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An Analysis of Judge Kavanaugh's Opinions in Split-Decision Cases

Acknowledgments

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About Public Citizen

Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

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I. INTRODUCTION AND OVERVIEW

Supreme Court nominee Judge Brett Kavanaugh has served on the U.S. Court of Appeals for the D.C. Circuit for 12 years, during which time he has participated in more than 1,000 cases and written hundreds of opinions. Cases before the federal courts of appeals are decided by three-judge panels. A significant proportion of those cases are decided on a 3-0 basis, often reflecting consensus among judges across the political spectrum. On the other hand, when cases are decided 2-1, or when the court sitting en banc (composed of all the appellate judges in the circuit) splits, by definition at least one judge disagreed with his or her colleagues. Studying a judge's opinions in those cases can provide insight into the judge's philosophy and predilections.

That's what we did for Judge Kavanaugh. Rather than select out controversial cases in which he participated, we reviewed and analyzed each of the 101 split decision cases in which he wrote an opinion. To gain perspective on his record in regulatory and business cases, but avoid concerns about cherry-picking, we tallied his decisions in five distinct areas: consumer and regulatory issues and administrative law, environmental protection, worker rights, claims alleging police or human rights abuses, and antitrust.

The results are striking.

JUDGE KAVANAUGH'S OPINIONS IN SPLIT-DECISION CASES

	Opinions for business interests or against public interest	Opinions for public interest or against business interests
Regulatory Issues and Administrative Law	**18**	**4**
Environmental Protection	**11**	**2**
Worker Rights	**15**	**2**

Police and Human Rights Abuse	**7**	**0**
Antitrust	**2**	**0**

In developing the tally, we made no assessment of the merits of the underlying issues in the case. We tallied only whether Judge Kavanaugh sided for or against a corporation or public interest group suing an agency. Some of the environmental cases were filed by state or local entities challenging environmental protections, typically with business groups intervening or providing amicus briefs in support of the state. In worker rights cases, we tallied whether Judge Kavanaugh sided for or against the employer, or for or against the union or employee involved in the case[1]. In civil cases involving alleged police and human rights abuses, we tallied whether Judge Kavanaugh sided for or against the victim, or the governmental or corporate defendant. In a few instances, corporate backed nonprofits filed lawsuits reflecting business interests; we treated those cases as filed by business.

The most eye-catching conclusion from reviewing Judge Kavanaugh's opinions is the consistency of the outcomes—the overwhelming tendency to reach conclusions favorable to business interests and opposed to consumers, workers, environmental protections, and victims of human rights abuses:

- In 18 of 22 cases involving consumer and regulatory issues or matters of administrative law, Judge Kavanaugh sided with corporations against agencies, or with agencies against public interest challengers.

- In 11 of 13 environmental cases, Judge Kavanaugh sided with corporations or states challenging the Environmental Protection Agency or other federal agencies for being too protective of the environment, or against environmental groups seeking stronger environmental enforcement.

- In 15 of 17 cases involving worker rights, Judge Kavanaugh sided with employers against employees or employees' unions, or with employers against the National Labor Relations Board.

- In all seven cases involving victims suing for compensation over police or human rights abuses, Judge Kavanaugh sided with the alleged abuser and against the victims.

[1] We excluded from the employee tally one case, 654 F.3d 11

- In both antitrust cases, Judge Kavanaugh sided with merging companies and against antitrust enforcement agencies.

Important themes also emerge in analyzing the decisions themselves.

- **Judge Kavanaugh is inconsistent on the issue of deference to agency action; he consistently favors corporations.** A cross-cutting issue in many of the cases that come before the appeals courts, especially the D.C. Circuit, is the degree to which the courts should defer to Executive Branch agencies. If a statute is unclear about the scope of an agency's authority, or in directing how an agency should act, to what degree should the court defer to the agency's judgment? To what extent should the court defer to an agency's technical determinations, reflecting the agency's issue-specific expertise? When an agency adjudicates an enforcement action, how deferential should the court be to the agency's ruling? Judge Kavanaugh has strong thoughts on these questions in the abstract, but reviewing his decisions reveals something else: He defers to agencies when they take business-friendly action, but he affords them little or no deference when their actions are against corporations.

- **Judge Kavanaugh favors a standard benefitting corporations on the issue of standing.** To bring a case against in federal court, a party must have "standing" – meaning that the action is challenges must have caused it actual injury that can be remedied by the court. If a party does not establish standing, the case is dismissed without consideration of the merits – even if, say, a violation of the Constitution is claimed. In cases involving federal regulations, Judge Kavanaugh believes that regulated corporations always have standing, and that businesses not directly regulated by or affected by regulations almost always have standing. By contrast, he believes it should be difficult for citizen groups to establish standing, especially where the organization is complaining about agency action that creates a statistical likelihood of injury across the population (e.g., an inadequate auto safety rule that will lead to needless death and injury, but where the victims of preventable accidents are not identifiable in advance).

- **Judge Kavanaugh's record demonstrates that he imposes high bars to citizen access to the courts, but treats corporations differently.** Judge Kavanaugh wrote opinions in nine cases where the judges split on access to the courts questions, involving the legal issues of standing, ripeness and justiciability. (A finding that a plaintiff does not have standing, or a case is not ripe (ready) for review, or is not justiciable (subject to federal court adjudication) prevents the judges from assessing the underlying merits of a case). In each of these cases – nine out of nine – he favored a ruling against allowing a case brought by an individual or citizen group to proceed to the merits, or favored allowing a case brought by a corporation to proceed to the merits. Specifically, when standing, ripeness, or justiciability arose in lawsuits filed by an individual or a citizen group (three cases), he argued that the case should not be allowed to proceed. When these issues arose in lawsuits filed by corporations (six cases), he argued that the corporate cases *should* be allowed to proceed. Relatedly, Judge Kavanaugh argued in seven cases that various

immunities should block individuals' claims against governmental or corporate actors. He never reached a similar conclusion in a case initiated by a corporation.[2]

- **Judge Kavanaugh opposes independent agencies.** In two key cases, Judge Kavanaugh argued against the constitutionality of specific independent agency structures. But his opinions suggest a fundamental distrust of all independent agencies, and it is not clear that he favors upholding longstanding jurisprudence establishing the constitutionality of independent agencies.

- **Judge Kavanaugh's record shows him to be highly skeptical of civil rights claims.** Although he has cited an employment discrimination decision as among the 10 most significant cases in which he has issued opinions ("because of what it says about anti-discrimination law and American history"), Judge Kavanaugh ruled against plaintiffs in each of the 10 split-decision civil rights cases in which he wrote an opinion.[3] [Eight of these 10 cases are otherwise tallied in our tables – especially among employment cases. So these 10 cases are NOT in addition to those appearing in the table above.]

Methodology

To analyze these cases, we relied on the compilation of Judge Kavanaugh's opinions published by the Congressional Research Service (CRS) (Judicial Opinions of Judge Brett M. Kavanaugh, July 23, 2018).[4] We analyzed all of the split decision cases from the CRS compilation. We did not include unanimous decisions that were accompanied by a concurrence. We then categorized all of the cases in our sample, and tallied Judge Kavanaugh's opinions in the categories of consumer and other regulatory issues/administrative law, environmental law, worker rights, police and human rights abuse, and antitrust. These categories are somewhat overlapping and fluid (for example, most environmental law cases are a subset of administrative law), but we counted each case only once. In the antitrust analysis, we include two cases tallied in the consumer and regulatory issues section, but those cases are not included in the regulatory tally.

The Remainder of this Report

[2] Cases brought by citizens or citizen groups in which Judge Kavanaugh found no standing or another bar to access: In re Navy Chaplaincy, Am. Bird Conservancy, Inc. v. FCC, Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin. Cases brought by corporations in which Judge Kavanaugh found standing or simillar issues not to block cases, although other judges did: Texas v. EPA, Grocery Mfrs. Ass'n v. EPA, White Stallion Energy Ctr., LLC v. EPA, Koretoff v. Vilsack, Morgan Drexen, Inc. v. CFPB. Cases in which Judge Kavanaugh found immunities to pose a barrier to cases proceeding: Rattigan v. Holder, Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, Meshal v. Higgenbotham, Doe VIII v. Exxon Mobil Corp., Doe I v. Exxon Mobil Corp., Odhiambo v. Republic of Kenya.

[3] These are: *America v. Mills, Rattigan v. Holder, Jackson v. Gonzales, Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, Ortiz-Diaz v. Dep't Hous. &Urban Dev, Redman v. Graham, Multicultural Media, Telecom and Internet Council v. FCC, Moore v. Hartman, Huthnance v. Dist. Of Columbia, Meshal v. Higgenbotham and South Carolina v. United States*. See case descriptions at the end of this report.

[4] Available at: https://www.everycrsreport.com/reports/R45269.html#_Toc520380441.

In Part II of this report, we analyze Judge Kavanaugh's opinions in each of the categories we tallied, highlighting key themes that emerge. In Part III, we list and summarize all of the cases in which Judge Kavanaugh wrote an opinion in a split decision case. Part IV briefly concludes.

II. ISSUE ANALYSIS

CONSUMER AND REGULATORY ISSUES AND ADMINISTRATIVE LAW

18-4

(Judge Kavanaugh opinions for corporations and against consumer and citizen interests versus opinions against corporations or favorable to consumer groups)

Key points:

- Judge Kavanaugh's opinions favor a standard on the issue of standing (a prerequisite to bringing a lawsuit) under which regulated corporations almost always have standing, but citizen groups very often do not, especially related to claims that regulatory action or inaction creates a statistical likelihood of preventable injuries across a broad population.
- Judge Kavanaugh's opinions demonstrate a very clear and consistent pattern of strong deference to agency decisions challenged by public interest groups or individuals, and no deference – and sometimes hostility – to agency actions challenged by corporations.
- Judge Kavanaugh favors a theory – the "major questions" doctrine – that tilts heavily against regulation on important issues, and gives judges the authority to decide what counts as important.
- Judge Kavanaugh is highly skeptical of independent agencies and may believe them to be unconstitutional, notwithstanding 80 years of settled law on the matter.

Because it is based in the nation's capital, the Court of Appeals for the D.C. Circuit hears a disproportionate number of cases involving the actions of federal agencies. In his opinions on these cases – which touch on everything from enforcement actions at the Consumer Financial Protection Bureau to the Federal Communications Commission's Net Neutrality rules to a Department of Agriculture rule on pasteurization of domestically grown almonds – Judge Kavanaugh frequently invokes grand themes related to the constitutional separation of powers. But in practice, the principles that he draws from these themes is applied unevenly, so that the results overwhelmingly favor corporate interests.

Judge Kavanaugh's approach is most apparent in the area of standing law, where it is explicit. He believes both that regulated corporations, and competitors of directly regulated corporations,

should almost always be able to challenge agency action. By contrast, the standing test he applies to public interest groups is extremely difficult to meet, and in some cases, impossible – an implication he acknowledges.

Judge Kavanaugh has also evoked a version of the "major questions" doctrine that cuts unilaterally against regulation on important topics. It also stands in tension with the modest role he otherwise claims for the judiciary, as it imposes on judges the duty to determine what constitutes a "major question."

Judge Kavanaugh has also been sharply critical of the constitutionality of independent agencies. In split decisions, he has argued against the constitutionality of two independent agency structures, that of the Public Company Accounting Oversight Board and the Consumer Financial Protection Bureau. In those decisions, he has also made plain that he is dubious about the very constitutionality of independent agencies.

These and other key themes in his consumer and regulation issue cases are elaborated below.

Deference to Executive Branch and Independent Agencies

A cross-cutting theme in judicial review of agency actions is the degree to which the judiciary should defer to agencies – how much should the agencies be given the benefit of the doubt when it comes to deciding whether agency action comports with their statutory authority? When agencies engage in adjudicative action, how deferential should courts be to agency findings and conclusions?

Judge Kavanaugh's decisions – including those in the environmental and labor law spheres, as discussed in other sections of this report – do not show consistency on the question of deference. Rather, what emerges is a very clear and consistent pattern of strong deference to agency action when that action is challenged by public interest groups or individuals, and no deference – and sometimes hostility – to agency actions challenged by corporations.

For example, in *Hall v. Sebelius*, where individual plaintiffs sought to disavow their Medicare Part A benefits so they could receive superior benefits from their private carriers, Judge Kavanaugh's majority decision relied in part on the agency's interpretation of the law as set forth in a Medicare manual. Judge Henderson pointed out in dissent, however, that the manual merited less deference than might otherwise be accorded to an agency's interpretation of a statute, because the manual was issued informally, without the procedures that would accompany notice-and-comment rulemaking. Similarly, in his majority decision in *Multicultural Media, Telecom and Internet Council and the League of United Latin American Citizens v. Federal Communications Commission*, Judge Kavanaugh found it reasonable for the FCC to gather more information before deciding whether to act on a petition requesting emergency alerts be broadcast in languages other than English. Dissenting, Judge Millett offered a very different assessment of the FCC's reasonableness:

> In 2005, Hurricane Katrina laid bare the tragic consequences of that gap when peoples' lives were lost because they could not understand the warnings. The Federal

> Communications Commission, which regulates emergency broadcasters, has repeatedly emphasized the urgency of bridging that critical communications divide. After spending a full decade studying the problem and potential solutions, the Commission's long-awaited answer to this crisis was to stall: To simply ask for the third time a question for which it already knew it would get no satisfactory response.
>
> That is unreasonable. If the Commission needs new information, it should ask for new information. If it believes it should regulate, it should say so. If the Commission believes it is not the right agency to address the problem, it should say that and put the ball in what it thinks is the right court. At a minimum, the Commission was obligated to explain why it rejected the multiple solutions reasonably proposed to and previously recognized by it.

