THE DISSENTS OF JUDGE BRETT KAVANAUGH: A NARROW-MINDED ELITIST WHO IS OUT OF THE MAINSTREAM

Many if not most decisions by the Supreme Court and the federal courts of appeals are unanimous. Examining the cases where an appellate judge has disagreed with and dissented from his or her colleagues, therefore, can be particularly revealing. And that is precisely the case with Judge Brett Kavanaugh.

Judge Kavanaugh's 61 dissents from his colleagues on the U.S. Court of Appeals for the D.C. Circuit are consistently right-wing and reflect a narrow-minded elitist view, generally seeking to favor big business and other authority and harm the interests of workers, the environment, and those who have suffered abuse by government officials, often in cases of national impact.[1] These include dissents on reproductive freedom, the Affordable Care Act, and many other issues. He has consistently voted to strike down laws and regulations that have protected consumers, sometimes disagreeing even with other Republican-appointed colleagues. Not surprisingly, his opinions often reflect conservative Republican political views, leading Kavanaugh to be characterized as an "ideological warrior." And out of all the 11 active judges now on the D.C. Circuit, whether appointed by Republicans or Democrats, Kavanaugh has by far the highest number of dissents per year of service on the court.[2] For example:

- In *United States Telecom Ass'n. v. FCC*, a three-judge panel had rejected a challenge by large corporations to the FCC's "net neutrality" or open internet rule. That rule required that when an internet service provider (ISP) held itself out to customers as providing unfiltered internet service, it could not later decide to limit access to some web content to promote its own commercial sites – such as by degrading or blocking access to Netflix and promoting its own video service instead.. A clear majority of the full D.C. circuit (including one Republican-appointed judge) declined to rehear the case. Kavanaugh and

[1] The July edition of this report listed 60 Kavanaugh DC Circuit dissents, per a Lexis search of the "dissent by" field. Later research has found that one Kavanaugh dissent, in *Morgan Drexen v. CFPB,* was incorrectly classified by Lexis as a concurrence. That dissent has been added in this edition.

[2] Specifically, Kavanaugh has averaged 5.1 dissents per year on the bench, while most other active D.C. Circuit judges have less than 2 and a few have just under 3. Kavanaugh has also dissented significantly more frequently than several very conservative Republican-appointed senior judges: David Sentelle (just under 3 dissents per year) and Laurence Silberman (1.25). These numbers were derived through a Lexis search on July 1, 2018 of the "dissent by" field concerning each active D.C. Circuit judge within D.C. Circuit cases and the two senior judges, divided by the time since each received their commission after being appointed to the bench. An Aug. 21, 2018 CRS report confirms that Kavanaugh is the most frequent dissenter on the DC Circuit, dissenting in 8.5% of his cases with reported opinions.

one other judge dissented, however, arguing that Congress had not specifically authorized the FCC to adopt the rule and, according only to Kavanaugh, that the rule violated the First Amendment. Judges Srinivasan and Tatel explained the serious flaws in the "misconceived" dissents. The Supreme Court had "pointedly recognized" the FCC's clear authority to adopt such a rule, they noted, and "no Supreme Court decision" supported the "counterintuitive" claim, which not a single dissenting FCC commissioner had supported, that the First Amendment somehow prohibited the FCC from requiring an ISP to "abide by its representation" that it would provide open access to the internet. Many consumer advocates and members of Congress protested when a Trump-controlled FCC repealed the net neutrality rule. But if Kavanugh's view had prevailed, the FCC would be legally forbidden from ever adopting this important pro-consumer measure.

- In *Howmet Corp. v. EPA,* Kavanaugh dissented from a decision to approve an EPA fine of over $300,000 against a company that had improperly shipped a corrosive chemical to be added to fertilizer without properly labelling it and taking other precautions to treat it as a hazardous waste. Kavanaugh claimed that the EPA had misinterpreted the language of its own regulation on the subject. But this view was rejected by the two judges in the majority, Janice Rogers Brown and David Sentelle, who were among the most conservative judges on the D.C. Circuit. As they pointed out, the EPA's interpretation was appropriate and helped prevent "significant risks to public health and the environment" from hazardous wastes. Kavanaugh would have allowed the corporation's shipment of the corrosive chemical to proceed without the precautions prescribed under federal law.

