PostEverything Perspective

## Kavanaugh is radically conservative. Here's the data to prove it.

# He's to the right of, and much more political than, his peers on the federal bench.

By Elliott Ash and Daniel L. Chen July 10

Judges, particularly those on the Supreme Court, are expected to sit above the partisan fray. "I have no agenda," Chief Justice John Roberts said at his confirmation hearing. "... I will confront every case with an open mind." Supporters of Brett Kavanaugh, whom President Trump nominated to succeed Anthony M. Kennedy on Monday night, think that he follows in that tradition. The Weekly Standard said that his record won't "give any fair-minded lawmaker, Democrat or Republican, reason to conclude that he is anything but a first-rate legal mind." Kenneth Starr wrote in The Washington Post that Kavanaugh "deeply respect[s] both the democratic process and the structural principles undergirding our constitutional republic."

But according to a deep, data-driven survey of his writings from the bench, Kavanaugh is much like the man who selected him — highly divisive in his decisions and rhetoric. He is an uncommonly partisan judge, even compared with other federal appeals court judges. Trump is seizing this opportunity to shape a generation of U.S. jurisprudence, and the direction he's chosen is a hard right turn.

On the circuit court, Kavanaugh has tended to dissent more often along partisan lines than his peers, according to our research. He has justified his decisions with conservative doctrines far more frequently than his colleagues, citing politicized precedents consistent with other Republican-appointed judges, invoking the original articles of the Constitution (in line with the originalist jurisprudence favored by conservative jurists), and using the language of economics and free markets. What's more, Kavanaugh's divisiveness has ramped up during campaign season: He has disagreed with his colleagues more often before elections, suggesting that he feels personally invested in national politics.

These findings stem from our work as social scientists who use data to understand the U.S. legal system and the decisions of judges. Although we can't read their minds, new data technologies

allow us to sift through judges' records for insights into their worldviews and political values. Through his published decisions on the U.S. Court of Appeals for the D.C. Circuit (where he has reviewed cases since 2006), Kavanaugh provides ample material for this type of data-driven investigation. Through the published decisions of all 26 appellate judges who sat on at least fifty circuit cases and later served on the Supreme Court from 1946 to 2016, these metrics predict Supreme Court decisions.

In federal appeals courts, cases are usually decided by three-judge panels. Across the D.C. Circuit during Kavanaugh's tenure there, 3 percent of the votes were dissents. But Kavanaugh has cast a dissenting vote 7 percent of the time out of the 407 published cases he heard until 2013. When Kavanaugh authored an opinion, 14 percent of the time his co-panelists dissented against him, compared with 10 percent of opinions that provoked dissents when he wasn't the author. In contrast to this rift-making, Trump's prior nominee, Justice Neil M. Gorsuch — as well as previous nominees rejected for being divisive, such as Merrick Garland and Robert Bork — generated more agreement than Kavanaugh relative to their peers on the opinions they wrote.

We also found that Kavanaugh has been extremely polarizing in his votes. We measured how judges' dissents vary with the party affiliation of the president who appointed them. (For the sake of our research, judges elevated by a Republican president are "Republicans," and vice versa.) Judges who tend to dissent mostly against those appointed by the opposing party's president contribute to "vote polarization." When sitting with two panelists appointed by Democrats, which occured 56 times, Kavanaugh dissented 19 percent of the time; in other cases, he dissented 5 percent of the time, which is nearly double the rate of his colleagues. His vote polarization is especially clear in cases relating to constitutional, civil rights and due process law. (In a recent abortion case, for example, he dissented against the Democratic-controlled majority's ruling that guaranteed an undocumented immigrant's right to an abortion while in state custody.) Gorsuch and Bork, by contrast, did not display the same degree of vote polarization. Garland was actually more likely to cross party lines than his D.C. Circuit colleagues were.