Judge Kavanaugh's approach is very different when corporations challenge agencies. In *Bais Yaakov of Spring Valley v. Federal Communications Commission*, a case involving an FCC rule requiring opt-out language in faxed advertisements, including when a recipient had at one time consented to receive the ads, Judge Kavanaugh's majority decision held that the FCC rule was not reasonable. His opinion ridiculed the agency's approach, saying it adopted a theory of statutory interpretation that "has it backwards as a matter of basic separation of powers and administrative law" and that the agency was trying to "sidestep" the statute. "If you are finding the FCC's reasoning on this point difficult to follow, you are not alone. We do not get it either."

In a case involving an attempt by the Food and Drug Administration to withdraw approval for a dangerous medical device, *Ivy Sports Medicine v. Burwell*, Judge Kavanaugh's majority decision rejected the FDA's position that it could rescind an erroneously cleared device by the same process by which it initially cleared it. Instead, ruling for the business-side challenge to the agency action and showing no deference to the agency's approach, Judge Kavanaugh's majority opinion held that the FDA, to cure its error, would have to employ a far more elaborate process. Dissenting, Judge Pillard argued that "[t]he statute's text, structure, history and purpose, in addition to past administrative practice, all show that the FDA permissibly read the statute not to displace its otherwise-undisputed implicit authority to correct erroneous substantial equivalence decisions" (permitting the sale of the device).

Standing

The Constitution establishes that the federal courts shall hear cases or controversies, which the Supreme Court has interpreted through the doctrine known as standing. To bring a case against a federal agency in federal court, a plaintiff must show that they have "standing" – that the agency's action has caused or is going imminently to cause the plaintiff injury that can be remedied by the court. Courts thus must decline to preside over disagreements, in the absence of standing. Standing doctrine has evolved considerably over the past 40 years, such that it is now far harder for public interest groups to demonstrate standing to challenge federal agency action.

Judge Kavanaugh has written many opinions in split decision cases touching on standing considerations, including cases discussed separately in the environmental case section of this report. Arguably his most important decision on standing was in *Public Citizen v. National Highway Traffic Safety Administration*, a case filed by Public Citizen over a motor vehicle safety

standard.[5] In that case, Judge Kavanaugh made explicit that he believes that regulated industry can almost always bring suits to challenge agency action and that public interest organizations very often cannot.

"Stated broadly," he wrote in the *Public Citizen* case, "the issue posed by Public Citizen's submission is this: To reduce the risk of harm from using a product, when do consumers have standing to sue an executive agency to compel it to impose greater regulation on the product's manufacturers?"

Judge Kavanaugh's answer was: Very rarely, if ever.

In the lawsuit, Public Citizen alleged that a weak motor vehicle safety standard would foreseeably lead to preventable deaths and injuries and that the organization's members were imperiled by the rule. That was not good enough for Judge Kavanaugh. "Public Citizen is attempting to assert remote and speculative claims of possible future harm to its members. Allowing a party to assert such remote and speculative claims to obtain federal court jurisdiction threatens, however, to eviscerate the Supreme Court's standing doctrine."

The only way for individuals of a consumer group to establish standing to sue an agency over an inadequate safety standard, he wrote, would be to show that the agency action caused a substantially increased risk of harm and a substantial probability of harm: "Under the Supreme Court's precedents, it therefore does Public Citizen no good to string together 130,000 remote and speculative claims rather than one remote and speculative claim. Each claim is still remote and speculative, which under the Supreme Court's precedents is an impermissible basis for our exercising the judicial power."

"Opening the courthouse to these kinds of increased-risk claims," Judge Kavanaugh wrote, would make it too easy for citizens to establish standing, too easy to bring too many cases.

Major Questions Doctrine

A running issue in administrative law is the degree to which courts should defer to agency interpretation of statutes. The governing Supreme Court framework for this issue is known as the *Chevron* doctrine, which posits a two-step test: if a statute is clear on a question, the courts should rule based on the unambiguous meaning; if there is ambiguity, or a "gap" left by Congress for the agency to fill, courts should defer to a reasonable agency interpretation of the statute. There is a very considerable ongoing debate about the *Chevron* doctrine, and a lesser debate about how important *Chevron* actually is in determining the outcome of cases.

In *United States Telecom v. Federal Communications Commission*, however, Judge Kavanaugh did more than work around *Chevron*, as judges often do, or even suggest that *Chevron* gives too much authority to agencies, as many conservative legal scholars now claim. Rather, he invoked

[5] The court in this case agreed on the issue of standing, but Judge Sentelle dissented as to whether Public Citizen should have an opportunity to submit additional information to establish standing. Based on our methodology of including any case in which a dissent was lodged, *Public Citizen v. NHTSA* is included here..

the "major questions" doctrine, a concept that has appeared in some Supreme Court cases but is not clearly established law. He described it this way: "For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful." The underlying sentiment is, if Congress wants an agency to take major regulatory action, it would say so explicitly; and if it doesn't say so, the best understanding is that Congress affirmatively does not want the agency to act, even if it conferred broad and nonspecific authority on an agency. The doctrine, Judge Kavanaugh explained, "constrains the Executive and helps to maintain the Constitution's separation of powers."

The flaws, or at least consequences, of the major questions doctrine, are evident to anyone who knows much about regulatory policy. First, Congress does not pass many non-spending laws of "major" impact. Thus, if for important questions agencies are able to regulate only if specifically commanded by Congress to do so in a particular area, that means that most of the time they won't regulate – even if they are responding to changing technologies or developments that Congress could not have imagined at the time it gave relevant, overarching regulatory power to the agency. Second, although Judge Kavanaugh claimed the doctrine is designed to maintain the separation of powers between Congress and the Executive, its primary impact is to confer enormous power on the judiciary. That is because the doctrine confers on the judiciary the authority to pronounce whether a particular rule is "major." In this case, Judge Kavanaugh argued that it was "indisputable" that Net Neutrality was a major rule. It's easy to see why he thought so: He argued it would "transform" the Internet, and that it "wrests control of the Internet from the people and private Internet service providers [ISPs] and gives control to the Government." However, if the rule were characterized more accurately, it is not at all clear that it was "major" in the sense that Judge Kavanaugh described. In fact, the rule aimed to preserve the status quo of ISP nondiscrimination against content providers – at least the ISPs themselves said they have always operated according to the nondiscrimination approach mandated by Net Neutrality. And the rule did not in any way "giv[e] control to the Government" – rather, it was the government creating a framework that would prevent the ISPs from "wresting control" of the Internet from the broad public, from taking control of what *has been* a resource of the commons.

Independent Agencies

In two very important opinions in split decision cases, as well as a couple of others, Judge Kavanaugh argued that the organizational structure of particular independent agencies was unconstitutional. One of these cases involved the high-profile, ongoing dispute about the structure of the Consumer Financial Protection Bureau, and so Judge Kavanaugh's views may be of importance in shaping the future of that crucial consumer protection agency. From a regulatory policy or administrative law standpoint, however, the bigger picture is that Judge Kavanaugh is highly distrustful of independent regulatory agencies from a constitutional standpoint, and perhaps would overturn the 80-year-old Supreme Court precedent establishing their constitutionality.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Judge Kavanaugh argued that the structure of the PCAOB – an agency established by Congress in the wake of the Enron and related scandals – was unconstitutional. Congress gave responsibility for appointing

members of the PCAOB to the Securities and Exchange Commission. Judge Kavanaugh made the argument – later accepted by the Supreme Court – that empowering the SEC commissioners, who can be removed by the president only for cause, to appoint PCAOB board members, who themselves could be removed only for cause, was unconstitutional. With that arrangement, he reasoned, the PCAOB was too removed from accountability to the president, in violation of the president's Article II appointment power. He wrote:

> This latest chapter involving the Public Company Accounting Oversight Board is the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years. [U]nder this statute, the President is also two levels of for-cause removal away from Board members, a previously unheard-of restriction on and attenuation of the President's authority over executive officers. …
>
> "By restricting the President's authority over the Board, the Act renders this Executive Branch agency unaccountable and divorced from Presidential control to a degree not previously countenanced in our constitutional structure.

Similarly, in *PHH v. Consumer Financial Protection Bureau*, Judge Kavanaugh argued that an independent agency headed by a single director who can be removed only for cause violates core constitutional separation of powers issues. He argued that while the Supreme Court has long upheld the constitutionality of independent agencies with multiple commissioners removable only for cause, a single director is categorically different from a constitutional perspective, because the one director has more concentrated power than each member of a commission:

> Multi-member independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members. … The single-Director structure of the CFPB represents a gross departure from settled historical practice. …
>
> Because the Director acts alone and without Presidential supervision or direction, and because the CFPB wields broad authority over the U.S. economy, the Director enjoys significantly more unilateral power than any single member of any other independent agency. … Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power. That is not an overstatement. …
>
> How does a single-Director independent agency fare worse than multi-member independent agencies in protecting individual liberty? A single-Director independent agency concentrates enforcement, rulemaking, and adjudicative power in one individual. By contrast, multi-member independent agencies do not concentrate all of that power in one individual. The multi-member structure thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty. … Moreover, multi-member independent agencies are better structured than single-Director independent agencies to guard against "capture" of – that is, undue influence over – independent agencies by regulated entities or interest groups, for example.

What is striking in these decisions is how Judge Kavanaugh moves from concern about agency structure to core constitutional issues about the structure of government and then connects those concerns to "individual liberty." In the PCAOB case, he wrote: "Our constitutional structure is premised, however, on the notion that such unaccountable power is inconsistent with individual liberty." Similarly, his opening sentence in the CFPB case was: "This is a case about executive power and individual liberty." These claims were made for cases about the organizational structure of a body to set accounting standards and an agency to protect consumers from financial predators.

There is reason to question whether as Supreme Court justice he would argue to overturn the longstanding precedent upholding such agencies. In the CFPB case, he wrote, "The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government. They hold enormous power over the economic and social life of the United States. Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."

In the PCAOB case, he directly criticized the longstanding precedent establishing the constitutionality of independent agencies. "By permitting a good-cause restriction on the removal of an executive officer by the President or the President's alter ego, there is no doubt that *Humphrey's Executor* and *Morrison* authorize a significant intrusion on the President's Article II authority to exercise the executive power and take care that the laws be faithfully executed … [T]hose cases have long been criticized by many as inconsistent with the text of the Constitution."

First Amendment - FCC

Over the past 40 years, the Supreme Court has increasingly recognized corporate claims to First Amendment protections, giving rise on one hand to *Citizens United,* and on the other to grave worries about the use of the First Amendment to strike down a vast range of important regulations having little or nothing to do with the right to free speech. Only one of his opinions in split cases addresses either corporations' political speech or commercial speech, *American Meat Institute v. U.S. Department of Agriculture.* In that case, he concurred in a decision upholding country-of-origin labeling on meat, but did so to state that, in his view, the disclosure requirement was permissible in light of the long history of government support for industry through country-of-origin labeling, not because of the government interest in providing information to consumers.

Two other opinions in split cases raised different corporate First Amendment issues. Both of these cases involved action by the Federal Communications Commission to promote competition, in the cable TV market and on the Internet. In each case, Judge Kavanaugh argued that agency action should be foreclosed because it interfered with the First Amendment rights of cable companies. In *Cablevision Systems v. Federal Communications Commission*, cable TV companies challenged an FCC decision to extend for five years a statutory prohibition against exclusive contracts between cable operators and cable-affiliated programming networks. The idea was that if a cable company could maintain exclusive rights to carry highly desired

programming content, then competitors would be unfairly disadvantaged and the public would suffer – for example, if the only way to watch the Olympics is on NBC, and the only way to watch NBC is by having a subscription to Comcast. Judge Kavanaugh said this rule impermissibly restricted the First Amendment rights of cable companies. "This forced-sharing mandate poses a First Amendment issue because the right of a First Amendment-protected editor or speaker *not* to speak and associate 'serves the same ultimate end as freedom of speech in its affirmative aspect' and is entitled to similar constitutional protection." (If the cable companies had "bottleneck monopoly" power, the First Amendment restrictions might be justified, he stated, an issue discussed in more detail in the competition section of this report.)

Judge Kavanaugh made precisely parallel arguments in the Net Neutrality case, *United States Telecom Association v. Federal Communications Commission*. "[I]nternet service providers and cable operators perform the same kinds of functions in their respective networks. Just like cable operators, Internet service providers deliver content to consumers. Internet service providers may not necessarily generate much content of their own, but they may decide what content they will transmit, just as cable operators decide what content they will transmit. Deciding whether and how to transmit ESPN and deciding whether and how to transmit ESPN.com are not meaningfully different for First Amendment purposes. … It may be true that some, many, or even most Internet service providers have chosen not to exercise much editorial discretion, and instead have decided to allow most or all Internet content to be transmitted on an equal basis. But that 'carry all comers' decision itself is an exercise of editorial discretion."

One could imagine instances where a cable company was making a programming editorial judgment on ideological and expressive grounds – a political judgment not to carry Fox or MSNBC or Russia TV, for example – and while there still may be room for debate about whether and in what way this decision should be subject to First Amendment analysis based on the rights of cable companies, at least core First Amendment values would be at stake. Those same values do not seem implicated in decisions about whether Comcast will permit local cable competitors to carry CNBC programming, or whether AT&T will impose charges on Netflix. Those seem to be, simply, business decisions. Moreover, the sweeping First Amendment values at stake in the public access to information are not raised in Judge Kavanaugh's decisions.

What Judge Kavanaugh's opinions in these cases suggest, at minimum, is that his understanding of the First Amendment rights of cable companies and ISPs, and presumably other providers and platforms, may meaningfully constrain the ability of the FCC and other agencies to adopt fair rules of the road, at the potential expense of less powerful market competitors, innovation and, crucially, the public.