- In *Garza v. Hargan,* the full D.C. Circuit considered the plight of a 17-year old fleeing from abuse in Central America who believed she had a right to be in the U.S., was taken into custody when she entered, and stated that she then discovered that she was pregnant and decided to terminate her pregnancy. She obtained consent from a Texas state judge, but the federal government refused to release her from custody temporarily so she could obtain an abortion. A district judge ordered the government to stop blocking her access to an abortion, but a divided three-judge panel on the D.C. Circuit, in an opinion by Kavanaugh, stayed the district court order, The full D.C. circuit reversed in a split decision, to which Kavanaugh and other Republican-appointed judges dissented, and effectively reinstated the lower court order. Kavanaugh claimed that the court was authorizing "immediate abortion on demand" for "unlawful immigrant minors." Judge Millet carefully explained what was wrong with that claim. Jane Doe had already been delayed for seven weeks in carrying out her decision, and the three-judge court order would likely have produced a delay of "multiple more weeks" as the government allegedly looked for an approved sponsor or otherwise forced the litigation to start again, subjecting her to additional health risks and coming close to the Texas 20-week limit on

abortions (she was reportedly fifteen weeks pregnant at the time of the district court order). The government did not dispute that she was entitled to have an abortion under the Constitution and that she had complied with Texas law, but had "categorically blocked" her from exercising her right to choose in the hope of discouraging or stopping an abortion from occurring. As Judge Millett explained, the only sense in which this was an abortion "on demand" was that it was clearly permitted under "the demands of the Constitution and Texas law." After Jane Doe was able to exercise her right to choose, the Supreme Court vacated the court of appeals decision as moot.

- .In *PHH Corp. v. Consumer Fin. Prot. Bureau*, Kavanaugh dissented from a ruling by the majority of the full D.C. Circuit, including one other Republican appointee, which rejected an effort by large corporations and others to have the Consumer Financial Protection Bureau (CFPB) thrown out as unconstitutional. The decision reversed an earlier panel decision written by Kavanaugh himself. Kavanaugh claimed, joined by one other Republican appointee, that the law establishing the CFPB was unconstitutional because it provided that the President could remove the CFPB director only for "inefficiency, neglect of duty, or malfeasance in office." As the majority explained, however, this claim "flies in the face" of previous Supreme Court precedent upholding similar limits, and "defies the historical practice." Protecting the CFPB director from removal except for such good cause, the majority explained, had ample precedent and was a "valid exercise" of Congress' law-making powers, particularly in light of the financial and consumer crisis that led to the Dodd-Frank Act that established the CFPB.

These are just a few of the dissents written by Kavanaugh where his disagreements with his own colleagues, including other Republican appointees, show that he is a narrow-minded elitist who is out of the mainstream. Along with many other aspects of his record, Kavanaugh's dissents are an important reason that his nomination to the Supreme Court should be rejected. Altogether, Judge Kavanaugh's 61 dissents are in the following areas: discrimination, immigration, workers' rights, the environment, corporations and consumers, criminal law and abuse of official authority, and other issues. Each is discussed below.

Discrimination and Immigration Issues

Judge Kavanaugh has written nine dissents in cases concerning discrimination claims by workers and others or immigration-related cases, several of which involved worker issues. In all seven substantive decisions, the majority found in favor of the worker or tenant or immigrant, but Kavanaugh argued for a result that would have hurt those who tried to prove discrimination or immigration-related violations.[3] In addition to *Garza* discussed above, these include:

[3] Two of Kavanaugh's dissents involved attorneys' fees. In *Sims v. Johnson*, *he* disagreed with a ruling that required that a district judge hold an evidentiary hearing on a request for a declaratory judgment concerning attorneys' fees to be provided to a plaintiff's counsel in a settled discrimination case. *Washington Alliance of Tech. Workers v.*

In *Miller v. Clinton,* the court majority ruled that a lower court had improperly dismissed an age discrimination complaint by a State Department overseas employee who was fired on his 65th birthday, based on the Department's claim that it was exempt from the Age Discrimination in Employment Act (ADEA) concerning such employees. Kavanaugh agreed with the State Department's interpretation, even though, as the majority pointed out, that view would lead to exempting State from laws banning bias based on race, sex, disability, and other grounds. As the majority pointed out in criticizing Kavanaugh's dissent,"it would be surprising if Congress had intended to authorize an exemption from the country's landmark antidiscrimination laws by using ambiguous terms that appear to refer to something else entirely." To the contrary, the majority explained, the ADEA was enacted as "part of an ongoing congressional effort to eradicate discrimination in the workplace," and "reflects a societal condemnation of invidious bias in employment decisions", as to which Congress has used clear language when deciding "to exempt" particular groups of individuals "from the coverage of those statutes," which Congress had not done in this case. Kavanaugh's willingness to embrace such a broad exemption from anti-discrimination laws is disturbing.