Another way dissents can provide evidence of polarization is when they respond to external political factors. A forthcoming paper by Daniel L. Chen with Carlos Berdejó shows that circuit court judges tend to dissent more in the run-up to presidential elections, consistent with a (perhaps subconscious) political cheerleading motive or affect related to partisan identity. Kavanaugh has been an exemplar of this trend. Beginning the February before a presidential election, Kavanaugh has dissented 15 percent of the time; at other times, he has dissented in just 5 percent of cases. (Other judges in his circuit dissented 3 percent right before an election and 2 percent in other periods.) Kavanaugh's "electoral dissent" is especially prevalent on highly political

topics such as economic regulation, constitutional law and due process. Gorsuch, Garland and Bork were significantly less affected by external politics.

Kavanaugh is a partisan warrior even in his legal citations. When justifying his rulings, he tends to cite precedents that have a Republican slant: In *Adeyemi v. District of Columbia*, putting limits on employee discrimination claims, he quoted conservative precedent articulating "an employer's unfettered discretion" over hiring and firing. He often cites original articles of the Constitution, especially Article II, which is associated with originalism and expanded executive power. He also invokes more economics language than his colleagues do, using market-oriented arguments associated with deregulatory policy goals. In *United States v. Bullock*, for instance, he used a risk-harm calculus to determine the propriety of police searches.

These partisan views also emerge in a "sentiment analysis" of Kavanaugh's opinions. Using the relative positive or negative sentiment of his language (words like "favorable" and "warm" vs. words like "unfavorable" or "cold"), we found that Kavanaugh has tended to speak positively of conservatism and negatively of liberalism. More so than his colleagues, he has expressed dislike toward Congress and the federal government, as well as working-class groups (labor unions and farmers).

Kavanaugh's dissent in *Agri Processor Co., Inc. v. NLRB* illustrates his unenthusiastic attitude toward labor: "Their immigration status apparently unbeknownst to their employer, illegal immigrant workers voted in a union election and affected the election's outcome. The employer later discovered that the workers were illegal; terminated them as required by federal immigration law; and sought to overturn the tainted union election."

A broader comparison of his writing style to those of sitting Supreme Court justices shows that Kavanaugh's opinions are closest to those of Samuel Alito, a George W. Bush appointee who is known to be on the conservative fringe. But as a circuit judge, Alito was *less* extreme than Kavanaugh in terms of dissents, vote polarization, electoral dissents and citations of partisan precedents. Kavanaugh is ranked in the 1st percentile of judges based on partisan dissents (those written against two judges appointed by the opposing party), the 1st percentile for electoral dissents, the 3rd percentile for overall dissent rate, and the 13th percentile for generating dissents by colleagues when he is the opinion author. Compared to other Circuit Court judges elevated to the Supreme Court since the 1980s, Kavanaugh gets the top spot on all these measures.

Kavanaugh is an outlier judge; he would not be your average justice. On the evidence derived from the content of his decisions, he would be more radical than his colleagues.



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#### **Research Note: Trump's Supreme Court Picks are Divisive, Just Like Him** July 10, 2018 (updated with additional results on July 17, 2018)

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When institutions are tested and politics are divided, Americans look to the courts as the final safeguard against instability and the erosion of rights. This is especially true of the Supreme Court and sets the stakes for any new addition to the bench. With a conservative majority in the balance, the impending nomination to replace Justice Kennedy gives Trump the opportunity to define American law for the next generation.

As social scientists who use data to understand the U.S. legal system, we have analyzed the records of the short list of potential nominees. Though we can't read their minds, new data technologies allow us to sift through a judge's record to uncover new insights into his or her worldview and political values.

Here is what we found.

First, Raymond Kethledge is particularly similar in his legal writing to the departing Justice Kennedy, who he clerked for previously. The other two top picks, Brett Kavanaugh and Thomas Hardiman, are closer to the more conservative justices, Samuel Alito and Antonin Scalia.

Second, a sentiment analysis of their opinions shows that Trump's favorites tend to speak positively of conservatism and negatively of liberalism. They also dislike Congress, the federal government and labor unions. Meanwhile, Judge Kethledge writes effusively of the police and military.