Access to Information

Judge Kavanaugh wrote opinions in three split decision cases concerning the federal open records law, the Freedom of Information Act. In these, Judge Kavanaugh was highly deferential to governmental claims to secrecy. In one case, *National Security Archive v. Central Intelligence Agency*, he upheld the CIA's invocation of FOIA's "deliberative process" exemption – covering pre-decisional agency communications and intended to encourage frank internal discussion – for an unfinished volume in the CIA's definitive assessment of the Bay of Pigs debacle. A CIA staff

historian prepared the work from 1973 to 1984; the first three volumes, revised by the CIA, were released, as was the historian's draft of the fourth volume. Thirty years after the work on the draft was completed, the National Security Archive sought to obtain the final volume. Judge Kavanaugh wrote the majority opinion in favor of the CIA, arguing that the deliberative process exemption does not have "an expiration date." Dissenting, Judge Roberts argued that a draft document is not automatically deliberative, and that no showing had been made about how this particular release would impede agency decision-making.

In a second FOIA case, Judge Kavanaugh dissented from a decision addressing information sought by a death row inmate that he believed might show his innocence by establishing four other men (three still living) were responsible for the quadruple homicide of which the inmate was convicted. The FBI neither confirmed nor denied that it had the requested records, contending it could withhold information under FOIA Exemption 7(c), which permits the withholding of law-enforcement records to protect against unwarranted invasions of privacy. The district court agreed. By a 2-1 majority, the court reversed the district court, holding that the public interest in whether FBI information might corroborate a death row inmate's claim of innocence outweighed the privacy interests of the other men. Judge Kavanaugh dissented, arguing that FOIA cannot ordinarily be used to obtain private information from law enforcement relating to a criminal prosecution.

In a third case, *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312 (D.C. Cir. 2006), the three-judge panel in a decision written by Judge Kavanaugh unanimously agreed on withholding information from a FOIA requester on commercial confidentiality and other grounds. Judge Henderson dissented in the case as to whether a law firm that had filed a successful open records request for its own purposes could receive legal fees.

Judge Kavanaugh's Opinions in Split Decision Cases Involving Consumer and Regulatory Issues and Administrative Law

Kavanaugh opinions for regulations of industry or for consumer interest	Kavanaugh opinions against regulations of industry or for industry interests
Sw. Airlines Co. v. Transp. Sec. Admin., 650 F.3d 752	*Free Enter. Fund v. Pub. Co. Accounting Oversight Bd*., 537 F.3d 667, aff'd in part, rev'd in part, 561 U.S. 477 (2010)
Am. Meat Inst. v. Dep't of Agric., 760 F.3d 18 (en banc)	*Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227
Competitive Enter. Inst. v. DOT, 863 F.3d 911	*Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.,* 489 F.3d 1279
Seven-Sky v. Holder, 661 F.3d 1, abrogated by *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519 (2012)	*Koretoff v. Vilsack*, 614 F.3d 532

	Cablevision Sys. Corp. v. FCC, 597 F.3d 1306
	Hall v. Sebelius, 667 F.3d 1293
	Ivy Sports Med., LLC v. Burwell, 767 F.3d 81
	Morgan Drexen, Inc. v. CFPB, 785 F.3d 684
	Multicultural Media, Telecom & Internet Council v. FCC, 873 F.3d 932
	Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078
	Lorenzo v. SEC, 872 F.3d 578, cert. granted, No. 17-1077, 2018 U.S. LEXIS 3813 (June 18, 2018)
	U.S. Telecom Ass'n v. FCC, 855 F.3d 381 (denying rehearing en banc)
	John Doe Co. v. CFPB, 849 F.3d 1129
	PHH Corp. v. CFPB, 881 F.3d 75 (en banc)
	Sissel v. HHS, 799 F.3d 1035 (denying rehearing en banc)
	Roth v. Dep't of Justice, 642 F.3d 1161
	Nat'l Sec. Archive v. CIA, 752 F.3d 460
	Baker & Hostetler LLP v. Dep't of Commerce, 473 F.3d 312
TOTAL: 4	TOTAL: 18

ENVIRONMENTAL PROTECTION

11-2

(Judge Kavanaugh opinions against environmental protection versus opinions for environmental protection)

Key points:

- Judge Kavanaugh's record in split decision cases shows him to afford minimal deference to the expertise of the Environmental Protection Agency when the agency is challenged by corporate interests.
- Judge Kavanaugh argues that rational EPA and other agency action requires consideration of cost, even when an authorizing statute is silent on whether the agency should do so.
- Judge Kavanaugh's environmental opinions evidence his generous interpretation of corporate, but not citizen group, standing to challenge agency action.

Judge Kavanaugh has written decisions in more than a dozen split cases involving environmental protection, deciding for businesses or states challenging EPA rules as too stringent, or against environmental organizations challenging government action as inadequately protective of the environment, in almost every instance. What is most striking about the decisions in total is Judge Kavanaugh's systematic refusal to defer to EPA interpretations of the Clean Air Act and other key environmental statutes and his conclusion, in almost every close case filed by industry or with industry support, that the EPA got it wrong.

The pattern is overwhelming:

- Judge Kavanaugh concluded that the EPA exceeded its authority in issuing the Cross-State Air Pollution Rule (Transport Rule), which established emission reduction standards for upwind states. ("It is not our job to set environmental policy. Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set. EPA did not do so here.") (*EME Homer City Generation v. EPA*)
- Judge Kavanaugh dissented in a case involving EPA regulations treating greenhouses gases including carbon dioxide as air pollutants, arguing that EPA exceeded its statutory authority under the Prevention of Significant Deterioration provisions of the Clean Air Act. ("This is a very strange way to interpret a statute. When an agency is faced with two initially plausible readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose

the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out. … Agencies presumably could adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness. Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process. I would not go down that road.") (*Coalition for Responsible Regulation v. EPA*)

- In a case involving the Resource Conservation and Recovery Act (RCRA), Judge Kavanaugh wrote that the EPA misinterpreted the definition of its own regulatory term, "spent material." ("Courts must not permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation") (*Howmet v. EPA*).
- Judge Kavanaugh ruled that the EPA exceeded its authority in seeking to force replacement of hydrofluorocarbons (HFCs), which contribute to climate change, under a Clean Air Act provision giving the agency authority to mandate replacement of ozone-depleting substances. HFCs are a substitute for ozone-depleting substances. ("The separation of powers and statutory interpretation issue that arises again and again in this Court is whether an executive or independent agency has statutory authority from Congress to issue a particular regulation," holding that EPA's "novel reading" exceeds that authority.) (*Mexichem Fluor v. EPA*)

In his decisions against EPA statutory interpretation and action, Judge Kavanaugh repeatedly emphasizes that he is not making policy determinations, simply enforcing the law and preserving the separation of powers. Yet it is worth noting the contrast between that sentiment and his sensitivity to business concerns about how environmental rules will purportedly injure them. Strikingly, in his dissent in *Coalition for Responsible Regulation v. EPA*, is his credulous recitation of the U.S. Chamber of Commerce's claim in the opening paragraph: "The US Chamber of Commerce describes the EPA regulation at issue here as 'the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency'."

On the other hand, he treated the EPA very generously in a case filed not by business, but the Sierra Club. In that instance, in dissent, he wrote that he would uphold an EPA rule that gave the agency power to prevent state and local authorities from tougher permitting standards – the sort of arrangement to which he showed frequent hostility when states sought to adopt less environmentally protective approaches than the federal EPA. Judge Kavanaugh argued that the plain terms of the statute supported the agency, and that "EPA's approach … is consistent with the overall statutory and regulatory scheme" – friendly language wholly absent from the cases involving business challenges to the EPA. (*Sierra Club v. EPA*)

(It should be noted that one of the two environmental cases in which Judge Kavanaugh favored the environmental side was filed by an environmental organization.)

It is not only on the matter of harsh scrutiny of EPA's statutory interpretation that Judge Kavanaugh has displayed sympathy to corporate challenges to EPA rules. Although he often finds public interest parties to be without standing, or otherwise blocked on procedural grounds from successfully challenging agency action or inaction, he has argued strongly for expansive

corporate standing. In a case involving ethanol rules, as part of a three-judge panel and an en banc consideration of a petition for review, Judge Kavanaugh strongly dissented against majorities that concluded food and petroleum trade associations did not have standing. "Despite the fact that two enormous American industries will be palpably and negatively affected by EPA's allegedly illegal E15 waiver [referring to a decision under the agency's renewable fuels (ethanol) program], the majority opinion tosses the case for lack of standing." This is not the kind of passion he brought to ensuring public interest groups could maintain lawsuits against agencies. He argued for a broad interpretation of whether the trade associations were in the "zone of interests" protected or regulated by a statute, and referenced Supreme Court precedent that "the benefit of any doubt goes to the plaintiff." (*Grocery Manufacturers Association v. EPA*) He made similar arguments in *White Stallion Energy Center v. EPA*: "As one respected commentator has summarized the Supreme Court's case law: 'It is hardly a caricature to say that the current law is this: Business desiring to complain that the government is regulating their competitors with insufficient stringency are invariably and automatically held to fall within the zone of interests of any allegedly violated statute.'"

Judge Kavanaugh also argued vociferously in two separate cases that the EPA could not rationally make decisions without consideration of cost, even when relevant statutes were silent on consideration of cost. This position is now embraced, at least in some contexts, by the Supreme Court (*Michigan v. EPA*, 576 U.S. ___ (2015)). Judge Kavanaugh articulated the point in *White Stallion Energy Center v. EPA*, mocking the agency for not considering cost:

> Suppose you were the EPA Administrator. You have to decide whether to go forward with a proposed air quality regulation. Your only statutory direction is to decide whether it is "appropriate" to go forward with the regulation. Before making that decision, what information would you want to know? You would certainly want to understand the benefits from the regulations. And you would surely ask how much the regulations would cost. You would no doubt take both of those considerations—benefits and costs—into account in making your decision. That's just common sense and sound government practice.
>
> So it comes as a surprise in this case that EPA excluded any consideration of costs when deciding whether it is "appropriate"—the key statutory term—to impose significant new air quality regulations on the Nation's electric utilities.

The majority made clear that this appeal to common sense did not capture the entirety of the issue, arguing that neither the text nor history of the statute supported Judge Kavanaugh's interpretation, and emphasizing that cost considerations had already been built into the statute itself:

> Even if the word "appropriate" might require cost consideration in some contexts, such a reading of "appropriate" is unwarranted here, where Congress directed EPA's attention to the conclusions of the study regarding public health hazards from EGU [electric generating unit] emissions. Throughout § 112, Congress mentioned costs explicitly where it intended EPA to consider them. …

> [I]nterpreting one isolated provision not to require cost consideration does not indicate that Congress was unconcerned with costs altogether, because Congress accounted for costs elsewhere in the statute.

There is a very considerable literature explaining how cost-benefit analysis, which Judge Kavanaugh's argumentation drives to make mandatory in regulatory decision-making, systematically tilts the playing field to regulated entities. The reasons include overreliance on industry estimates of cost, a systematic undercounting of benefits that are necessarily speculative, the challenge of incorporating non-monetary benefits (privacy, fairness, democracy and much more) into cost-benefit calculations, the inherent imprecision in calculating the potential cost of low-probability, catastrophic events (like the 2008 financial crash), and much more.

Judge Kavanaugh's Opinions in Split Decision Environmental Protection Cases

Kavanaugh opinions for environmental organization or to uphold an environmental rule against industry challenge	**Kavanaugh opinions for industry or governmental challenge to an environmental rule for being unauthorized or too strict, or to uphold a rule against environmental group challenge**
Ctr. for Biological Diversity v. EPA, 722 F.3d 401	*Sierra Club v. EPA*, 536 F.3d 673
Am. Trucking Ass'ns, Inc. v. EPA, 600 F.3d 624	*Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027
	Howmet Corp. v. EPA, 614 F.3d 544
	EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, rev'd and remanded, 134 S. Ct. 1584 (2014)
	Coal. for Responsible Regulation, Inc. v. EPA, Nos. 09- 1322 et al., 2012 U.S. App. LEXIS 25997 (Dec. 20, 2012) (denying rehearing en banc)
	Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169
	In re Aiken County, 725 F.3d 255
	Texas v. EPA, 726 F.3d 180
	White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, judgment reversed by *Michigan v. EPA*,135 S. Ct. 2699 (2015)
	Mingo Logan Coal Co. v. EPA, 829 F.3d 710
	Mexichem Fluor, Inc. v. EPA, 866 F.3d 451
TOTAL: 2	TOTAL: 11

We excluded from our tally *Honeywell Int'l, Inc. v. EPA*, 705 F.3d 470 (an industry-industry dispute). Judge Kavanaugh issued written decisions in two split decisions in *In re Aiken Cty*., *Mexichem Fluor v. EPA* and *Grocery Mfrs. Ass'n v. EPA*. In each instance, we tallied only one.

WORKER RIGHTS

15-2

(Judge Kavanaugh opinions against workers versus decisions favorable to workers)

Key points:

- In worker rights cases, Judge Kavanaugh has sided overwhelmingly against workers.
- In every split decision case involving workers' collective bargaining rights, Judge Kavanaugh decided against the workers and their unions.
- In every split decision case involving claims of employment discrimination, Judge Kavanaugh decided against the employees.
- In a case involving a SeaWorld employee killed by a killer whale, Judge Kavanaugh claimed the issue concerned when society should "paternalistically decide" to protect employees against risks of which they are purportedly aware.

In worker rights cases, Judge Kavanaugh has sided overwhelmingly against workers. When employees sue employers alleging discriminatory treatment, he almost always sides with employers. When employers sue the National Labor Relations Board, protesting NLRB determinations of unfair labor practices or other determinations, he sides with employers. By contrast, when unions sue federal agencies, he sides with the agencies. And in the one worker health and safety case that came before Judge Kavanaugh and resulted in a split decision, he sided with the employer against the Department of Labor.

The worker rights cases before Judge Kavanaugh and resulting in split decisions tended to be fact specific, decided either on differing interpretations of underlying facts or the application of very particular legal principles to the specific case. That case-specific component is notable, because in spite of this diversity of fact patterns, Judge Kavanaugh has a consistent record of siding against workers.

