



## BRETT KAVANAUGH: A DANGEROUS PICK FOR WOMEN

On July 9, 2018, President Trump nominated Kavanaugh to fill Justice Kennedy's seat on the United States Supreme Court. Kavanaugh currently sits on the U.S. Court of Appeals for the D.C. Circuit, where he has demonstrated hostility to reproductive rights and employment rights and a willingness to restrict students' rights in schools. The confirmation of Kavanaugh would shift the balance of the Court against our core civil and constitutional rights..

### **Trump Promised to Select a Nominee Who Would "Automatically" Overturn *Roe v. Wade* and Dismantle the Affordable Care Act.**

Trump's entire nomination process has been tainted from the start. Trump promised to select a nominee from a short list created by the Federalist Society and the Heritage Foundation, and he has imposed a clear litmus test – any nominee must be hostile to *Roe v. Wade* and must be willing to gut the Affordable Care Act.

Kavanaugh's record illustrates why President Trump nominated him to the Supreme Court.

### **Kavanaugh Has Demonstrated Extreme Hostility to Abortion.**

In 2017, Kavanaugh issued an order in *Garza v. Hargan* allowing the Trump-Pence Administration to continue blocking a seventeen-year-old immigrant woman, Jane Doe, from obtaining an abortion. After the majority of the D.C. Circuit overturned his ruling, Kavanaugh dissented, saying that the majority had "badly erred." He would have let the Trump-Pence Administration delay Jane Doe's abortion under the guise of looking for a sponsor until abortion was no longer a viable option under state law. Kavanaugh distorted existing Supreme Court precedent in order to

justify his decision to force a woman to remain pregnant against her will, and his opinion showed disregard for a woman's decision-making ability and a lack of concern for the burdens placed in the path of those seeking an abortion. Kavanaugh accused the majority of creating a new right to "immediate abortion on demand," a phrase long associated with anti-abortion extremists. This decision was Kavanaugh's audition for the Supreme Court; shortly after this decision, Kavanaugh's name appeared on President Trump's short list of potential Supreme Court nominees.

Furthermore, Kavanaugh has expressed doubt about the constitutionality of *Roe v. Wade*. For example, in a keynote address to the American Enterprise Institute on September 18, 2017, Kavanaugh praised Justice Rehnquist for "stemming the general tide of free willing judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," specifically naming Rehnquist's dissent in *Roe v. Wade* as a primary example.

### **Kavanaugh Thinks Employers' Religious Beliefs Should Override Employees' Birth Control Decisions.**

In 2015, in *Priests for Life v. Department of Health and Human Services*, Kavanaugh voted to allow an organization's religious beliefs to override an individual's right to insurance coverage of birth control. Non-profit organizations with religious objections to contraception brought a challenge to the "accommodation" given to them by the Obama Administration that allowed them to opt out providing contraceptive coverage as otherwise required by the Affordable Care Act. Under the accommodation, these organizations needed to fill out a form in order to opt out, and the insurance companies were required to provide contraceptive coverage directly to the employees without the employer's involvement. When a panel of the D.C. Circuit held that the accommodation does not violate the Religious Freedom Restoration Act, the employers asked for the entire court to rehear the case. The full D.C. Circuit refused, and Kavanaugh dissented. He argued that requiring objecting



employers to fill out a form in order to opt out imposed a substantial burden on religious beliefs. His reasoning showed that he would give near-absolute deference to claims of religious objections. Kavanaugh's reasoning went against not only his own court, but also 7 other circuit courts of appeals that considered the issue.

As one of his former clerks noted, "On the vital issues of protecting religious liberty and enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh. On these issues, as on so many others, he has fought for his principles... He would do the same on the Supreme Court."<sup>1</sup>

### **Kavanaugh Has Demonstrated Disdain for the Affordable Care Act.**

In two cases, *Sissel v. U.S. Department of Health and Human Services* and *Seven-Sky v. Holder*, and Kavanaugh expressed contempt for the Affordable Care Act in two ACA cases that came before him while on the D.C. Circuit. While each case turned on procedural issues and Kavanaugh did not rule on the merits of the law in either case, he made his disdain for the law clear. Kavanaugh also criticized the ACA in speeches given just weeks before he landed on President Trump's short list of potential nominees. Some of Kavanaugh's former law clerks have made it clear that he fulfills Trump's anti-ACA litmus test. One wrote an article explaining how Kavanaugh's ACA decisions were a "roadmap" for those Supreme Court Justices who voted against the constitutionality of the ACA,<sup>2</sup> and another said, "... he left no doubt about where he stood. No other contender on President Trump's list is on record so vigorously criticizing the law."<sup>3</sup>