Third -- though judges are nominally expected to sit above the partisan fray -- we find evidence that Trump's judges are, like him, highly divisive in their decisions and rhetoric. They tend to dissent and be dissented against, and this tends to run along partisan lines. Far more often than their colleagues, they justify their decisions with conservative doctrines, including politicized precedents that tend to be favored by Republican-appointed judges, the original Articles of the Constitution, and the language of economics and free markets. This divisiveness ramps up during election season: Judge Kavanaugh, in particular, is observed disagreeing with

his colleagues more often before elections, suggesting that he feels personally invested in national politics.

Finally, we looked at Judge Hardiman's record on criminal sentencing during his former post as a trial judge. We found that Hardiman meted out longer prison sentences than his colleagues.

In sum, Trump judges are not your average justice. On the evidence derived from the content of their decisions, they differ systematically from their colleagues. The Trump Administration, the U.S. Senate, and the American people should reckon with these facts and figures in the coming weeks and months.

#### A. How do the nominees compare to recent Supreme Court judges?

We begin by looking at how the main nominees compare to recent Supreme Court judges. We use a text analysis technique, described in our recent <u>working paper</u>, that allows us to measure the similarity of language across judges.

We report results as a series of graphs. A mark further to the right means a higher similarity of case language to the indicated Supreme Court judge. A mark to the left means lower language similarity. Technical details for these graphs, and others in the table, are reported in the technical notes at the bottom of this document.



#### Figure A1, Where does Kethledge sit among Supreme Court judges?

We start with Raymond Kethledge. We see in Figure A1 that Kethledge is most similar to Anthony Kennedy, the departing Justice. This is somewhat intuitive, given that Kethledge was Kennedy's clerk. It also might be an argument in favor of Kethledge, to the extent that it maintains the judicial status quo.

Next, we see in Figure A2 that Brett Kavanaugh is most similar to Samuel Alito, a Bush appointee with a reputation as a conservative Justice. Interestingly, while Kavanaugh, like Kethledge, was a former Kennedy clerk, he is not relatively similar to Kennedy in how he writes his opinions.

Figure A2, Where does Kavanaugh sit among Supreme Court judges?



Figure A3, Where does Hardiman sit among Supreme Court judges?



Third, we look at Thomas Hardiman in Figure A3. Hardiman is similar in his case writing style to Stevens and Scalia. Stevens is usually associated with the liberal wing of the court, while Scalia is recognized to be a conservative Originalist.

#### B. How do the nominees associate concepts in their language?

To better understand the differences between the Trump judges and their colleagues, we use sentiment analysis to analyze their written opinions. As detailed in the <u>working paper</u> with <u>Sergio Galletta</u>, we look at the positive or negative sentiment when the judges discuss various topics.

Going forward, we report results for the 8 short-listers that have served on the Circuit Court for at least 5 years (Kethledge, Kavanaugh, and Hardiman, plus Steve Colloton, Raymond Gruender, William Pryor, Diane Sykes, and Tim Tymkovich). For comparison we also include the recently confirmed Neil Gorsuch, and the unconfirmed Merrick Garland, based on the decisions they took part in as Circuit Court judges. The analysis includes all published Circuit Court decisions for the years 1997 (the earliest year of appointment for these judges) through 2013.

The graphs are constructed as statistical differences from other judges. The marks give the average difference of the judge from the comparison group judges, while the error spikes are confidence intervals summarizing how precise is the estimate. The horizontal dashed line is zero, so estimates where the confidence interval is far away from the dashed line indicate a statistically significant difference. A marker above the gray dashed line indicates a positive effect, while a marker below the gray dashed line indicates a negative effect.



#### Figure B1, Sentiment towards conservative and liberal

In Figure B1, we see that Hardiman and Kethledge tend to associate positive sentiment towards conservatives, while Hardiman, Kethledge, and Kavanaugh express negative sentiment towards liberals. This provides additional evidence from language content about their ideological preferences. In contrast, Garland displays positive sentiment towards liberals.





In Figure B2, we see that Hardiman, Kethledge, and Kavanaugh express negative sentiment towards Congress and the federal government. These "anti-government" attitudes are consonant with ideas about the dangers of regulation and a large welfare state.