Most of Kavanaugh's other dissents in discrimination cases also broadly interpret exemptions that favor employers or other defendants, harming plaintiffs who seek relief from job or housing discrimination. In *Howard v. Office of the Chief Admin. Officer*, the majority ruled that a black woman fired from her position as House of Representatives deputy budget director should get a chance to prove her claim of race discrimination and retaliation under the Congressional Accountability Act because it would not violate the Constitution's Speech or Debate Clause by requiring "proof of a legislative act or the motives or purposes behind such an act," but Kavanaugh disagreed and would have dismissed the entire claim. In *Rattigan v. Holder,* the majority ruled that a black FBI agent could pursue a case of improper retaliation for filing a discrimination claim where the agency began a security investigation against him, as long as he did so without questioning unreviewable decisions by the FBI security division Kavanaugh said the entire claim must be dismissed, despite the majority's warning that this was not required by previous holdings and that the courts should preserve "to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation." And in *Redman v. Graham,* Kavanaugh dissented from a majority, including another Republican-appointed judge, which ruled that a tenant should have the opportunity to prove a discrimination and retaliation claim against a law firm that she claimed had assisted her former landlord in discriminating against her on the basis of disability.

Dept. of Homeland Security concerned a dispute by Kavanaugh with two other Republican-appointed judges, who voted to affirm an attorneys' fee order in a case against the Department of Homeland Security in which the district court awarded fees only for work relating to arguments that actually prevailed against a rule concerning student visa holders.

In *Agriprocessor v. NLRB,* the majority affirmed an NLRB order that a company must collectively bargain with its workers. Kavanaugh and the corporation claimed it was exempted from collective bargaining requirements because its employee included some undocumented immigrants. The majority, which included another Republican-appointed judge, firmly rejected this claim, based on the "plain language" of the National Labor Relations Act and a directly applicable Supreme Court decision. Kavanaugh asserted that a Congressional immigration law implicitly amended at least part of the NLRA, but the majority rejected that claim as well. "[N]ot only is there no clear indication that Congress intended IRCA implicitly to amend the NLRA," the majority explained, "but all available evidence actually points in the opposite direction." Kavanaugh's view, the majority concluded, would lead to an "absurd result."

And in *Fogo de Chao Inc. v. Department of Homeland Security*, Kavanaugh dissented from a ruling that reversed a DHS decision refusing to grant temporary visas to foreign workers with specialized knowledge concerning Brazilian-style cooking, even though such visas had been granted before. The majority remanded the case for reconsideration of the argument, supported by the restaurant and its workers, that culturally-acquired knowledge could constitute specialized knowledge for visa purposes. The majority was critical of Kavanaugh's dissent, which it claimed was based on a concern about "displacement of American workers" through the visa program. As the majority explained, however, it was Congress that created the visa program and the Executive Branch that had previously interpreted it to provide opportunity to the foreign workers. "Perhaps the dissent disagrees with those policy judgments," the majority noted, but the Constitution "places such sensitive immigration and economic judgments squarely in the hands of the Political Branches, *not* the courts."

Other Workers' Rights Issues

In addition to those described above, Judge Kavanaugh has written seven dissents concerning workers' rights. In all of them, his dissents have opposed workers and their interests. Specifically:

In *Sea World of Fla. v. Perez,* Kavanaugh dissented from an opinion that upheld a Department of Labor finding, in accord with previous cases, that Sea World had violated agency rules by failing to take available precautions with respect to trainers' work with killer whales, directly resulting in one employee's death The majority was highly critical of Kavanaugh's view that no action should have been taken by the agency. That claim, the majority explained, was " [i]gnoring" the court's "precedent regarding congressional purpose and intent" in enacting workplace safety mandates. "Nothing the Commission said" in a previous ruling cited by Kavanaugh, the majority stated, "immunizes a workplace's dangerous 'normal activities' from oversight." Indeed, the majority noted that much of the dissent " can only be read as raising the question" of whether "employees should be protected from the risk of significant physical injury" under such circumstances, a question that the majority made clear is "to be answered by Congress, not this court," and . "Congress has done so."

In several cases, Kavanaugh dissents argued that unions and their workers should not be able to effectively enforce the fiduciary duties of union officials to their members. In *Int'l. Union, Sec. Police and Fire Professionals of America v. Faye*, he dissented from a ruling that a union had the right to sue a union official for breach of duty by attempting to use union time and resources to establish and promote a rival union. The majority explained that Kavanaugh's dissent "ignored" language making clear that such a lawsuit was proper. And in *Noble v. Sombrotto*, Kavanaugh dissented from a ruling by two other Republican-appointed judges, including noted conservative David Sentelle, which said that a union member should be able to pursue a claim that union officers had abused unmonitored in-town expense allowances. One of the majority judges wrote that Kavanaugh's view allowing later ratification of such expenses contradicted "both the language and the purpose" of federal law on the issue

In three cases, Kavanaugh dissented from majority rulings that upheld NLRB findings of unfair labor practices. These included *Midwest Division MM LLC v. NLRB*, where he dissented from a ruling that a hospital had committed unfair labor practices by refusing to disclose information to nurses about a peer review program; *NLRB v. CNN America, Inc.*, where he dissented from a decision agreeing that CNN had committed unfair labor practices by refusing to bargain with a union representing technical employees and discriminated against former union members in hiring; and *Island Architecture Woodwork, Inc. v. NLRB*, where he dissented from a decision upholding an NLRB ruling that a company had committed unfair labor practices by refusing to recognize a union.