### **Kavanaugh Has Sided Against Working People Time and Time Again**

Kavanaugh has repeatedly sided with employers and against working people. He would close the courthouse door for many people seeking to challenge harassment and other forms of discrimination. Kavanaugh has shown similar hostility to workers' rights in cases where working people have come together to try and improve their working conditions or raise health and safety concerns. Kavanaugh has prioritized deference to corporate interests over safe, dignified and respectful workplaces.

For example, Kavanaugh has sought to prevent several groups of federal employees from bringing employment discrimination claims at all. In *Miller v. Clinton*, Kavanaugh's dissent argued that the State Department should not be bound by the Age Discrimination in Employment Act (ADEA) or other antidiscrimination laws in its treatment of some federal employees working abroad. In that dissent,

Kavanaugh argued that those who are protected by civil rights laws are less desirable employees—a troubling assumption. In *Rattigan v. Holder*, Kavanaugh wrote a dissent arguing that FBI employees should be barred from bringing retaliation claims alleging that their employer targeted them for security clearance investigations because they filed discrimination complaints. And in *Howard v. U.S. House of Representatives*, Kavanaugh wrote a dissent arguing that Congressional staff should not be able to bring discrimination lawsuits against their employer in many instances. Kavanaugh's repeated efforts to carve out classes of working people from the civil rights laws that protect against sexual harassment, pay discrimination, pregnancy discrimination, and other forms of discrimination should be of deep concern to women.

Kavanaugh has also signaled an unwillingness to fairly enforce the Family and Medical Leave Act (FMLA). He joined an opinion in *Breeden v. Novartis Pharmaceuticals Corp* rejecting a FMLA claim from a sales worker who was transferred to less valuable accounts position after requesting maternity leave. Kavanaugh concluded that this reassignment of accounts was unimportant and did not interfere with her ability to take leave under the FMLA. This approach ignores the realities of the workplace and empowers employers to retaliate against employees who take maternity leave or other forms of leave protected by the FMLA.

Kavanaugh has also made it clear that he is willing to put a thumb on the scale in favor of employers rather than letting juries decide discrimination cases. For example, in *Jackson v. Gonzales*, Kavanaugh wrote an opinion dismissing an employee's claim that he was denied a promotion because of his race. The employer argued that the white employee who was promoted instead was more qualified, but the white employee's experience did not line up with the qualifications set out in the job description. Kavanaugh ruled for the employer, rather than letting a jury decide whether the employer's explanation was believable.

In addition, Kavanaugh has shown open hostility to working people banding together to advocate for better wages, working conditions, or the right to join a union—rights that translate into key protections for working women. For instance in *Agri Processor Co. v. N.L.R.B.*, Kavanaugh dissented from the majority opinion which held that the employer must bargain with its employees. Kavanaugh disagreed, because many of the workers were undocumented immigrants. Ignoring Supreme Court precedent to the contrary, Kavanaugh claimed that because of their immigration status, these workers had no rights under the National Labor Relations Act.



## Kavanaugh Could Limit the Rights of Students with Disabilities and Other Children

All students deserve access to quality education. But Kavanaugh's disregard for special education law could deny that right for students with disabilities. In *Hester v. District of Columbia*, a student with a learning disability sued D.C. for not living up to its duty to provide special educational services under the Individuals with Disabilities in Education Act (IDEA) and its contract to provide him with particular special education services. He won his case in the lower court, but Kavanaugh reversed that win on appeal. Kavanaugh concluded that because the student was in a correctional facility in Maryland, it was too difficult for the D.C. to provide these services and it did not have to do so. This hostility to laws that protect student rights spells danger for any child or student seeking fair or safe access to the classroom.

- 1 Sarah E. Pitlyk, *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism*, NAT'L REV. (July 3, 2018), <https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/>.
- 2 Justin Walker, *Brett Kavanaugh Said Obamacare was Unprecedented and Unlawful*, THE FEDERALIST (July 3, 2018), <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/>.
- 3 Sarah E. Pitlyk, *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism*, NAT'L REV. (July 3, 2018), <https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/>.