Figure B3 shows that Hardiman, Kethledge, and Kavanaugh express negative sentiment towards labor unions and farmers. This could reveal some negative views for the working class.





In Figure B4, we see that Kethledge, in particular, expresses positive sentiment towards the police and the military. These institutions are often most supported by conservative groups.

#### C. How divisive are the Trump nominees?

Here we analyze the divisiveness of the decisions and rhetoric for the shortlisted Trump judges.



#### Figure C1, Dissent Rate

We start by looking at disagreement. In Circuit Courts, cases are usually decided by panels of 3 judges, and sometimes there are dissents filed. In Figure C1 we ask two questions. First (left panel), do Trump judges dissent more often in their colleagues? Second (right panel), when Trump judges author an opinion, is it likely to provoke a dissent? We see that in the case of Brett Kavanaugh, the answer is yes on both accounts. When a Trump nominee authors an opinion, it is likely to have a dissent filed against it, compared to colleague's cases. This is especially strong for Kavanaugh, Kethledge, and Pryor. In contrast, Gorsuch and, especially, Garland, were generative of disagreement to their opinions.

Next we look at how these dissent tendencies vary with the partisan affiliation of judges. While federal judges do not have an official party label, we can make strong inferences about their partisan ties based on the party of the president who initially appointed them. So in our case, Bush (I or II) appointees are considered Republicans, while Clinton/Obama appointees are considered Democrats. The <u>idea</u> is that judges who tend to dissent only against judges appointed by the opposing party's president contribute to "Vote Polarization."

#### Figure C2, Polarizing Dissents



Figure C2 reports a set of estimates on these margins for the Trump judges. We see that the three first-choice nominees, Kavanaugh, Kethledge, and (to a lesser degree) Hardiman are relatively polarizing in their votes. This means they tend to dissent against Democrat-appointed circuit court judges when they sit with two panelists appointed by Democrats. This is especially salient in Due Process cases.



Figure C3, Relative Response of Dissent Rates to Electoral Cycle

Another way that dissents can provide evidence of polarization is whether they respond to external political factors. A previous <u>paper</u> shows that circuit court judges tend to dissent more

in the run-up to presidential elections, consistent with a (perhaps subconscious) political cheerleading motive. In Figure C3, we ask how Trump nominees respond on this margin: do they tend to dissent more in the months leading up to a presidential election?

We find that yes, they do. In the months leading up to a presidential election (February through October), Hardiman and Kavanaugh are more likely to dissent relative to their baseline level of dissent and that of their colleagues. This happens especially for Due Process cases. Kavanaugh, especially, gets fired up during the election season.

What are the doctrinal sources of ideological polarization in the judiciary? One idea is that the language used, or the authorities cited, might be informative about political views. To investigate this issue, we use the partisan association of text and citations (as described in our <u>working paper</u>) to measure the degree of polarization among these judges.



#### Figure C4, Precedent and Phrase Partisanship

Figure C4 shows that Hardiman and Kethledge tend to cite precedents and phrases that Republican appointees cite and use, relative to their colleagues. Garland, on the other hand, used citations and phrases that are more associated with Democrat appointees.

A major factor underlying ideological citation could be Originalism -- the legal philosophy that advocates attention to founding-era documents and their original meaning. To investigate this possibility, we looked at citations to the Articles of the U.S. Constitution, in particular Articles II and III. These articles are interesting because they refer to the powers of the presidency (Article II) and the judiciary (Article III). Conservative jurists tend to cite Article II as favoring expanded executive power, including a narrow reading of civil liberties in criminal law, terrorism, and related contexts. Judges tending to cite Article III may favor more power given to the judiciary. In both cases, a focus on Article II and Article III (rather than Article I, which concerns Congress) may be interpreted as favoring the less democratic branches of government.





These results for Trump judges are reported in Figure C5. We see that Hardiman tends to cite Article III, while Kethledge tends to cite Article II, relative to their peers. Kavanaugh cites both Articles II and III more than his colleagues do. In comparison, Garland was less inclined to cite either of the two Articles.