Finally, Kavanaugh tried to deal a major blow to employee privacy rights in *National Fed. of Fed. Employees v. Vilsack*, where the majority invalidated a random drug testing program for US Forest service employees at Job Corps Civilian Conservation centers. The majority, which included another Republican-appointed judge, noted that there was: "no evidence of any difficulty" maintaining a zero drug tolerance policy during the 14 years before the random drug testing policy was adopted, and that the primary administrator of the Job Corps, the Department of Labor, had no such policy. The majority specifically criticized Kavanaugh, pointing out that he "paints with a broad brush without regard to precedent from the Supreme Court, and this court, on the particularity of the Fourth Amendment inquiry" with respect to such drug testing programs.

Environmental Issues

Including the *Howmat* case described above, Judge Kavanaugh has issued ten dissents in pollution and other cases concerning the environment. He argued against environmental protection and in favor of industry in all ten.[4] Specifically:

[4] In one of these ten cases, *White Stallion Energy Ctr LLC v. EPA*, a 5-4 majority of the Supreme Court later agreed with a dissent by Kavanaugh and ruled that the EPA must engage in cost-benefit analysis when deciding whether to adopt rules limiting emissions by power plants.

In two dissents in *Grocery Manufacturers Ass'n. v. EPA*, Kavanaugh sided with corporations that tried to challenge an EPA rule approving the introduction of a blend of gas and ethanol, which reduced air pollution. The two judges in the majority in a panel decision in the case, written by noted conservative and Republican appointee David Sentelle, ruled that the industry groups did not have proper standing to challenge the rule, but Kavanaugh dissented. As the other judge in the majority explained, Kavanaugh's citation of some cases that agreed with his view was "too thin a reed" to permit the court to "depart from our clear prior holdings" that there was no clear injury to the companies that gave rise to standing to sue. The industry groups then tried to get the full D.C. Circuit to rehear the case. Although Kavanaugh again dissented, every other judge who considered the case, including four appointed by Republicans and three by Democrats, decided not to rehear the issue.

Kavanaugh dissented from four other decisions upholding EPA rules or penalties to help protect the environment, arguing for positions favored by industry. These included:

- *Texas v. EPA,* where Kavanaugh would have invalidated EPA rules regulating greenhouse gas emissions by plants and factories. The majority explained that Kavanugh's "reasoning is flawed" because it ignored the "plain text" of the Clean Air Act.
- *Coalition for Responsible Regulation, Inc. v. EPA,* where Kavanaugh disagreed with a decision, including by conservative Republican appointee David Sentelle, to uphold an EPA rule regulating greenhouse gas emissions by autos and trucks.[5]
- *Mingo Logan Coal Co. v. EPA,* where Kavanaugh dissented from a decision, written by one of his Republican-appointed colleagues, which sustained an EPA determination to partly revoke a coal company's permit to discharge materials into streams where the result would have been "unacceptable adverse effects" on the environment.
- *Mexichem Specialty Resins, Inc., v. EPA*, where Kavanaugh would have at least delayed an EPA rule limiting hazardous emissions related to manufacture of PVCs, which the majority explained would result in the emission of "more than a dozen known or suspected carcinogens and other hazardous" materials.

Even when his dissents did not disagree with the EPA or other regulatory agencies, Kavanaugh nevertheless took positions that favored industry and opposed environmental protection. In *American Bird Conservancy, Inc. v. FCC*, Kavanaugh dissented from a decision that required the FCC to more completely review the possible harm to migratory birds of proposed industry cell towers in the Gulf Coast area. The majority noted that Kavanaugh had relied on a "mistaken assumption" that the agency was reconsidering the issue and on cases that were "inapposite." And in *Sierra Club v. EPA*, Kavanaugh dissented from a ruling by two Republican-appointed colleagues, including Judge Sentelle, which vacated an EPA rule that had improperly prevented

[5] The Supreme Court later reversed part of the decision in a splintered opinion.

state and local authorities from supplementing inadequate federal monitoring requirements concerning factories and other stationary sources of air pollution.