Federal employee claims of discrimination:

- In a case involving the Bureau of Prisons he found on the record no racially discriminatory intent. (*Jackson v. Gonzales*)
- Judge Kavanaugh wrote in dissent that an FBI employee should not be able to bring a lawsuit alleging racially discriminatory treatment, on the grounds that the employee's case involved security clearance issues, which are not judicially reviewable. (*Rattigan v. Holder*)

- Judge Kavanaugh wrote in dissent that a congressional employee should not be able to bring a lawsuit alleging racially discriminatory treatment, on the grounds that legislative activity is protected by the Speech and Debate clause. (*Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives*)

Union lawsuits over federal employee rights:

- When the American Federation of Government Employees sued the Department of Defense over regulations curtailing the collective bargaining rights of civilian employees at the Defense Department, Judge Kavanaugh sided with the department. (*American Federation of Government Employees v. Gates*)
- When the National Federation of Federal Employees, International Association of Machinists sued over a Department of Agriculture drug testing program, Judge Kavanaugh sided with the department. (*National Federation of Federal Employees, International Association of Machinists v. Vilsack*)

Disputes over collective bargaining rights at private employers:

- Judge Kavanaugh argued that undocumented immigrants should not be eligible to join unions, on the basis that they did not meet the statutory definition of "employee." (*Agri Processor v. NLRB*)
- Judge Kavanaugh ruled that union signs appearing in the parked cars of employees constituted picketing and were therefore proscribed by a union contract. (*Verizon New England v. NLRB*)
- Dissenting, Judge Kavanaugh wrote that employees should not have a right to union representation at peer review committees. (*Midwest Division MMC, LLC v. NLRB*)
- Kavanaugh found that a unionized firm and a non-union shop – established by the unionized firm to specialize in a product made by the union shop, with the non-union shop established in the back building of the unionized firm and under the leadership of the daughter of the president of unionized firm – were *not* alter egos. (*Island Architectural Woodwork, Inc. v. NLRB*)

Worker health and safety:

- Judge Kavanaugh dissented against a decision upholding a Labor Department enforcement action against SeaWorld in a case where an animal trainer was killed by a killer whale. Judge Kavanaugh argued that the Department of Labor's action was arbitrary and capricious, and outside of the scope of the agency's authority to regulate, which he argued did not include entertainment activities. (*SeaWorld of Florida v. Perez*)

  In a comment in the SeaWorld case offering important insight into his judicial philosophy, he wrote, "The broad question implicated by this case is this: When should we as society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves – that the risk of significant physical injury is simply too great even for eager and willing participants? And most importantly for this case, who decides that the risk to participants is too high?"

(Answered the majority: "This is a question to be answered by Congress, not this court. And Congress has done so.")

In this case, Judge Kavanaugh claimed there was a longstanding understanding that the Department of Labor did not regulate safety conditions in either sports or entertainment industries: "The Department cannot reasonably distinguish close contact with whales at SeaWorld from tackling in the NFL or speeding in NASCAR." (The majority would note the consequential distinctions between entertainment and sports, and animal trainers and NFL stars.)

Judge Kavanaugh also discussed a matter of statutory interpretation of significant import, reaching far beyond the particular details of this case. The Department had brought its enforcement action under the General Duty Clause of the Occupational Safety and Health Act. The clause requires employers to protect employees from recognized hazards that might cause death or serious physical harm, an obligation to employees separate and apart from the health and safety standards managed by specific Occupational Safety and Health Administration rules. Judge Kavanaugh offered a cramped view of the General Duty Clause, arguing "some activities, though dangerous, are among the 'normal activities' intrinsic to the industry and therefore cannot be proscribed or penalized under the General Duty Clause."

Judge Kavanaugh's Opinions in Split Decision Worker Rights Cases

Kavanaugh opinion for employee or union	Kavanaugh opinion for employer or against worker
Stephens v. U.S. Airways Grp., Inc., 644 F.3d 437	*America v. Mills*, 643 F.3d 330
Wash. All. of Tech. Workers v. DHS, 857 F.3d 907	*Jackson v. Gonzales*, 496 F.3d 703
	Am. Fed'n of Gov't Emps., AFL-CIO v. Gates, 486 F.3d 1316
	In re Navy Chaplaincy, 534 F.3d 756
	Noble v. Sombrotto, 525 F.3d 1230
	Agri Processor Co., Inc. v. NLRB, 514 F.3d 1
	Rattigan v. Holder, 643 F.3d 975, reh'g granted, judgment vacated by No. 10- 5014, 2011 U.S. App. LEXIS
	Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483
	Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939

	SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202
	Verizon New England Inc. v. Nat'l Labor Relations Bd., 826 F.3d 480
	Midwest Div.–MMC, LLC v. NLRB, 867 F.3d 1288
	NLRB v. CNN Am., Inc., 865 F.3d 740
	Island Architectural Woodwork, Inc. v. NLRB, 892 F.3d 362
	Miller v. Clinton, 687 F.3d 1332
TOTAL: 2	TOTAL: 15

Note: We excluded several cases from our tally: *Int'l Union, Sec., Police and Fire Professionals of Am. v. Faye*, 828 F.3d 969 (arguable whether the decision, involving union disputes with union employees, is pro- or anti-worker); *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437 (involving a dispute between two unions); *Sims v. Johnson*, 505 F.3d 1301 (a fact specific dispute between plaintiffs and their attorneys); and *Ortiz-Diaz v. Dep't Hous. & Urban Dev.,* 831 F.3d 488, vacated, 697 F. App'x 6 (D.C. Cir. 2017) (in which the three-judge panel vacated its early decision; in the prior decision, a majority with Judge Kavanaugh concurring held that denial of a lateral job switch could not constitute discriminatory action). We also did not include *Noble v. Sombrotto*, 525 F.3d 1230 (a union democracy case in which Kavanaugh sided with the union officers against union members). Judge Kavanaugh issued written decisions in two split decisions in *Rattigan v. Holder*; we tallied only one.

VICTIMS OF POLICE ABUSE AND HUMAN RIGHTS VIOLATIONS

7-0

(Judge Kavanaugh opinions against victims of police abuse and human rights violations versus opinions for victims)

Key points:

- In every split decision case involving police abuse and human rights cases, Judge Kavanaugh has sided against victims.
- Judge Kavanaugh is highly deferential to Executive claims of national security or foreign policy interests, as a rationale to foreclose claims by victims of torture and other abuse.
- Judge Kavanaugh is skeptical of using U.S. courts to remedy abuses outside of the United States.

Judge Kavanaugh has written opinions in a considerable number of cases involving physical mistreatment, and sometimes torture and killing, by governmental officers in the United States and overseas. These cases in many instances involve horrific abuses. A key challenge for plaintiffs is overcoming sovereign immunity and various doctrines that preclude lawsuits against governments or their proxies. In every split-decision case in which he's written an opinion, Judge Kavanaugh has sided against the victims of police and military misconduct.

In the domestic context, Judge Kavanaugh urged on two occasions that police officers accused of violating arrestees' constitutional or statutory rights should be entitled to qualified immunity, a doctrine that protects government officers from liability unless they clearly violate constitutional rights. (*Huthnance v. District of Columbia, et. al*. and *Moore, Jr. and Moore v. Hartman, et. al.*) In a third case involving alleged police abuse, the majority found that a mistaken jury instruction was harmless; in dissent, Judge Kavanaugh contended the errant instruction was "very damaging" to the defendant police officers and the District of Columbia.

In cases involving abuses occurring outside of the United States, Judge Kavanaugh has similarly sided against the victims in each split-decision case where he has written an opinion. These cases have involved more complicated legal issues, and Judge Kavanaugh has written extensively to express his standpoint.

In *Meshal v. Higgenbotham*, an American citizen alleged he was held overseas by the FBI for four months without a hearing and subjected to torture. Meshal is a U.S. citizen who traveled to Somalia to "broaden his understanding of Islam" and was arrested in a U.S.-Kenyan-Ethiopian

operation. He alleged he was arbitrarily detained in three countries for four months, denied counsel, and threatened with disappearance and death. He filed a *Bivens* action, under which victims of federal government constitutional violations can seek compensation. By a 2-1 majority, the court held that a *Bivens* action could not be sustained for abuses occurring overseas in connection with counterterrorism operations. Judge Kavanaugh concurred, emphasizing the national security aspect of the case and arguing that courts should not unilaterally impose limits on U.S officers' wartime activities. The case "involves a *national security* investigation during a congressionally authorized war, not a simple arrest for securities fraud, drug trafficking and the like" and "courts should not – under the guise of *Bivens – unilaterally* recognize new limits that restrict U.S. officers' wartime activities." Dissenting, Judge Pillard noted, "there is zero basis here on which we could conclude that these defendants had grounds for treating this plaintiff as a suspected al Qaeda terrorist, or that they acted pursuant to the President's war powers."

In another concurrence, Judge Kavanaugh argued that Uighurs held at Guantanamo Bay had no right to challenge their transfer to a third country on the grounds that they might be tortured, or even a right to advance notice of where they would be transferred. Instead, Judge Kavanaugh urged absolute deference to the Executive Branch, in the absence of any specific congressionally created rights to the contrary. Precedent and "the deeply rooted 'rule of non-inquiry' in extradition cases require that we defer to the Executive's considered judgment that transfer is unlikely to result in torture." (*Jamal Kiyemba v. Barack Obama*)

In two separate, but interconnected cases involving claims made by Indonesian villagers against Exxon Mobil for human rights violations allegedly carried out by the Indonesian military on Exxon Mobil's behalf, Judge Kavanaugh urged dismissal of the villagers' lawsuits. In *John Doe I v. Exxon Mobil*, Judge Kavanaugh dissented against the majority decision to permit the lawsuit to proceed, which he wrote was "inconsistent with bedrock principles of judicial restraint." For Judge Kavanaugh, the fact that the Executive Branch said that permitting the case to proceed would negatively impact U.S. foreign policy was, by itself, sufficient reason to hold that the case presented non-justiciable political questions.

In *John Doe VIII v. Exxon Mobil*, Judge Kavanaugh again dissented, again arguing for deference to Executive Branch claims of foreign policy interests, but also arguing that the Alien Tort Statute – empowering non-U.S. citizens to sue in U.S. courts for injuries committed in violation of the law of nations – applied neither to abuses committed overseas nor to corporations. Because "customary international law does not recognize corporate liability," the Alien Tort Statute should not be understood to authorize actions against corporations, he wrote, proferring a theory that would later be adopted by the U.S. Supreme Court.

However, Judge Kavanaugh has not always been so sanguine about international law establishing the boundary of legal rights and fora in the U.S. context. In *Al Bahlul v. United States*, Judge Kavanaugh angrily rejected the argument that conspiracy to commit a war crime should be triable only in U.S. courts, not before military commissions, because military commissions are permitted to hear only matters relating to violations of international law. "On its face, that is an extraordinary argument that would, as a matter of U.S. constitutional law, subordinate the U.S. Congress and the U.S. President to the dictates of the international

community – a community that at any given time could be unsupportive of or even hostile to U.S. national security interests as defined by Congress and the President."

Judge Kavanaugh's Opinions in Split Decision Cases Involving Claims of Police or Human Rights Abuse

Kavanaugh opinions against government or for civilian	Kavanaugh opinions for government or against civilian
	Moore v. Hartman, 704 F.3d 1003
	Huthnance v. Dist. of Columbia, 722 F.3d 371
	Meshal v. Higgenbotham, 804 F. 3d 417
	Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, vacated by 527 F. App'x 7 (D.C. Cir. 2013)
	Doe I v. Exxon Mobil Corp., 473 F.3d 345
	Kiyemba v. Obama, 561 F.3d 509
	Wesby v. Dist. of Columbia, 816 F.3d 96 (denying rehearing en banc)
TOTAL: 0	TOTAL: 7

ANTITRUST AND COMPETITION POLICY

2-0

(Judge Kavanaugh opinions for merging parties versus opinions for antitrust enforcement agencies)

Key points:

- Judge Kavanaugh is skeptical of government antitrust enforcers' expertise.
- Judge Kavanaugh is highly credulous of merging companies' claims to be creating "efficiencies."
- Judge Kavanaugh expresses disdain for the idea that antitrust policy should focus on anything other than consumer price impacts.
- At least in the telecommunications context, Judge Kavanaugh expresses hostility to pro-competition initiatives in the absence of a prior showing of already existing market power.

Judge Kavanaugh wrote opinions in two split cases involving antitrust matters, in each instance siding with the corporations challenging governmental efforts to block proposed mergers. He also wrote two opinions involving important competition policies that are included in our regulatory case policy tally but are discussed here.

Merging companies typically try to justify their combination on the grounds that the newly unified company will benefit consumers, by creating synergies and efficiencies. In a proposed merger between two giant health insurers, Cigna and Anthem, Judge Kavanaugh argued that the "modern approach" required consideration of purported efficiencies even if the merger substantially reduced market competition. (*United States of America v. Anthem*) The majority retorted: "[O]ur dissenting colleague applies the law as he wishes it were, not as it currently is." One potential hazard of Judge Kavanaugh's approach is overreliance on theoretical prospective efficiencies that do not manifest in practice. Indeed, Judge Kavanaugh treated the merging parties' expert witness with great credulity, notwithstanding the obvious self-interest of the merging companies in presenting favorable evidence. By contrast, he was dismissive of the government's expert and the government's projections that the combined company would have dangerous market influence – even though the district court had found the government case on the merits to be more persuasive.