Another major source of conservative ideology in judiciary is law and economics. In <u>ongoing</u> <u>work</u> with <u>Suresh Naidu</u>, we have shown that economics training and economics ideology is an important source of conservative, anti-regulatory decision-making in the courts. In this part we look at how Trump judges stack up on the use of economics language in their opinions.





In Figure C6 we look at economics language. In the left panel, we see how Trump judges compare to Richard Posner, a former circuit court judge and leader in economic analysis of law. Kavanaugh, Kethledge, and Hardiman, in their written opinions, are similar to Richard Posner relative to their counterparts. As seen in the right panel, Kavanaugh and Kethledge are writing opinions that reflect economics language. Note that the recently confirmed Justice, Gorsuch, is also very close to Posner.

#### Section D: How do the potential nominees sentence defendants?

As another analysis, we look at whether Trump judges differ in the criminal sentencing decisions. For this analysis, we use District Court data, which are the trial courts. Three of the judges on Trump's short list have served as district court judges: Thomas Hardiman, Federico Moreno, and Amul Thapar. To see whether they are relatively "tough" on crime, we ask whether they tend to be harsher in their sentences.





The results are in Figure D1. We see that all three judges are more severe relative to their colleague judges in their district, month, and year, along a range of margins: life sentences, number of prison months, and issuing any prison time.

#### <u>Outlook</u>

American law makes giants of its judges. While presidents come and go, Supreme Court Justices live forever since their decisions set precedent and have large impacts on society. Therefore it pays to use the best evidence available to try to understand the types of people we elevate to this court. We hope that the evidence reported here provides some contribution to the choice of the next Justice.

#### Update July 17, 2018 - Addendum:

### Kavanaugh really is a radical, outlier judge. And our metrics predict Supreme Court decisions. Here's more data.

On July 10, we <u>wrote</u> that Kavanaugh is a 'radical' conservative. We got asked -- is he more 'radical' than the other justices currently on the court, and if so, by how much? And how does Kavanaugh really compare to Alito, Thomas, or Scalia (the justices to whom he is often compared)? Do our metrics predict decisions in the Supreme Court?

Here we present his rank along with the ranks of Supreme Court justices during their tenure on the federal appellate courts.

Kavanaugh is ranked in the top 1st percentile of judges based on partisan dissents (dissents when seated with two members appointed by the opposing party), the top 1st percentile for electoral dissents (dissents during election season), the top 3rd percentile for overall dissent rate, and the top 13th percentile for generating dissents by colleagues when he is the opinion author.

Simply based on behavior and decisions alone, Kavanaugh is an outlier judge.

On these respective metrics, Kavanaugh is more conservative than Sotomayor or Garland are liberal.

Electoral dissent is particularly problematic, as it is potentially indicative of susceptibility to extraneous factors, raising the question of what other behavioral factors--beyond political--affect judicial decisions. And why? Do behavioral factors become relevant in settings where judges are closer to indifference?



In terms of text (precedent cited and prose), Kavanaugh is highly ranked, but not an outlier. It could be that Kavanaugh is polarized in a dimension not detected along party lines or

economics. As Stanford law professor <u>Bernadette Meyler wrote</u>, "in cases involving politically controversial issues, [Kavanaugh] tends to acknowledge the views of both sides while stating something to the effect that these political considerations can't weigh into his decision and he is instead bound by Supreme Court precedent. I have already seen people posting a passage in which he explains the views of those who support a right to abortion as a sign of his evenhandedness. Kavanaugh's rhetorical strategy should not mask the weight of the decisions at which he ultimately arrives, however."

On this, we agree. Such a rhetorical strategy would reduce his ranking in textual or precedential polarization.

But his decisions are polarized and polarizing.

These differences are not the result of court or time specific factors, either in terms of levels or in variability.

Through the published decisions of all 26 appellate judges who sat on at least fifty circuit cases and later served on the Supreme Court from 1946 to 2016, these data-driven metrics also predict Supreme Court decisions.