Other Cases concerning Corporations and Consumers

In addition to some of the environmental, workers' rights, and other cases discussed above, Kavanaugh has issued eighteen dissents in a wide variety of other cases concerning the interests of corporations and consumers, including the net neutrality and *PHH* decisions discussed above. He has favored corporations or opposed the interests of consumers in all but one of these cases.[6] Specifically:

In two cases, Kavanaugh disagreed with majority opinions that upheld the constitutionality of the pro-consumer Affordable Care Act (ACA). In *Seven-Sky v. Holder*, noted conservative Laurence Silberman wrote a majority opinion rejecting a claim that the ACA exceeded Congress' authority under the Commerce Clause. Kavanaugh argued in dissent that the court did not have jurisdiction to consider the case, which was rejected by the majority. Kavanaugh's dissent gratuitously suggested that a future president could decline to enforce the ACA if he "deems" it unconstitutional, even if the courts had upheld its constitutionality, an argument that one legal commentator characterized as "pandering to the base" of conservatives opposed to the ACA.

Several years later, in *Sissel v. United States HHS*, Kavanaugh argued in dissent that the full D.C. Circuit should consider the claim that the ACA was unconstitutional because it was a revenue-raising bill that had to originate in the House of Representatives. Several of the judges who concurred in the decision not to rehear the case rejecting the "origination" claim explained that Kavanaugh's dissent was "flawed" and "misreads" Supreme Court precedent. The Supreme Court later decided not to hear the case.

In addition to his *PHH* dissent arguing that the Consumer Financial Protection Bureau was unconstitutional, Kavanaugh wrote two other dissents seeking to limit recent federal legislation designed to help consumers. In *Doe Co. v. Cordray*, a company wanted to get a preliminary injunction against a CFPB civil investigative demand into alleged defrauding by the company of veterans and the elderly. Kavanaugh would have granted the injunction, but the panel majority rejected it.[7] And in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, a panel majority, including conservative Janice Rogers Brown, rejected a constitutional challenge to the Oversight Board established by Congress to protect consumers from the types of accounting fraud that occurred in the Enron case. Kavanaugh dissented, and a conservative 5-4 majority of the Supreme Court later agreed with him.

[6] In that case, *Gordon v. Holder*, Kavanaugh disagreed with a decision by two other Republican appointees to affirm a preliminary injunction against the collection of taxes called for by an anti-cigarette trafficking law passed by Congress.

[7] Kavanaugh also dissented in Morgan Drexen v. CFPB, disagreeing with the majority and the lower court and arguing that an attorney had standing to challenge the constitutionality of the CFPB.

Kavanaugh issued two separate dissents in *Cohen v. United States*, which concerned an IRS interpretation of tax laws that caused "millions of Americans" to pay "billions of dollars in excise tax collections" on long-distance phone calls and a challenge to the IRS' refund scheme as defective, since it left "almost half the funds" unclaimed. In 2009, a panel majority, including noted conservative Janice Rogers Brown, ruled that those challenging the refund procedure should have the chance to prove that it violated the Administrative Procedure Act (APA). The majority criticized Kavanaugh, who would have stopped the case from going forward, noting that his opinion relied on "revisionist history" and was contradicted by "binding circuit precedent." The full court of appeals reheard the case in part, and in another opinion by Judge Brown (joined by two other Republican and all Democratic appointees to the court), reaffirmed that the panel decision was correct. Kavanaugh again dissented, joined by two other Republican colleagues. Brown was particularly critical of Kavanaugh's dissent, which supported the IRS. Brown noted that "it would be cold comfort to direct [the taxpayers] to proceed in a series of individual suits," as Kavanaugh suggested, "submitting themselves one by one to the very refund procedures that they claim to be unlawful." Indeed, Brown explained that the result of Kavanaugh's argument would have been "a judicially created exemption for the IRS from suit under the APA."

Kavanaugh wrote two dissents arguing that a large corporation should not be held liable for misconduct overseas. In *Doe v. Exxon Mobil Corp.*, a group of Indonesian villagers sued Exxon Mobil, claiming that its security forces near an Indonesian plant "committed murder, torture, sexual assault, battery, false imprisonment," and other misconduct. When a lower court rejected an Exxon motion to dismiss the case at a very early stage, the company filed an appeal, seeking to get the appeals court to take the very unusual step of reversing the preliminary decision or issuing a writ of mandamus to throw out the entire case. Kavanaugh agreed with Exxon in dissent, accepting the company's argument that allowing the suit to go forward could harm the executive branch's ability to conduct foreign relations. In an opinion by noted conservative David Sentelle, the majority rejected Exxon's request and sent the case back to the lower court, noting that the federal government had not made any request in support of Exxon and that "[n]one of the cases cited by our [dissenting] colleague stand for the proposition that we should grant a mandamus for which the executive has not prayed." When the lower court later dismissed the claims against Exxon, a different majority panel disagreed and sent a number of the claims against the company back for further consideration by the district court, though Kavanaugh again dissented. The majority was very critical of the dissent, concluding that "none" of Kavanaugh's claims "withstand analysis."[8]