Dissenting in the other split antitrust case in which he wrote an opinion, Judge Kavanaugh expressed similar disdain for his colleagues in the majority for failing to follow what he considers the "modern" approach to antitrust analysis. (*Federal Trade Commission v. Whole Foods Market)* That case involved the merger between premium organic grocery chains Whole

Foods and Wild Oats. Judge Kavanaugh cited Judge Robert Bork's antitrust work, saying the Federal Trade Commission's position – largely adopted by the majority – "calls to mind the bad old days when mergers were viewed with suspicion regardless of their economic benefits." Judge Kavanaugh harshly criticized the majority for what he called resuscitation of the "loose antitrust standards of *Brown Shoe Co. v United States*," which he said failed to "account for the basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine." The case against the merger, he argued, "is weak and seems a relic of a bygone era when antitrust law was divorced from basic economic principles." Judge Kavanaugh seemed to disregard that the majority did engage in "modern" economics, analyzing first submarkets that were distinct from the broader market on which he focused, and where the price effects he focused on exclusively likely could be found. Relatedly, Judge Kavanaugh again seemed to adopt a credulous approach to industry-provided data; where he argued that no price effects had been demonstrated in local markets where one of the two competitors had closed or were not present, the majority pointed out that the company-provided evidence on which he relied looked only at impact on dried goods, not the perishables that were the companies' profit centers.

Judge Kavanaugh also wrote opinions in two other competition policy cases, each involving regulatory approaches from the Federal Communications Commission. The first case involved a decision by the FCC to extend for five years a statutory prohibition against exclusive contracts between cable operators and cable affiliated programming networks, a measure designed to increase market competition and prevent cable companies from leveraging their power in the cable provision market to exert unfair influence over the programming market. Judge Kavanaugh argued the rule had been permissible only because of the bottleneck power that cable companies had wielded, a market power he argued no longer existed thanks to satellite TV offerings and other means of competition. From a competition standpoint, his argument raised two issues: First, the claim that cable companies no longer exerted market power was, at minimum, contestable, raising again the question of Judge Kavanaugh's predilections in this area. Second, and of more doctrinal importance, was his argument that pro-competition measures could not be justified – at least against the purported First Amendment interests of cable companies – in the absence of a demonstrated market power problem.

The second case involved a challenge to the FCC's Net Neutrality rule, a pro-competition measure designed to prevent internet service providers (ISPs – commonly cable companies) from leveraging their power to disadvantage competitor content providers or to charge tolls to content providers and in the process disadvantage consumers who would face either higher costs or diminished quality Internet service. (*United States Telecom Association v. Federal Communications Commission*) By a 2-1 majority, the court held that the FCC had acted reasonably. Dissenting, Judge Kavanaugh again argued that what he claimed to be limits on the First Amendment rights of cable companies and ISPs could not be justified in the absence of a showing of monopoly power: "[A]bsent a showing of market power, the Government must keep its hands off the editorial decisions of Internet service providers." (Judge Kavanaugh described ISPs charging tolls to or providing inferior connections to disfavored content providers as "editorial decisions.") As with the cable exclusive contract issue, the implication of Judge Kavanaugh's position is that the agency could not adopt vital rules designed to promote market

competition in what is arguably the most important expressive platform of all time, unless it could first establish an already existing monopoly problem.

Read together, Judge Kavanaugh's split decision opinions on competition policy manifest a strong preference for a hands-off government approach to competition policy, a readiness to credit industry's self-interested claims of "efficiencies" and pro-consumer, pro-competitive effects against both strong counter evidence and legions of experience, and a disdain for evaluation of non-price impacts of mergers and monopolistic arrangements.

Judge Kavanaugh's Opinions in Split Decision Antitrust Cases

Kavanaugh for governmental antitrust enforcement	**Kavanaugh for corporate challenges to governmental antitrust enforcement**
	FTC v. Whole Foods Mkt., Inc. (No. 07-5276), 533 F.3d 869, amended and reissued by 548 F.3d 1028
	*United States v. Anthem, Inc.,*855 F.3d 345
TOTAL: 0	TOTAL: 2

Note: Judge Kavanaugh wrote opinions in two split decision cases involving *FTC v. Whole Foods*, implicating the same issues. To avoid double counting, we counted only one.

III. JUDGE KAVANAUGH'S OPINIONS IN SPLIT DECISION CASES

Year	Name	Case Summary
2006	Baker & Hostetler LLP v. Dep't of Commerce, 473 F.3d 312	By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that a law firm was entitled to government-paid attorneys' fees for a successful Freedom of Information Act lawsuit related to documents that the law firm had itself requested. Dissenting, Judge Henderson argued that law firm should not be entitled to fees in such a circumstance, based both on the text of FOIA and the fear that law firms might file FOIA lawsuits for the self-interested purpose of generating fees, rather than a genuine effort to obtain information held by the government.
2006	Redman v. Graham, No. 05-7160, 2006 U.S. App. LEXIS 28147	By a 2-1 majority, the court vacated the district court's decision to dismiss the plaintiff's discrimination and retaliation claim against a law firm that had represented her in an eviction proceeding. Judge Kavanaugh dissented, arguing there was no authority under relevant statutes to hold an attorney representing a client in an eviction proceeding liable for discrimination.
2007	United States v. Askew,482 F.3d 532, rev'd en banc, 529 F.3d 1119 (D.C. Cir. 2008)	By a 2-1 majority, the court held that during a *Terry* stop – a brief detention based on reasonable suspicion, but short of probable cause – it was not a violation of the suspect's Fourth Amendment rights for the police to partially unzip his jacket. (Unzipping the jacket revealed the suspect was illegally carrying a gun.) Dissenting, Judge Edwards argued the police did violate the suspect's Fourth Amendment rights.
2007	Valdes v. United States, 475 F.3d 1319 (en banc)	An en banc panel held that a police detective who searched police databases to provide otherwise public information to an informant, apparently in exchange for cash, could not be convicted of receiving an illegal gratuity "for or because of an official act." An official act, they held, must relate to a matter, suit, proceeding or controversy; misuse of government resources by itself is not enough. Judge Kavanaugh, joined by Judge Williams, concurred to emphasize that the majority's holding was narrow and that public officials also remain subject to bribery laws. Judges Garland, Sentelle, Henderson, Randolph and Brown dissented, arguing that the defendant's action did constitute an official act, the definition of which must include investigations.

2007	Jackson v. Gonzales, 496 F.3d 703	An African-American employee of the Bureau of Prisons was denied a promotion, which was instead granted to a white employee. The African-American employee sued, alleging racial discrimination. The court by a 2-1 vote, with Judge Kavanaugh writing for the majority, found no discrimination, concluding that the Bureau properly gave the position to the applicant who scored the highest on a test. Dissenting, Judge Rogers argued that the majority neglected the employee's argument that the asserted nondiscriminatory rationale for the hiring decision was merely pretextual, and that the district court therefore should not have granted summary judgment for the employer.
2007	Am. Fed'n of Gov't Emps., AFL-CIO v. Gates, 486 F.3d 1316	The American Federation of Government Employees sued the Department of Defense over regulations, issued pursuant to the National Defense Authorization Act for Fiscal Year 2004, curtailing the right of Defense Department civilian employees to engage in collective bargaining. In a 2-1 decision, authored by Judge Kavanaugh, the court held that the plain language of the Act authorized the Defense Department to restrict collective bargaining rights. Dissenting, Judge Tatel argued the majority misinterpreted the statute.
2007	Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279	Public Citizen sued the National Highway Traffic Safety Administration, alleging that the agency acted arbitrarily and capriciously by not issuing a stronger standard for tire pressure monitoring systems in new vehicles. By a 2-1 majority, in an opinion written by Judge Kavanaugh, the court held that the organization had not established standing because it had not shown that the standard issued substantially increased its members' risk of a substantial risk of injury. The alleged harms were held to be too remote and speculative, and the court sought further evidence from Public Citizen to establish standing. Dissenting, Judge Sentelle argued the case should have been dismissed outright.
2007	Doe I v. Exxon Mobil Corp., 473 F.3d 345	Indonesian villagers sued Exxon, claiming that Exxon relied on the Indonesian military to provide security for its operations in the Aceh province of Indonesia, and that these security forces committed murder, torture and other torts. By a 2-1 majority, the court denied Exxon's appeal that the plaintiffs' claims were non-justiciable political questions. Judge Kavanaugh dissented, arguing that lawsuits that would adversely affect the foreign policy of the United States can pose non-justiciable political questions, and that the courts should give deference to Executive Branch reasonable claims that a lawsuit would harm U.S. foreign policy interests. In this case, Judge Kavanaugh argued, those reasonable claims had been made and thus the plaintiffs' case

		should be dismissed.
2007	Sims v. Johnson, 505 F.3d 1301	By a 2-1 majority, the court vacated a district court decision concerning payment of attorneys' fees in a discrimination case. The court found that the record did not reveal the terms of a settlement agreement that was the basis for the plaintiff's request for declaratory relief. Judge Kavanaugh dissented, arguing the settlement terms were clear and the request for declaratory relief should be denied.
2008	United States v. Gardellini, 545 F.3d 1089	By a 2-1 majority, the court upheld the sentence for a defendant who pled guilty to filing a false income tax return, against the prosecution's argument that the sentence improperly and unreasonably departed from the Sentencing Guidelines. The court noted that after *Booker*, appeals courts should afford high deference to the sentencing decisions of trial courts, even when they depart from the Sentencing Guidelines. Dissenting, Judge Williams argued that the defendant's sentence – a probation term (which he would serve while in Belgium), as against the Sentencing Guidelines recommendation of 10-16 months imprisonment – disregarded the deterrence factor in sentencing and was an abuse of discretion.
2008	United States v. Askew, 529 F.3d 1119 (en banc)	An en banc panel held that during a *Terry* stop – a brief detention based on reasonable suspicion, but short of probable cause – it was a violation of the suspect's Fourth Amendment rights for the police to partially unzip his jacket, where they had no protective interest in doing so. (Unzipping the jacket revealed the suspect was illegally carrying a gun.) Judge Kavanaugh, joined by Judges Sentelle, Henderson and Randolph, dissented, arguing that the officers did have a reasonable basis to protect themselves by unzipping the jacket.
2008	In re Sealed Case, 527 F.3d 188	A defendant pled guilty to drug related charges and cooperated extensively with law enforcement. He was sentenced to time served and five years of supervised release. He then committed several modest violations of the terms of his supervised release. The district court sentenced him to 18 months imprisonment. By a 2-1 majority, the court vacated the sentence on the grounds that the district court provided no explanation of its reasons for the sentence. Judge Kavanaugh dissented, arguing the district court adequately explained its rationale.

2008	In re Navy Chaplaincy, 534 F.3d 756	A group of Protestant Navy chaplains sued the Navy, claiming the Navy's retirement system discriminated in favor of Catholic chaplains in violation of the First Amendment's Establishment Clause. The court held 2-1, with Judge Kavanagh writing the majority opinion, that the chaplains did not have standing to bring their claim.
2008	Noble v. Sombrotto, 525 F.3d 1230	A member of the National Association of Letter Carriers sued union officers claiming they violated their fiduciary duty to union members, by improperly paying for various union officer expenses and benefits. The court upheld the district court dismissal of certain of the member's claims but reversed the district court's dismissal of the member's claim about improper, unmonitored "in-town" expense allowances. Judge Kavanaugh dissented from the portion of the decision reversing the district court on the expense allowance issue, contending the court should defer to union officials' interpretation of what is authorized under the union constitution.
2008	Agri Processor Co., Inc. v. NLRB, 514 F.3d 1	Agri Processor's workers voted to unionize, but the company refused to negotiate, claiming that many of the voting employees were undocumented immigrants. The court by a 2-1 vote upheld the National Labor Relations Board finding that the undocumented immigrants qualified as "employees" under the terms of the National Labor Relations Act, and that the company's action was therefore illegal. In dissent, Judge Kavanaugh argued that the immigrants should not be considered employees under the Act, and that the union election was therefore improperly tainted.
2008	Sierra Club v. EPA, 536 F.3d 673	The 1990 amendments to the Clean Air Act required certain stationary sources of pollution to obtain permits that identify emission limits and require emission monitoring. The Environmental Protection Agency promulgated a rule preventing states and localities from supplementing inadequate monitoring for stationary sources of air pollution. By a 2-1 majority, the court held the EPA's rule conflicted with the statutory requirement for adequate monitoring. Judge Kavanaugh dissented, arguing that the statute supported the EPA's action.
2008	Am. Bird Conservancy, Inc. v. FCC,516 F.3d 1027	By a 2-1 majority, the court vacated an order by the Federal Communications Commission regarding pending communications towers, concluding that it had failed to apply the proper National Environmental Policy Act (NEPA) standard, mandating at least preparation of an environmental assessment, and to undertake required consultations with the Fish and Wildlife Service pursuant to the Endangered Species Act. Judge Kavanaugh dissented, claiming the environmental organizations'

		lawsuit was unripe.
2008	Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, aff'd in part, rev'd in part, 561 U.S. 477 (2010)	The Sarbanes-Oxley financial reporting legislation adopted after the Enron scandal created a Public Company Accounting Oversight Board, with members appointed by and removable only for cause by Securities and Exchange Commissioner commissioners, who are in turn removable by the President only for cause. By a 2-1 majority, the court upheld the constitutionality of the board's structure against a claim that it violated the separation of powers because it did not provide adequate presidential control. Dissenting, Judge Kavanaugh argued that the structure violated the separation of powers.
2008	Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227	An association of amateur radio operators challenged a Federal Communications Commission regulation relating to radio spectrum. By a 2-1 majority, the court found the FCC rule not to have satisfied notice-and-comment requirements under the Administrative Procedure Act, because the agency redacted studies on which it relied in promulgating the rule. The court also remanded to the FCC to provide a reasoned explanation for why it used a certain measurement in assessing the impact of its rule on amateur radio operators and to dismiss empirical data that suggested that measurement was flawed. Judge Kavanaugh dissented in part, raising concerns about the jurisprudence on disclosure of studies, and arguing that the FCC had provided an adequate explanation for its decision to use the measurement in question.
July 2008	533 F.3d 869, amended and reissued by 548 F.3d 1028	By a 2-1 majority, the court reversed the district court's denial of a preliminary injunction to block a merger between Whole Foods and Wild Oats, two premium, organic supermarket chains. Judge Kavanaugh dissented, arguing that the court employed too weak a standard for issuance of a preliminary injunction and that the Federal Trade Commission had not established that the merged entity would have market power.
Nov, 2008	FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, amending and superseding 533 F.3d 869 (D.C. Cir. 2008) and denying petition for en banc rehearing	An en banc panel denied a petition for rehearing in a merger review case. Judge Kavanaugh dissented.

