senator Leahy has noted, only with a complete set of records can the Senate determine whether Judge Kavanaugh's testimony during his prior confirmation hearing was truthful and complete.

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https://www.theatlantic.com/politics/archive/2018/07/how-kavanaughs-last-confirmation-hearing-could-haunt-him/565304/.

In practice, this means that Judge Kavanaugh's confirmation hearing should not commence until a complete set of his records has been made available. Members of the Senate and their constituents deserve complete information before a decision of this magnitude can be made.

CONCLUSION

After careful consideration, the Chicago Council of Lawyers opposes the nomination of Judge Kavanaugh to the Supreme Court. Judge Kavanaugh's record suggests that he does not regard the role of a judge as that of a neutral arbiter but as a means to reaching certain outcomes. And while the Council does not ordinarily consider the substance of the candidates' views when evaluating judges, the Supreme Court is a uniquely powerful institution, and Judge Kavanaugh's views are uniquely extreme and troubling. If confirmed to the Supreme Court, Judge Kavanaugh will likely make justice less accessible to the disadvantaged and undermine the rule of law.