Finally, Kavanaugh has dissented in five additional antitrust, fraud, or other cases in ways that would have helped corporations and hurt consumers. These include:

[8] The second decision was later vacated for reconsideration in light of a different Supreme Court decision concerning corporate liability for misconduct abroad in *Klobel v. Royal Dutch Petroleum Co*.

- *United States v. Anthem*, where Kavanaugh would have set aside an order preventing the merger of two large health insurance companies that would have reduced competition for consumers in 14 states. The majority criticized Kavanaugh for trying to "appl[y] the law as he wishes it were, not as it currently is," with respect to alleged efficiencies that the merger would have produced[354];
- *Lorenzo v. FEC*, where Kavanaugh disagreed with a majority decision, including by one of his Republican colleagues, that upheld an SEC finding that an investment broker had made false or misleading statements to possible investors, including some that an administrative judge found "staggering" in their falsity. The majority was critical of Kavanaugh's dissent, noting that he wanted to accept an argument that the SEC rejected as "implausible."
- *Cablevision Sys. Corp. v. FCC,* where Kavanaugh argued that the First Amendment should invalidate a pro-consumer 5-year extension of an FCC ban on cable operators only doing business with cable programming providers that they partially own or have a similar interest in. The two Republican-appointed judges in the majority upheld the FCC action and rejected Kavanaugh's argument in an opinion by Judge Sentelle, which noted that such a ban had already been upheld under the First Amendment and that Cablevision did :"not even set forth" the First Amendment argument "as an issue" in the case.
- *American Radio Relay League, Inc., v. FCC*, where Kavanaugh dissented from a decision to send back for reconsideration an FCC rule that an association of amateur radio operators contended would injure them in favor of companies and operators of high-speed broadband radio emissions. The majority was critical of the argument accepted by Kavanaugh that the court should not insist on full disclosure of the studies that the FCC relied on, noting that this "undermines the court's ability to perform the review function" required by law.
- *FTC v. Whole Foods Mkt.,* where Kavanaugh dissented from an opinion by Judge Janice Rogers Brown that a lower court had erred in finding that the FTC would not probably succeed in an antitrust claim against the merger of the country's two largest "premium natural and organic supermarket" chains. The other judge in the majority criticized Kavanaugh because he "ignores circuit precedent" and the relevant statute in "his zeal to reach the merits and preempt the FTC." Kavanaugh also disagreed with the full D.C. Circuit decision not to rehear the case.

Criminal and abuse of power issues

Kavanaugh has written twelve dissents in criminal cases or cases concerning abuse of power by police, prosecutors, or with respect to Guantanamo detainees. As explained below, he has disagreed with the government in only two such cases: one involving detainees and one involving a person given a longer sentence because of possession of an automatic weapon. In all the others, he has dissented in favor of the government and against individuals, even in cases where Republican colleagues were in the majority. For example:

In *United States v Malenya*, Kavanaugh dissented from a decision by two Republican-appointed colleagues, including Judge Janice Rogers Brown, which reversed a supervised release plan concerning a gay Army member who was charged with soliciting a minor, because the lower court "failed to weigh the burden of the conditions on Malenya's liberty against their likely effectiveness" as required by law. The majority was particularly concerned about a condition that prohibited possession or use of any computer or online service without prior consent by a parole officer. Kavanaugh claimed that this consent provision was sufficient, but the majority clearly disagreed, noting the practical problems with obtaining such consent and the significant deprivation of liberty that would result, and stated that the requirement would "shrink Malenya's employment opportunities to the vanishing point."

In *United States v. Askew*, a majority of the full court, including Judge Brown and two other Republican-appointed judges, reversed a lower court and decided that the police violated the fourth amendment rights of a suspect by unzipping his jacket to search him without a warrant after a stop and frisk produced no results. Kavanaugh wrote a dissent joined by several other Republican-appointed judges, claiming that the action was justified because it was a reasonable continuation of the stop and frisk and it helped police in showing the subject to a witness to an alleged robbery. The majority explained that both these claims were clearly wrong. There were "no reasonable grounds for believing that the unzipping would establish or negate appellant's identification as the robber in question", the majority explained, and in fact the witness did not identify the subject as the robber. In addition, the majority concluded, the continuation argument was "both contrary to the District Court's factual findings and unsupportable on any plausible reading of the record."