2009	Cohen v. United States, 578 F.3d 1, reh'g granted in part, vacated in part, 599 F.3d 652 (D.C. Cir. 2010)	The Internal Revenue Service improperly applied a tax on long-distance phone calls. The IRS created a process for collecting refunds of improperly collected taxes but many taxpayers did not apprise themselves of this mechanism. By a 2-1 majority, the court reversed district court's dismissal of a lawsuit arguing the IRS action was unlawful. Judge Kavanaugh dissented, arguing that claims over tax laws and regulations must be brought in a refund suit, after exhaustion of administrative remedies.
2009	Kiyemba v. Obama, 561 F.3d 509	Nine Uighurs, held at Guantanamo Bay, challenged their detention, petitioning for a writ of habeas corpus, and seeking to prevent their transfer to a country in which they feared they would be tortured.. The court overturned the district court grant of habeas, holding that Supreme Court precedent prevented the grant of habeas on the grounds of fear that a detainee may be punished in the country to which he or she will be transferred. Judge Kavanaugh concurred, arguing that courts must defer to executive branch determinations that detainees will not be tortured in the countries to which they will be transferred, especially so in the case of wartime alien detainees. Judge Griffith dissented in part, arguing that the detainees were entitled to some notice of their transfer and an opportunity to challenge the assurances of safety.
2010	United States v. Jones, 625 F.3d 766 (denying rehearing en banc)	An en banc panel denied a petition for rehearing in a case in which the three-judge panel held the government's warrantless, 4-week use of a GPS system to track a defendant's vehicle violated the Fourth Amendment. Judge Kavanaugh dissented, arguing that the legal issues were close enough that rehearing should be granted.
2010	Am. Trucking Ass'ns, Inc. v. EPA, 600 F.3d 624	By a 2-1 majority, the court in a decision written by Judge Kavanaugh upheld a California rule, authorized by the Environmental Protection Agency, limiting emissions from in-use non-road engines (such as used for truck refrigeration units). Judge Williams dissented in part, arguing that the EPA improperly failed to consider whether the California standard amounted to an impermissible national standard.
2010	Howmet Corp. v. EPA, 614 F.3d 544	By a 2-1 majority, the court upheld the Environmental Protection Agency's finding that a company called Howmet violated rules for the disposal of hazardous waste. The court concluded that the EPA's interpretation of which materials were subject to the regulation was reasonable, and that Howmet had adequate notice of the agency's interpretation. Judge Kavanaugh dissented, arguing that the EPA's interpretation conflicted with an earlier interpretation of the statute such that it exceeded the EPA's authority, and that Howmet permissibly disposed of the

		hazardous waste.
2010	Koretoff v. Vilsack, 614 F.3d 532	By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that almond growers had the right under the Agricultural Marketing Agreement Act of 1937 to challenge a Department of Agriculture rule mandating that almonds produced in the United States be pasteurized or chemically treated to prevent salmonella outbreaks. Judge Henderson dissented, arguing that only almond handlers, not producers, have the right under the act to bring suit.
2010	Cablevision Sys. Corp. v. FCC, 597 F.3d 1306	The Federal Communications Commission extended for five years a statutory prohibition against exclusive contracts between cable operators and cable affiliated programming networks. By a 2-1 majority, the court held that the FCC had acted reasonably. In response to the dissent, the court ruled that the cable companies had not mounted a First Amendment challenge to the FCC's action, and that in any case the First Amendment issue had been resolved in a prior case. Dissenting, Judge Kavanaugh argued that the prohibition violated the First Amendment rights of cable companies to exercise editorial discretion.
2010	Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union, 589 F.3d 437	By a 2-1 majority, the court in a decision written by Judge Kavanaugh affirmed a district court decision concerning a dispute between two unions. The court held that the district court was correct in deferring to an arbitrator's decision, even though the arbitrator's decision was probably erroneous, because of the high deference afforded arbiters in labor arbitration decisions. Judge Sentelle dissented, arguing that the arbitrator's decision was so far removed from the underlying collective bargaining agreement that the court should not defer to it.
2011	America v. Mills, 643 F.3d 330	A former employee of the Small Business Administration alleged discriminatory treatment and settled a lawsuit for a monetary payment and a commitment to neutral references for future potential employers. By a 2-1 majority, the court held in a decision written by Judge Kavanaugh that negative statements made in a reference were not material and therefore did not breach the settlement agreement. Dissenting, Judge Brown argued that negative comments violated the terms of the agreement.

2011	Stephens v. U.S. Airways Grp., Inc., 644 F.3d 437	Two retired pilots sued US Airways, contending that the airline was obligated to pay them interest on a delay in making a lump sum pension payment; lump sum payments were paid 45 days later than the first annuity payment they could alternatively receive. Judge Brown wrote the opinion for the court, with which Judge Kavanaugh concurred. Judge Kavanaugh argued that ERISA demands that lump sum payments be actuarially equivalent to annuity payments, and this equivalence could only be afforded if interest was paid during the delay. In dissent, Judge Henderson argued that reasonable delays in calculating the lump sum owed did not necessitate interest payments under ERISA's rules.
2011	Rattigan v. Holder, 643 F.3d 975, reh'g granted, judgment vacated by No. 10- 5014, 2011 U.S. App. LEXIS	An FBI employee alleged he was discriminated against in violation of Title VII of the Civil Rights Act of 1964, when in response to reporting unfounded security concerns, the Bureau investigated his security clearance. By a 2-1 majority, the court vacated a verdict for the employee, arguing that the jury had impermissibly considered security-related matters in their deliberation. The court remanded to the trial court, to give the employee a chance to prove his case without implicating any security issues at the FBI. Judge Kavanaugh dissented, arguing that Supreme Court precedent established that agency security clearance decisions, including reports of potential security risks, are not judicially reviewable.
2011	Roth v. Dep't of Justice, 642 F.3d 1161	A death row inmate sought information under the Freedom of Information Act that he believed might show his innocence by establishing four other men were responsible for the quadruple homicide of which the inmate was convicted. The FBI neither confirmed nor denied it had the requested records, contending it could withhold information under FOIA Exemption 7(c), permitting the withholding of law-enforcement records to protect against unwarranted invasions of privacy. The district court agreed. By a 2-1 majority, the court reversed the district court, holding that the public interest in whether FBI information might corroborate a death row inmate's claim of innocence outweighed the privacy interests of the other men. Judge Kavanaugh dissented, arguing that precedent established that FOIA cannot ordinarily be used to obtain private information from law enforcement relating to a criminal prosecution.
2011	Sw. Airlines Co. v. Transp. Sec. Admin., 650 F.3d 752	By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that the Transportation Safety Administration's calculation of fees imposed on airlines to fund security screenings was not arbitrary and capricious, and that the agency had adequately considered a Department of Transportation report that it did not rely upon in making its final determination.

		Judge Brown dissented, arguing that TSA impermissibly failed to consider the data in the Department of Transportation report.
2011	Seven-Sky v. Holder, 661 F.3d 1, abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)	Two members of a three judge panel determined that the Affordable Care Act was constitutional, as against the argument that the Affordable Care Act's "mandate" (requirement for all persons to maintain health insurance) exceeded Congressional authority under the Commerce Clause. Judge Kavanaugh dissented as to the court's jurisdiction to hear the case; he argued that because the mandate was enforced with a tax penalty, the plaintiff's lawsuit was subject to the Anti-Injunction Act, which denies jurisdiction over pre-enforcement tax controversies.
2011	Cohen v. United States, 650 F.3d 717 (en banc)	The Internal Revenue Service improperly applied a tax on long-distance phone calls. The IRS created a process for collecting refunds of improperly collected taxes but many taxpayers did not avail themselves of this mechanism. In this case, an en banc panel upheld the determination of the three-judge panel that the courts had jurisdiction to hear the case. Judge Kavanaugh, joined by Judges Sentelle and Henderson, dissented, arguing that the case was barred because the plaintiffs had an alternative adequate remedy in tax refund suits, and that the case was not ripe because the plaintiffs had not first filed a refund claim with the IRS.
2011	Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, vacated by 527 F. App'x 7 (D.C. Cir. 2013)	Indonesian villagers sued Exxon, claiming that Exxon relied on the Indonesian military to provide security for its operations in the Aceh province of Indonesia, and that these security forces committed murder, torture and other torts. By a 2-1 majority, the court held that the plaintiffs' claims against Exxon under the Alien Tort Statute should be permitted to proceed. Judge Kavanaugh dissented, arguing that the Alien Tort Statute should neither cover injuries that occurred abroad nor apply to corporations. Note: this is a parallel but distinct case from *John Doe I v. Exxon Mobil Corp*, involving separate legal claims and different Does.
2011	Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep't of Treasury, 638 F.3d 794	By a 2-1 majority, the court in a decision written by Judge Kavanaugh determined that the Treasury Department permissibly refused to renew the license of a Cuban corporation trademark. The court held the action was authorized under a 1998 law and that earlier Treasury regulations did not create a right to perpetual renewal for corporation trademarks. Judge Silverman dissented, arguing that the department's action violated the presumption against retroactivity.

2011	Heller v. Dist. of Columbia, 670 F.3d 1244	By a 2-1 majority, the court held that the District of Columbia had authority to promulgate prohibitions on assault weapons and large-capacity magazines, as well as to adopt certain registration requirements, and that these measures did not violate the Second Amendment. Judge Kavanaugh dissented, arguing that the bans violated the Second Amendment, and could not be squared with the Supreme Court's striking down of a DC ban on handguns.
2012	United States v. Burwell, 690 F.3d 500 (en banc)	A defendant was convicted of participation in a violent crime spree. He was given a thirty-year sentence pursuant to a law mandating such a sentence for anyone carrying a machine gun committing a crime of violence. The defendant claimed he did not know his AK-47 could fire automatically. An en banc panel held that the conviction was lawful, and that mens rea – a knowing state of mind – was not required for every element of an offense. Judge Kavanaugh, joined by Judge Tatel, dissented, arguing that the traditional presumption of a mens rea requirement should apply in this case.
2012	Rattigan v. Holder, 689 F.3d 764	An FBI employee alleged he was discriminated against in violation of Title VII of the Civil Rights Act of 1964, when in response to reporting unfounded security concerns, the Bureau investigated his security clearance. By a 2-1 majority, the court held that the employee's case could proceed, however only if he could establish that Bureau employees who reported him and prompted the investigation of his clearance acted with a retaliatory or discriminatory motive in reporting information they knew to be false. Judge Kavanaugh dissented, arguing that Supreme Court precedent established that agency security clearance decisions are not judicially reviewable. This decision was issued upon rehearing, following a previous decision on the same issue in which Judge Kavanaugh dissented on the same grounds.
2012	Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483	By a 2-1 majority, the court held that a random drug testing policy for all employees working at Job Corps Civilian Conservation Centers violated the Fourth Amendment prohibition on unreasonable searches. Judge Kavanaugh dissented, arguing "common sense" strongly supported a narrowly targeted drug testing program.
2012	Miller v. Clinton, 687 F.3d 1332	The State Department terminated an employee stationed abroad solely because he turned 65 years old. By a 2-1 majority, the court held that the Basic Authorities Act did not exempt the State Department from the Age Discrimination in Employment Act's broad proscription against age discrimination. Dissenting, Judge

		Kavanaugh argued that the Basic Authorities Act does permit the department to maintain a mandatory retirement age.
2012	EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, rev'd and remanded, 134 S. Ct. 1584 (2014)	Various states, industry groups and others challenged the Environmental Protection Agency's Cross-State Air Pollution Rule, which established emission reduction standards for upwind states. By a 2-1 majority, in a decision written by Judge Kavanaugh, the court held that the EPA's action exceeded its authority under the Clean Air Act. Dissenting, Judge Roberts argued the majority ignored the plain text of the Clean Air Act and upset Congress's vision of cooperative federalism between the states and federal government in implementing the Act.
2012	Coal. for Responsible Regulation, Inc. v. EPA, Nos. 09-1322 et al., 2012 U.S. App. LEXIS 25997 (Dec. 20, 2012) (denying rehearing en banc)	The Environmental Protection Agency promulgated a series of regulations treating greenhouses gases including carbon dioxide as air pollutants. A three judge panel upheld EPA's actions and an en banc panel denied a petition for review filed by industry and some states. Judge Kavanaugh dissented, arguing that EPA exceeded its statutory authority under the Prevention of Significant Deterioration provisions of the Clean Air Act.
2012	Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169	Food and petroleum trade associations sued to challenge EPA's approval of gasoline with 15 percent ethanol content, arguing it would cause increases in costs of food and petroleum production. By a 2-1 majority, the court dismissed the plaintiffs' claims for lack of standing. Judge Kavanaugh dissented, arguing that the industry groups had standing and that the EPA's approval violated the Clean Air Act.
2012	Hall v. Sebelius, 667 F.3d 1293	By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that individuals eligible for Medicare Part A cannot disclaim their legal entitlement to Medicare. (The plaintiffs would obtain superior insurance coverage from their private insurers, but only if they were not covered by Medicare.) Judge Henderson dissented, arguing that the Social Security Administration had no statutory basis for the position that individuals could not decline Medicare, or that they must in the process forego their Social Security retirement benefits.
2012	South Carolina v. United States, No. 12-203, 2012 U.S. Dist. LEXIS 188558 (D.D.C.	By a 2-1 majority, the court held that attorney-client privilege should not protect from discovery materials relating to the development of Act R54, a bill that allegedly denied the voting rights of African Americans. The materials had been drafted with the involvement of or reflected conversations involving South Carolina Judiciary Committee attorneys. The court held that