A judge who moves from the most Democrat to the most Republican in precedent and phrase usage is 32 percentage points and 23 percentage points, respectively, more likely to vote conservative. A judge who moves from the lowest to highest rank in Posner similarity and economics usage is 18 percentage points and 6 percentage points, respectively, more likely to vote conservative. A judge who moves from the lowest to highest rank in vote polarization and electoral dissent is 25 percentage points and 8 percentage points, respectively, more likely to vote conservative.

The question we should be asking is -- if the precedent is polarized, what does it mean when judges say they will uphold precedent?



#### **Technical Notes**

**Figures A1, A2, A3.** As described in <u>Ash and Chen (2018)</u>, Document vectors for each case were constructed using the Doc2Vec implementation in Python Gensim. The vectors were de-meaned by court, topic, and year, and then averaged by judge. Judges are compared by the cosine similarity (geometric closeness) of the vectors. The figures are coefficient plots from judge-level regressions, where the outcome is similarity to the named Supreme Court judge, and the coefficient is on a dummy variable for the named Circuit Court judge (Kethledge, Kavanaugh, or Hardiman), with robust standard errors.

**Figures B1, B2, B3. B4.** As described in <u>Galletta, Ash, and Chen (2018)</u>, we formed document vectors (also using Doc2Vec) for each sentence and each case. We then computed the vector similarity of each sentence to a set of targets and a set of sentiment words. The targets include conservative, liberal, congress, federal, labor, and farmer. The sentiment words include warm, favorable, good, cold, unfavorable, and bad. For a case, the sentiment toward a target is the covariance between sentence similarity and target similarity by sentence. The figures are coefficient plots from case-level regressions, where the outcome is sentiment toward the named target, and the coefficient is on a dummy variable for the Circuit Court judge indicated on the horizontal axis. Regressions include circuit-topic-year fixed effects and standard errors clustered by judge.

**Figure C1.** Coefficient plots from vote-level regressions, where the outcome is whether the vote is a dissent. On the left panel, the coefficient is on a dummy variable for whether the vote is by the Circuit Court judge indicated, and the regression includes case fixed effects. On the right panel, the coefficient is a dummy variable equaling one for the other votes on the panel, when the indicated judge is the author, and the regression includes circuit-month-year fixed effects. Standard errors clustered by judge.

**Figure C2.** The outcome is a dummy variable for dissenting, and the coefficient is on a dummy variable for whether the vote is by the Circuit Court judge indicated interacted with a dummy variable equaling one for when the panel has two members of the opposing political party. The right panel is limited to due process cases. Includes case fixed effects and judge fixed effects. Standard errors clustered by judge.

**Figure C3**. The outcome is a dummy variable for dissenting, and the coefficient is on a dummy variable for whether the vote is by the Circuit Court judge indicated interacted with a dummy variable equaling one for February through October of a presidential election year. The right panel is limited to due process cases. Includes circuit-year fixed effects and judge fixed effects. Standard errors clustered by judge.

**Figure C4.** Case-level analysis: Outcomes are the average partisanship of precedents cited (left panel) and of phrases used (right panel), as described in <u>Lu, Ash, and Chen (2018)</u>. A "partisan" case is one where, based on the citations or the phrases, one could predict the political party of the authoring judge. The method is based on <u>Gentzkow, Shapiro, and Taddy (2017)</u>. Regressions include circuit-year-month fixed effects. Standard errors clustered by judge.

**Figure C5.** Outcomes are whether a case cites Article II or Article III of the Constitution. Regressions include circuit-year-month fixed effects. Standard errors clustered by judge.

**Figure C6** These figures use the case vectors described above <u>(Ash and Chen 2018)</u>. In the left panel, we have the similarity of the case to <u>Richard Posner</u>'s average case. In the right panel, we have the similarity of the case to the word vector for "economics." Regressions include circuit-year-month fixed effects. Standard errors clustered by judge.

**Figure D1**. These figures are coefficient plots from federal district court sentencing data, at the case level. The outcomes are a dummy variable for giving a life sentence (left panel), the length of the average criminal sentence in months (middle panel), and a dummy variable for giving any prison at all (right panel). Includes district-year-month fixed effects. Standard errors clustered by judge.