Other cases with dissents written or joined by Kavanaugh in this category include:

- *In re Sealed Case*, where Kavanaugh dissented from a ruling by two Republican appointees written by Judge Brown, which vacated and sent back to a lower court a decision revoking a supervised release and requiring more specific reasons for the revocation.
- *United States v. Jones*, where Kavanaugh joined a dissent from a decision not to have the full court review a ruling that police had to obtain a warrant to use GPS to track a suspect's car for an extended period. Several other Republican-appointed judges were in the majority, and the Supreme Court later affirmed the ruling. In a different *United States v. Jones* case, Kavanaugh dissented from a ruling vacating a criminal sentence because of legal errors that led to a consecutive rather than a concurrent sentence.
- *Roth v United States Department of Justice*, in which Kavanaugh dissented from a majority ruling that the Justice Department improperly refused even to say whether it had records in response to a FOIA request by a death row prisoner who believed that DOJ records could corroborate his claim of actual innocence.

- *Wesby v. District of Columbia,* in which Kavanaugh dissented from the denial of full court review of a decision that had upheld a verdict against DC and several of its police officers of over $600,000 for improperly arresting a group of people without probable cause. The Supreme Court later reversed the panel decision.
- *Huthnance v. District of Columbia*, in which Kavanaugh dissented from a decision by two Republican-appointed judges, written by Judge Brown, which affirmed a verdict of over $95,000against DC and several police officers for improperly arresting a woman
- *Moore v Hartman,* where Kavanaugh dissented from a majority ruling reaffirming that lack of probable cause is not an element of a retaliatory prosecution claim based on "clearly established" law
- *United States v. Martinez-Cruz*, in which Kavanaugh dissented from a decision written by a Republican-appointed colleague that the district court should reconsider a claim by a defendant that he did not validly waive his right to counsel before agreeing to a guilty plea because the waiver was based on a signed form and the defendant stated that he was illiterate and didn't fully understand the form
- *Haji Bismullah v. Gates,* in which Kavanaugh joined a dissent from a decision by the full DC Circuit, including several other Republican-appointed judges, not to rehear a panel decision that the record on review of whether a Guantanamo Combatant Status Review Tribunal had properly labeled detainees as enemy combatants must include all information reasonably available to the government

In contrast to *Bismullah*, Kavanaugh dissented partly in favor of a Guantanamo detainee in *Ali HamzaAhmad Sulimanal Bahlul v. United States,* where he and Judge Brown argued that although the detainee's conviction for conspiracy should be sustained, the conviction should receive complete *de novo* review rather than review only for clear error. Kavanaugh dissented fully in favor of a criminal defendant in *United States v. Burwell,* where he argued that a robber could not be given a 20-year sentencing enhancement for carrying an automatic weapon when he genuinely believed that the weapon was only semi-automatic.

Other cases, including on constitutional issues

Kavanaugh has written four other dissents while on the D.C. circuit court of appeals. Two relate to contract or other commercial disputes involving foreign governments that do not raise major legal issues[9]. But the other two concern crucial public issues that Congress, the Supreme Court, and courts around the country have considered and likely will continue to review in the future: constitutional limitations on gun safety laws by local governments, and the ability of religious

[9] Specifically, in *Belize Soc. Dev., Ltd. v. Gov't. of Belize,* Kavanaugh dissented from a decision that a lower court had improperly stayed a proceeding to enforce an arbitration award against the Government of Belize, and in *Angeliino v. Al-Saud,* Kavanaugh dissented from a decision written by another Republican appointee to provide a sculptor who was himself suing the Saudi royal family for breach of contract with another opportunity to comply with the complex rules concerning serving such a lawsuit on foreign entities.

employers to obtain exemptions from providing contraceptive coverage to employees under the Religious Freedom Restoration Act (RFRA).

Specifically, after the 2008 5-4 Supreme Court decision striking down a D.C. law limiting firearms possession under the Second Amendment in *District of Columbia v. Heller*, the D.C. Circuit considered a challenge by the same plaintiff to a revised D.C. gun control law three years later in *Heller v. D.C.* Judge Ginsburg wrote the majority opinion for himself and another Republican appointee, sent back for reconsideration some provisions of the new law based on the Court's previous ruling, but upheld some parts of the revised D.C. law, particularly its ban on semi-automatic rifles. But Kavanaugh dissented, claiming that the unconstitutionality of the ban on semi-automatic rifles "follows" from the Supreme Court's earlier decision invalidating D.C's ban on all handguns, presumably including semi-automatic handguns.[10].