	Aug. 3, 2012)	political and strategic inputs from attorneys, distinct from legal advice, should not be covered by the privilege. Dissenting, Judge Kavanaugh argued the documents should be covered by attorney-client privilege.
2012	In re Aiken Cty., No. 11- 1271, 2012 WL 3140360, mandamus granted, 725 F.3d 255 (D.C. Cir. 2013)	By a 2-1 majority, the court in a decision written by Judge Kavanaugh granted a petition for mandamus ordering the Nuclear Regulatory Commission to issue a decision on the Department of Energy's application to store nuclear waste at Yucca Mountain. Judge Garland dissented, arguing that mandamus should only issue in extraordinary circumstances, and not in this case, where the commission did not have sufficient funds to make meaningful process in considering the department's application.
2012	Angellino v. Royal Family AlSaud, 681 F.3d 463, amended and superseded by 688 F.3d 771 (D.C. Cir. 2012)	By a 2-1 majority, the court held that a pro se defendant should be afforded extra time to serve the Royal Saudi family members he was suing. Judge Kavanaugh dissented, arguing that the plaintiff had not made sufficient efforts to effect service, and that the appeals court should defer to the district court's close-call decision to dismiss.
2012	Belize Soc. Dev. Ltd. v. Gov't of Belize, 668 F.3d 724	By a 2-1 majority, the court determined that a district court exceeded its authority in granting a stay in a case to enforce an arbitration award against the Government of Belize. The Belize government had requested the stay pending resolution of its dispute with a telecommunications company in a case before the Belize Supreme Court. Judge Kavanaugh dissented, arguing there was no appellate jurisdiction.
2013	United States v. Martinez-Cruz, 736 F.3d 999	A defendant was convicted of conspiracy to distribute methamphetamine, but was denied a lower sentence because of a past driving under the influence plea. He claimed that he was not informed of his right to counsel for the DUI charge, alleging the conviction therefore to have been unconstitutional. By a 2-1 majority, the court held that the defendant, having created a reasonable inference of wrongful conviction, shifted the burden of persuasion to the government. Dissenting, Judge Kavanaugh argued that the burden of proof should rest with the defendant.
2013	United States v. Malenya, 736 F.3d 554	A defendant pled guilty to attempting to have sex with a 14-year-old boy, and was sentenced to a year in prison and three years of supervised release subject to special conditions, including limited access to the internet and a prohibition on living or working arrangements in proximity to children. By a 2-1 majority, the court vacated the special conditions as an excessive burden on his liberty. Judge Kavanaugh dissented, arguing the special

		conditions were reasonable, with one exception.
2013	Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939	An African-American former employee of the Office of the Chief Administrative Officer of the U.S. House of Representatives alleged she was fired based on her race and was otherwise the victim of racial discrimination. By a 2-1 majority, the court overturned the district court's determination that her major claims must be dismissed because they would implicate the Speech or Debate Clause. Dissenting, Judge Kavanaugh argued that because the employer's reason for firing involved the plaintiff's performance of legislative activity protected by the Speech or Debate Clause, her lawsuit should be dismissed.
2013	In re Aiken County, 725 F.3d 255	By a 2-1 majority, the court held in abeyance a petition for mandamus related to the proposed Yucca Mountain nuclear waste site. Concurring, Judge Kavanaugh argued that a postponement was appropriate to assess whether Congress appropriated funds to act on the Department of Energy's petition to the Nuclear Regulatory Commission to store nuclear waste at Yucca Mountain. Judge Sentelle dissented, arguing that the NRC had a clear, Congressionally mandated duty, and mandamus should issue immediately.
2013	Texas v. EPA, 726 F.3d 180	Industry Petitioners and a few states challenged EPA's permitting requirements under a rule regulating greenhouses gases emitted by cars and light trucks under the Clean Air Act (the Tailpipe Rule). The majority concluded that the petitioners lacked standing; if an injury had been caused to the states, the majority held, it was done by the statute itself, not the EPA's implementation of its permitting rules. Judge Kavanaugh dissented, arguing that the EPA's promulgation of federal implementation plans for noncompliant states violated agency regulations and was unlawful.
2013	Ctr. for Biological Diversity v. EPA, 722 F.3d 401	By a 2-1 majority, the court held that an Environmental Protection Agency decision to defer regulation of "biogenic" carbon-dioxide – non-fossil-fuel carbon dioxide, such as ethanol – was arbitrary and capricious. Judge Kavanaugh concurred, arguing that there was no basis in the text of the Clean Air Act to justify the EPA treating biogenic carbon dioxide differently than fossil-fuel-generated carbon dioxide. Judge Henderson dissented, arguing the EPA needed time to study the issue properly, and that the case was unripe.

2013	Grocery Mfrs. Ass'n v. EPA, 704 F.3d 1005 (denying rehearing en banc)	Food and petroleum trade associations sued to challenge EPA's approval of gasoline with 15 percent ethanol content, arguing it would cause increases in costs of food and petroleum production. An en banc panel denied the trade associations' petition for rehearing on the issue of whether they had standing. Judge Kavanaugh dissented, arguing that the industry groups had standing.
2013	Gordon v. Holder, 721 F.3d 638	By a 2-1 majority, the court upheld the district court's preliminary injunction against provisions of the Prevent All Cigarette Trafficking Act that required cigarette sellers to pay state and local taxes for cigarettes shipped to other states. The court found the constitutional question to be close and so affirmed the district court's conclusion that the provisions violated the Due Process Clause. The court upheld provisions of the Act banning cigarette sales through the U.S. mail. Judge Kavanaugh dissented in part, arguing that the Due Process claim lacked merit and that the preilminary injunction should be vacated.
2013	Moore v. Hartman, 704 F.3d 1003	By a 2-1 majority, the court held that a plaintiff alleging a violation of the First Amendment right to be free of retaliatory prosecution does not need to prove an absence of probable cause. Dissenting, Judge Kavanaugh argued that because the law in this area was unsettled, the defendants were entitled to qualified immunity.
2013	Huthnance v. Dist. of Columbia, 722 F.3d 371	A jury awarded compensation to a Washington, D.C. resident who claimed the DC police violated her constitutional rights when they arrested her for disorderly conduct. By a 2-1 majority, the court found two jury instructions to be improper, but held the error to be not prejudicial. Judge Kavanaugh dissented, arguing that the error was very damaging to the defendants.
2013	Honeywell Int'l, Inc. v. EPA, 705 F.3d 470	By a 2-1 majority, the court in a decision written by Judge Kavanaugh ruled that HCFC transfers made pursuant to a cap-and-trade system under the Clean Air Act were valid, and thus a challenge by competitor companies should be rejected. Judge Brown dissented, arguing the petitions were untimely.. .
2014	SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202	After one of SeaWorld's trainers was killed while working in close contact with a killer whale during a performance, the Occupational Safety and Health Review Commission concluded that SeaWorld had violated the OSH Act by exposing trainers to recognized hazards when working in close contact with killer whales during performances. SeaWorld challenged the order. By a 2-1 majority, the court denied the petition for review. Judge Kavanaugh dissented, arguing that the Department of Labor's action was arbitrary and capricious, and outside of the scope of

		the agency's authority to regulate, which he argued did not include entertainment activities.
2014	Nat'l Sec. Archive v. CIA, 752 F.3d 460	The National Security Archive sought under the Freedom of Information Act a Central Intelligence Agency volume analyzing the Bay of Pigs invasion. By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that the CIA properly withheld the volume under FOIA's deliberative process exemption. Dissenting, Judge Roberts argued that a draft document is not automatically deliberative, and that no showing had been made about how this particular release would impede agency decision-making.
2014	Ivy Sports Med., LLC v. Burwell, 767 F.3d 81	The Food and Drug Administration rescinded a prior clearance decision for a medical device after allegations were raised that the clearance process had been tainted by improper political pressure. By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that the FDA's rescission was improper because it did not follow notice and comment procedures. Dissenting, Judge Pillard argued that the FDA could appropriate cure an erroneous decision without following a notice-and-comment process, particularly when it had not employed notice and comment in first clearing the device.
2014	Am. Meat Inst. v. Dep't of Agric., 760 F.3d 18 (en banc)	An en banc panel upheld a Department of Agriculture regulation requiring country-of-origin labeling for certain meat products, as consistent with the First Amendment. Judge Kavanaugh concurred in the judgment on the ground that the government had a substantial interest in promoting the interest of American manufacturers, farmers and ranchers, but noting that the interest in informing consumers would not justify the regulation. Judges Brown and Henderson dissented, arguing that in the absence of health, safety or anti-deception rationales, the government did not have a sufficient interest to burden the First Amendment rights of meat packers with mandated disclosures.
2014	Odhiambo v. Republic of Kenya, 764 F.3d 31	By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that under the Foreign Sovereign Immunities Act, Kenya was not obligated to pay a promised reward to an anti-corruption whistleblower. Judge Pillard dissented in part, arguing that the case should have been permitted to proceed under one of the exceptions to the Foreign Sovereign Immunities Act.

2014	Fogo de Chao (Holdings) Inc. v. DHS, 769 F.3d 1127	By a 2-1 majority, the court reversed a district court decision upholding the Department of Homeland Security's denial of a visa for those with "specialized knowledge" to a trained Brazilian gaucho chef. The court concluded there was no basis for imposing a strict bar on culturally based skills. Judge Kavanaugh dissented, arguing that the department properly determined that cultural background does not constitute specialized knowledge under the relevant immigration statute.
2014	Al Bahlul v. United States, 767 F.3d 1 (en banc)	In a case involving an associate of Osama bin Laden, an en banc panel held that it was permissible for a military commission to try a foreign combattant for conspiracy to commit war crimes. Judge Kavanaugh concurred, arguing that military commissions have traditionally tried individuals for conspiracy, and that international law – which does not make conspiracy a crime – should not be a constraint on the scope of authority of military commissions. Dissenting, Rogers, Tatel and Pillard argued that the prosecution for conspiracy before a military commission improperly infringed on the judiciary's power to preside over the trial of all crimes, under Article III of the Constitution. The permissible role for military commissions, they argued was only to try enemy belligerents for violations of international "laws of war."
2015	White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, judgment reversed by Michigan v. EPA,135 S. Ct. 2699 (2015)	By a 2-1 majority, the court upheld the Environmental Protection Agency's Mercury and Air Toxics Standard (the Utility MACT rule), establishing limits for a number of hazardous air pollutants emitted by coal- and oil-fired electric utility steam generating units. The court determined that the EPA rule was based on a permissible interpretation of the Clean Air Act of 1990. Dissenting, Judge Kavanaugh argued that the EPA's failure to consider the "costs" to industry conflicted with its statutory duty to consider whether air pollution standards were "appropriate."
2015	Morgan Drexen, Inc. v. CFPB, 785 F.3d 684	Morgan Drexen, a firm that provides support to law firms engaged in bankruptcy issues, and an attorney whose practice involves bankruptcy matters, were under investigation by the Consumer Financial Protection Bureau. They sued the bureau, seeking declaratory and injunctive relief, arguing that the CFPB was structured unconstitutionally. By a 2-1 majority, the court upheld the district court's dismissal; the district court found that Morgan Drexen could raise its constitutional challenge as a defense to an enforcement action that the CFPB subsequently brought against the firm, and that the attorney lacked standing. Judge Kavanaugh dissented, arguing that the attorney should have standing.

2015	Sissel v. HHS, 799 F.3d 1035 (denying rehearing en banc)	An en banc panel denied a petition for rehearing in a case involving a challenge to the individual mandate provision of the Affordable Care Act. The panel concluded that the mandate component of the Affordable Care Act did not transform it into a revenue-raising bill requiring that must originate in the House of Representatives. Judge Kavanaugh, joined by three other judges, dissented from the denial of rehearing, arguing that the Affordable Care Act should be treated as a tax bill subject to the Constitution's Origination Clause – but that the Senate's substitution of an entirely different text for a bill that did originate in the House satisfied the Origination Clause.
2015	Priests for Life v. HHS, 808 F.3d 1 (denying rehearing en banc)	The Affordable Care Act requires employers to provide health insurance coverage to employees. By regulation, that insurance must provide contraceptive coverage. The regulations exempt religious non-profit organizations from the contraceptive mandate, so long as they submit a form; the insurers must provide contraceptive coverage, but are funded by the U.S. government. An en banc panel denied a petition for rehearing in a case about the permissibility of this arrangement. Judge Kavanaugh dissented, arguing the arrangement improperly burdened complaining religious organizations exercise of First Amendment guaranteed freedom of religion.
2015	Fla. Bankers Ass'n v. Dep't of the Treasury, 799 F.3d 1065	By a 2-1 majority, the court in a decision written by Judge Kavanaugh determined that a challenge to an Internal Revenue Service Regulation imposing a penalty on U.S. banks that fail to report interest paid to certain foreign account holders was barred as premature by the Anti-Injunction Act, which bars pre-enforcement challenges to tax statutes and regulations. Judge Henderson dissented, arguing the penalty was not a tax covered by the Anti-Injunction Act.
2015	Meshal v. Higgenbotham, 804 F. 3d 417	An American citizen was allegedly held overseas by the FBI for four months without a hearing and subjected to torture. He filed a *Bivens* action, seeking compensation for denial of Fourth Amendment rights. By a 2-1 majority, the court held that a *Bivens* action could not be sustained for abuses conducted overseas in connection with counterterrorism operations. Judge Kavanaugh concurred, emphasizing the national security aspect of the case and arguing that courts should not unilaterally recognize new limits that restrict U.S officers' wartime activities. Judge Pillar dissented, arguing that congressional action supported a *Bivens* action in cases such as this which do not threaten military discipline and where no alternative remedies exist.