The two Republican-appointed judges in the majority vigorously disagreed. The major flaw in Kavanaugh's reasoning, they explained, was that the Supreme Court had not previously ruled specifically on whether a ban on semi-automatic handguns was unconstitutional. It had instead held that a broad ban on all handguns was improper, and did not foreclose a ban "on every possible sub-class of handguns," which may pose differing types of concerns. The majority went on to explain the terrible harm to crime control and to public and police safety caused by semi-automatic rifles as proven in the district court, noting that they cause "mass-produced mayhem" and "account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful." The majority agreed that the ban clearly promoted the government's interests in controlling crime and avoiding harm to police officers, especially in the "densely populated urban area that is the District of Columbia." In addition to his Republican colleagues on the D.C. Circuit, three other federal courts of appeals have rejected the views in Kavanaugh's dissent and voted to uphold bans on assault weapons since 2008, and not a single appellate court has ruled to the contrary.

Kavanaugh issued a dissent on the RFRA issue, which was out of step with most appellate court judges who had considered the question, in *Priests for Life v. US Dept. of Health and Human Services.* In the Supreme Court's earlier *Hobby Lobby* decision, the Court had ruled that religious employers that object on religious grounds can decide not to directly offer contraceptive coverage to their employees under their health insurance plans under the ACA, with the insurers themselves instead providing such coverage, as mandated by the ACA, directly to those employees who want it. After *Hobby Lobby*, some religious employers argued that the government was still imposing a "substantial burden" on their religious beliefs by requiring them to fill out a form stating that they objected on religious grounds to providing contraceptive coverage and identifying and notifying their insurer, which they claimed made them complicit in providing contraceptive coverage to their employees. A panel of the D.C. Circuit rejected that

[10] Kavanaugh and the majority also disagreed on some of D.C>'s new registration requirements, on which litigation continued for several years.

claim by Priests for Life, the majority of the full D.C. Circuit (including one Republican appointee) declined to rehear the case, but Kavanaugh and several other judges dissented.

The judges on the original panel who decided the case explained what was wrong with Kavanaugh's dissent. They explained that according to the dissent, *Hobby Lobby* created a "sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works." Unlike in *Hobby Lobby*, they elaborated, the religious adherents now were claiming that it was their filling out of the form opting out of contraceptive coverage that "makes such coverage available to employees" but that argument is wrong as a matter of law. It is ACA itself that requires that insurers provide such separate coverage, divorced completely from the religious employer, and thus filling out the form does not create a "substantial burden" on religion as a matter of law. Notwithstanding the deference to religious free exercise required by *Hobby Lobby*, the judges explained, it is the courts, not a religious employer or any private party, that "can and must decide which party is right about how the law works."[11].

Other federal appellate courts around the country considered similar challenges after *Hobby Lobby*, most agreed with the D.C. Circuit majority and not Kavanaugh, and the Supreme Court agreed to review the issue in 2016.[12] The Supreme Court did not decide the issue, but sent all the pending cases back to the lower courts for further proceedings, including negotiations, to attempt to work out the dispute; although those efforts may well obviate the need for a Supreme Court decision in these particular cases, one commentator has noted that the birth control cases "represent the beginning rather than the end of religious challenges", and the issue of "[w]hat counts as a substantial religious burden and who decides" will likely be very important in the future. Kavanaugh's views on this question, which are clearly in the minority among appellate court judges, are troubling.

CONCLUSION

This review of Judge Kavanaugh's dissents yields very disturbing conclusions. Consistently, he has argued in favor of corporations and government authority and against workers, consumers, environmentalists, and poor people, even where a majority of his colleagues, including other Republican appointees, disagree. The views in his dissents generally reflect far right political positions on issues like the environment, reproductive choice, health care, gun safety,

[11] Kavanaugh also argued in dissent that the government could have had objecting religious employers indicate that they did not want to provide contraceptive coverage without notifying or identifying their insurers. AS the judges in the original panel pointed out, however, that would have been like having the employer "raise its hand" objecting to providing contraceptive coverage "where the insurer cannot see it." Providing notice to or identifying the insurer was crucial so the government can promptly "communicate the religious objection to the insurer, or else the employer's insurance plan will continue to include contraceptive coverage."

[12] Specifically, courts of appeals in the Third, Fifth,, and Tenth Circuit Courts of Appeals rendered similar decisions as the D.C. Circuit, and the Court agreed to take the cases, and the Eighth Circuit the ruled the other way, as explained by one Supreme Court analyst.

immigration, and consumer protection. Measured against his own colleagues on the D.C. Circuit, including Republican appointees, he is a narrow-minded elitist who is far to the right and out of the mainstream, and should not be elevated to the Supreme Court.