2015	Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544	The Environmental Protection Agency issued a rule regulating the use of HFCs, which contribute to climate change. By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that the regulation was inconsistent with the provision of the Clean Air Act from which EPA sought to draw authority; that provision, the court held, did not authorize replacement of non-ozone-depleting substances such as HFCs. Dissenting in part, Judge Wilkins argued that the EPA had reasonably interpreted the statute, since HFCs were themselves a replacement for ozone-depleting substances.
2016	United States v. Nwoye, 824 F.3d 1129	A defendant was convicted with her boyfriend of conspiring to extort money. She claimed she acted under duress, but the trial court refused to instruct the jury on distress, a decision upheld by the appellate court, which cited the defense's failure to introduce expert testimony on battered women's syndrome. By a 2-1 majority, the court in a decision written by Judge Kavanaugh held the defendant was prejudiced by the failure to introduce expert testimony, and remanded to the district court to determine whether the defendant's counsel was constitutionally deficient. Dissenting, Judge Sentelle argued that it was reasonable for the trial court to conclude that there had not been prejudice by the failure to introduce expert testimony.
2016	Al Bahlul v. United States, 840 F.3d 757	An en banc panel upheld a military commission conviction of an associate of Osama bin Laden for conspiracy to commit war crimes. The six-judge majority had different rationales for upholding the conviction. In his concurrence, joined by Judges Brown and Griffith, Judge Kavanaugh argued that Congress may make conspiracy a charge triable by military commission. Judges Rogers, Tatel and Pillard dissented, arguing that the charge could only be brought before an Article III court.
2016	United States v. Williams, 836 F.3d 1	A defendant was convicted of second-degree murder and witness tampering after participating in a gang hazing ritual. By a 2-1 majority, the court reversed the murder conviction due to the prosecution's misstatement of law – relating to what the jury must find about the defendant's state of mind for a conviction – in its closing argument. Judge Kavanaugh concurred, emphasizing the importance of establishing mens rea – guilty state of mind – to sustain a second-degree murder conviction, instead of an involuntary manslaughter conviction. Judge Henderson dissented, arguing that the prosecution did not misstate the law, and that the defendant had the requisite state of mind for a second-degree murder conviction.

2016	Ortiz-Diaz v. Dep't Hous. & Urban Dev., 831 F.3d 488, vacated, 697 F. App'x 6 (D.C. Cir. 2017)	A Department of Housing and Urban Development employee was denied a requested lateral move, allegedly for racially discriminatory reasons. By a 2-1 majority, the court held that denials of lateral moves do not constitute "adverse employment action" under Title VII of the Civil Rights Act of 1964. Judge Kavanaugh concurred, stating that denials of requested lateral moves should be actionable under Title VII, but that he believed the issue was controlled by precedent. Judge Rogers dissented, arguing that denials of lateral moves could be actionable if they result in objective, adverse consequences for the terms of employment.
2016	Verizon New England Inc. v. Nat'l Labor Relations Bd., 826 F.3d 480	By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that union signs appearing in the windows of Verizon employees' cars parked in Verizon's parking lot constituted "picketing," in violation of the Verizon collective bargaining agreement. The rationale for the decision was the need to be "highly deferential" to the findings of the arbitration panel which first decided the case; the court held that the National Labor Relations Board's decision to find the arbitration panel's decision "palpably wrong" was unreasonable. Dissenting in part, Judge Srinivasan argued that the majority failed to properly defer to the NLRB and that the board's decision was not unreasonable.
2016	Int'l Union, Sec., Police and Fire Professionals of Am. v. Faye, 828 F.3d 969	The International Union, Security, Police and Fire Professionals of America sued a non-member employee for encouraging union members to join a rival union, alleging a breach of fiduciary duties. By a 2-1 majority, the court held that the union did have authority under the Labor Management Relations Act to bring the suit. Dissenting, Judge Kavanaugh argued that the Act only conferred authority to bring suits on individual union members, not the union itself.
2016	Mingo Logan Coal Co. v. EPA, 829 F.3d 710	The Environmental Protection Agency revoked a permit for a coal mining company to dump excess rubble into nearby streams because, after additional study, the agency concluded that the coal mining operation would have an unacceptably adverse effect on local wildlife. By a 2-1 majority, the court upheld the EPA's decision. Judge Kavanaugh dissented, arguing that EPA's failure to consider the costs to the company was unreasonable and unlawful.
2016	Wesby v. Dist. of Columbia, 816 F.3d 96 (denying rehearing en banc)	An en banc panel denied a petition for rehearing in a case in which a group of people had sued the District of Columbia and DC police officers for illegal arrest. Judge Kavanaugh, joined by three other judges, dissented, arguing that the officers were

		entitled to qualified immunity because they acted reasonably.
2016	Indep. Inst. v. FEC, 816 F.3d 113	Independence Institute, a 501(c)(3) organization, sought to air electioneering radio ads without disclosing its donors. It sued the Federal Election Commission, arguing the McCain-Feingold campaign finance reform legislation's required disclosure of donors to groups airing electioneering communications violated the First Amendment, and asking the district court to convene a three-judge district court as required for constitutional challenges to McCain-Feingold. By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that the organization was entitled to a three-judge panel. Dissenting, Judge Wilkins argued that the issues raised by the Independence Institute had been conclusively resolved by *Citizens United* and other cases, and that therefore there was no need to convene the three-judge panel.
2017	Garza v. Hargan, 874 F.3d 735 (en banc), cert. granted and vacated as moot, 138 S. Ct. 1790 (2018)	A pregnant minor, detained as an unaccompanied, undocumented immigrant, sought an abortion. The en banc panel reversed a district court order that she could not access abortion services until she was transferred to a sponsor who would take custody of her. Concurring, Judge Millett explained that the district court order violated the minor's constitutional right to an abortion. Judge Kavanaugh, joined by Judges Henderson and Griffith dissented, arguing that the district court order was appropriate in light of the Government's permissible interests in favoring fetal life, protecting the best interests of a minor and refraining from facilitating abortion.
2017	United States v. Anthem, Inc.,855 F.3d 345	The Department of Justice sued to block the proposed merger of Anthem and Cigna, two of the four major health insurance carriers. By a 2-1 majority, the court upheld the district court's injunction stopping the merger, on the grounds that Anthem had not demonstrated extraordinary efficiencies to offset the conceded anti-competitive effects of the merger. Dissenting, Judge Kavanaugh argued that the enhanced market power of the combined insurers would have the pro-competitive effect of enabling them to negotiate lower provider fees.
2017	Midwest Div.–MMC, LLC v. NLRB, 867 F.3d 1288	A peer review committee at Menorah Medical Center, an acute care hospital in Kansas, investigated two nurses for allegedly substandard conduct. By a 2-1 majority, the court sustained the National Labor Relations Board's finding that Menorah committed unfair labor practices in refusing to provide information to the union about the committee's operation. Dissenting in part from the majority, Judge Kavanaugh argued that the unfair labor

		practice finding should be not be sustained. He also argued that employees' Weingarten rights – to have union representatives present in investigative interviews – should not apply to peer review committee interviews.
2017	NLRB v. CNN Am., Inc., 865 F.3d 740	CNN replaced unionized contractors from a company called TVS with non-union, in-house employees, many of whom had previously worked for TVS. The court held that CNN and TVS were not joint employers, reversing the finding of the National Labor Relations Board. By a 2-1 majority, however, the court agreed with the NLRB that CNN was a successor employer and that its hiring decisions had been motivated by anti-union animus, in violation of the National Labor Relations Act. Judge Kavanaugh dissented from the 2-1 majority, arguing that CNN was not a successor employer, at least based on its purportedly anti-union discriminatory hiring practices.
2017	Wash. All. of Tech. Workers v. DHS, 857 F.3d 907	A workers association partially succeeded in a challenge to a Department of Homeland Security practice of allowing student visa holders to remain in the United States after they completed their formal education. The workers association sought legal fees under the Equal Access to Justice Act. By a 2-1 majority, the court upheld a district court decision awarding fees for time spent devoted to the successful claim only. Judge Kavanaugh dissented, arguing that the association prevailed in its effort to have the department rule vacated, and so should be paid fees for all time devoted to the case.
2017	Mexichem Fluor, Inc. v. EPA, 866 F.3d 451	By a 2-1 majority, the court in a decision written by Judge Kavanaugh held that the Environmental Protection Agency could not force replacement of HFCs, which contribute to climate change, under a Clean Air Act provision giving the agency authority to mandate replacement of ozone-depleting substances. HFCs are a substitute for ozone-depleting substances. Dissenting, Judge Williams argued that the EPA could reasonably interpret the statute to include replacement of substances that had themselves been replacements for ozone-depleting substances.
2017	Multicultural Media, Telecom & Internet Council v. FCC, 873 F.3d 932	By a 2-1 majority, in a decision written by Judge Kavanaugh, the court upheld the Federal Communications Commission's decision not to require broadcasters to broadcast emergency alerts in languages other than English, and instead to further study the issue. Judge Millett dissented in part, arguing that the agency's decision to further study the issue was unreasonable in light of the fact that it had studied the question for a decade and had not indicated any new information it sought or needed.

2017	Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078	By a 2-1 majority, in a decision written by Judge Kavanaugh, the court ruled that that the Federal Communications Commission's rule requiring solicited fax advertisements to include information on how the recipient could opt out of receiving future fax advertisements exceeded the FCC's authority. The Junk Fax Prevention Act only authorized the agency to impose such a rule for unsolicited fax advertisements. Dissenting, Judge Pillard argued that the FCC could reasonably interpret the statute to authorize its rule for solicited faxes.
2017	Lorenzo v. SEC, 872 F.3d 578, cert. granted, No. 17-1077, 2018 U.S. LEXIS 3813 (June 18, 2018)	By a 2-1 majority, the court upheld a Securities and Exchange Commission determination that a director at an investment banking firm communicated via email to investors false and misleading statements with requisite intent to be found in violation of SEC rules. The court overturned a determination that the director "made" the statements in violation of an SEC rule, because his supervisor drafted and directed him to send the email. Judge Kavanaugh dissented, arguing that the director could not be found to have willfully made a false statement when he was merely forwarding a message at the instruction of his supervisor.
2017	Competitive Enter. Inst. v. DOT, 863 F.3d 911	By a 2-1 majority, the court held that a statutory ban on "smoking" on airplanes was sufficient basis for a Department of Transportation ban on use of electronic cigarettes. Judge Kavanaugh joined the majority opinion and wrote a brief concurrence. Judge Ginsburg dissented, arguing that "smoking" could not reasonably be construed to include use of electronic cigarettes.
2017	U.S. Telecom Ass'n v. FCC, 855 F.3d 381 (denying rehearing en banc)	An en banc panel denied a petition for rehearing regarding the Federal Communications Commission's Net Neutrality rule. Judge Kavanaugh dissented, arguing that while agencies have authority to issue rules to resolve statutory ambiguities under *Chevron*, an agency can only issue a "major rule" – one of great importance, like the net neutrality rule – with clear congressional authorization, which was lacking. Judge Kavanaugh also argued that the rule violates the First Amendment rights of the Internet service providers (ISPs) by restricting their editorial discretion.
2017	John Doe Co. v. CFPB, 849 F.3d 1129	By a 2-1 majority, the court rejected a company's request for an emergency injunction against a Consumer Financial Protection Bureau Civil Investigative Demand (CID). The company request was based on a challenge to the constitutionality of the CFPB's structure. Judge Kavanaugh dissented, arguing that the company was likely to succeed on the merits because the CFPB's single-

		director for-cause removal structure was unconstitutional.
2017	PHH Corp. v. CFPB, 839 F.3d 1, vacated en banc, 881 F.3d 75 (D.C. Cir. 2018)	By a 2-1 majority, in a decision written by Judge Kavanaugh, the court held that the Consumer Financial Protection Bureau was unconstitutionally structured because it has a single director who can be removed only for cause. The court held that the combination of a single director of an independent agency, and the fact that by statute the director can only be removed for cause, violated constitutional separation of powers principles. The CFPB director, the court held, is too unaccountable, in violation of Article II of the Constitution. Judge Henderson dissented in part, arguing that the relief sought by PHH, a mortgage lender, could have been provided on the grounds that the CFPB's enforcement action contravened its statutory authority, and that the court therefore had no reason to reach constitutional issues.
2018	United States v. Lee, 888 F.3d 503	By a 2-1 majority, the court in a decision written by Judge Kavanaugh found that a defendant who signed a written plea agreement waiving his right to appeal his sentence, but who at his plea hearing was not apprised of the appeal waiver, knowingly waived the right to appeal his sentence. Judge Rogers dissented, arguing that the district court failure to inform the defendant of his waiver of the right to appeal contradicted federal rules of criminal procedure and was not a harmless error.
2018	United States v. Brown, 892 F.3d 385	By a 2-1 majority, the court vacated the sentences of two of four defendants, finding errors in the district court's sentencing calculation and failure to adequately explain why it deviated substantially from the Sentencing Guidelines. Judge Kavanaugh dissented, arguing that one of the defendants waived their right to appeal in a plea agreement, and that the other defendant's sentence was procedurally and substantively reasonable.
2018	Island Architectural Woodwork, Inc. v. NLRB, 892 F.3d 362	The National Labor Relations Board (NLRB) determined that Island Architectural Woodwork, Inc., a unionized company, created an alter ego, non-union employer to do the same work as Island and that Island's collective bargaining agreement should therefore apply to employees of the alter ego. By a 2-1 majority, the court upheld the NLRB's determination. Judge Kavanaugh dissented, arguing that the companies were not alter egos.

2018	PHH Corp. v. CFPB, 881 F.3d 75 (en banc)	An en banc panel overturned an appellate panel holding that the Consumer Financial Protection Bureau was unconstitutionally structured because it has a single director who can be removed only for cause. Judge Kavanaugh, joined by Judge Randolph, dissented, arguing that the CFPB structure violates the separation of powers. Judge Kavanaugh argued that the combination of a single director of an independent agency, and the fact that by statute the director can only be removed for cause, violated constitutional separation of powers principles. The CFPB director, Judge Kavanaugh argued, is too unaccountable, in violation of Article II of the Constitution.

CONCLUSION

Judge Kavanaugh's record on the D.C. Circuit raises serious issues that should be considered before any senator votes on his nomination to the Supreme Court.