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## The Kavanaugh Hearings and the Search for a Just Justice

Caroline Fredrickson

*American Constitution Society*

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## ARTICLE

# THE KAVANAUGH HEARINGS AND THE SEARCH FOR A JUST JUSTICE SUBMISSION

CAROLINE FREDRICKSON\*

On October 6, 2018, Brett Kavanaugh was sworn in as a United States Supreme Court justice.<sup>1</sup> His confirmation process had been *sui generis*, roiled by charges of sexual assault and extreme partisanship. Many of his opponents rallied to support Dr. Christine Blasey Ford who charged the future Justice with having sexually assaulted her in high school. His supporters, on the other hand, including the President who nominated him, claimed the process was “very unfair.”<sup>2</sup> Indeed, President Trump discounted Ford’s testimony entirely, saying that it was “very hard for me to imagine that anything happened.”<sup>3</sup>

However, before we can even analyze the Kavanaugh hearing and process, we have to step back because there is a lot of history that needs to be understood before we can appreciate how little we have advanced since the early 1990s with respect to sexual assault. It had been 27 years since Anita Hill testified against Justice Clarence Thomas,<sup>4</sup> and felt eerily similar. Hill, like Ford, found the Republican senators uninterested and even hostile to her experience, having already decided that they

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\* President, American Constitution Society (AMS), 2009.

<sup>1</sup> See *Biography of the Justices: Justice Brett M. Kavanaugh*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> (last visited Mar. 6, 2019).

<sup>2</sup> Peter Baker & Nicholas Fandos, *Kavanaugh’s Supporters and His Accuser Are at an Impasse Over Her Testimony*, N.Y. TIMES (Sept. 19, 2018), <https://www.nytimes.com/2018/09/19/us/politics/kavanaugh-accusations-trump-blasey-ford.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Elise Viebeck, *Here’s What Happened When Anita Hill Testified Against Clarence Thomas in 1991*, CHICAGO TRIBUNE (Sept. 27, 2018), <https://www.chicagotribune.com/news/nationworld/politics/ct-anita-hill-clarence-thomas-20180927-story.html>.

would vote in favor of Kavanaugh.<sup>5</sup> The Democrats too seemed flummoxed. Senator Dianne Feinstein, the ranking Democrat on the committee, sat on Ford's information for a month before bringing it before the committee.<sup>6</sup> The committee's discomfort was palpable and might have seemed a replay of the Thomas hearings, despite so much time passing—it felt almost as if the #MeToo moment had passed the Senate by.

Moreover, there is other history that is also important to understand before we can evaluate the “fairness” of the process. The fact that Trump was able to fill seats on the Supreme Court depended on a strategy of all-out obstruction by Senate Republican leadership of President Obama's nominees in the last two years of his presidency. In an October 2018 piece in *The New York Review of Books* (TNYRB), historian Christopher R. Browning wrote:

If the US [sic] has someone whom historians will look back on as the gravedigger of American democracy, it is Mitch McConnell. He stoked the hyperpolarization of American politics to make the Obama presidency as dysfunctional and paralyzed as he possibly could. As with parliamentary gridlock in Weimar, congressional gridlock in the US [sic] has diminished respect for democratic norms, allowing McConnell to trample them even more. Nowhere is this vicious circle clearer than in the obliteration of traditional precedents concerning judicial appointments.<sup>7</sup>

McConnell, the Senate Republican leader, aggressively used the filibuster<sup>8</sup> to block Obama's nominations. By 2013, there was such a backlog of executive nominees that the Democratic majority in the Senate, on a partisan 52-48 margin, passed the “nuclear option.”<sup>9</sup> This allowed a

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<sup>5</sup> Jessica Estepa, *Brett Kavanaugh: Who are the Key Votes for Him to Get Confirmed to Supreme Court?*, USA TODAY (Oct. 4, 2019, 2:14 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/10/04/brett-kavanaugh-votes-how-many-does-he-need/1522560002/>.

<sup>6</sup> Sean Sullivan, *‘Why Didn’t She Bring It Up?’: Feinstein Under Scrutiny for Handling of Allegations Against Kavanaugh*, WASHINGTON POST (Sept. 18, 2018), [https://www.washingtonpost.com/powerpost/why-didnt-she-bring-it-up-feinstein-under-scrutiny-for-handling-of-allegations-against-kavanaugh/2018/09/18/0ace9e24-bb78-11e8-9812-a389be6690af\\_story.html?utm\\_term=.4263889f3a14](https://www.washingtonpost.com/powerpost/why-didnt-she-bring-it-up-feinstein-under-scrutiny-for-handling-of-allegations-against-kavanaugh/2018/09/18/0ace9e24-bb78-11e8-9812-a389be6690af_story.html?utm_term=.4263889f3a14).

<sup>7</sup> Christopher Browning, *The Suffocation of Democracy*, N.Y. REV. OF BOOKS (Oct. 25, 2018), <https://www.nybooks.com/articles/2018/10/25/suffocation-of-democracy/>.

<sup>8</sup> The term “filibuster” is defined as an attempt to block or delay Senate action on a bill, nomination, or other matter by debating it at length by offering numerous procedural motions, or by any other delay or obstructive actions; such delay can be brought to an end by a vote of three-fifths (usually 60 or more) members of the Senate to bring debate to a close, known as a “cloture” vote. *Filibuster and Cloture*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Cloture.htm](https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm) (last visited Mar. 5, 2019).

<sup>9</sup> Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASHINGTON POST (Nov. 21, 2013), <https://www.washingtonpost.com/politics/senate-poised->

simple majority of 51 votes to confirm Obama's judicial nominations to the United States courts of appeals and the lower courts, ending the Senate's three-fifths or 60-vote cloture rule for most nominations.<sup>10</sup> The passing of the nuclear option effectively ended the delay of Obama's executive branch nominations, including the 17 judicial nominees pending at the time.<sup>11</sup> In 2014, Republicans regained control of the Senate<sup>12</sup> chamber allowing McConnell to prevent almost all of Obama's nominees from being confirmed with the goal of leaving a significant number of judgeships unfilled at the end of Obama's term. Most significantly, McConnell refused to consider President Obama's nominee, Judge Merrick Garland, to fill the seat on the Supreme Court that came open after Justice Antonin Scalia died in early 2016.<sup>13</sup> McConnell said that because it was an election year, the voters should decide—meaning the next president should decide.<sup>14</sup> [With Donald Trump as president, McConnell has recently reversed course, suggesting that a 2020 vacancy would be considered by the Senate.]<sup>15</sup>

And with Donald Trump's election as president in 2016, McConnell ended the filibuster for Supreme Court nominations—which Democrats had kept in place—in order to complete the “steal” of Scalia's seat from Obama and confirm Trump's nominee, Neil Gorsuch.<sup>16</sup> McConnell showed his partisan colors during the Kavanaugh hearings; rushing them despite lacking a vast trove of background information on the nominee and refusing to allow a full FBI inquiry into the allegations of sexual assault by several survivors. The midterms were coming.

So, was the process “fair?” Unfortunately, while Republicans decried Ford's testimony as unfair, they did not actually try to examine whether Kavanaugh had committed those acts, so how could they know? At the request of Senator Flake (although multiple Democrats had pushed for it as well), an FBI investigation was launched to investigate

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to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\_story.html?noredirect=on&utm\_term=.c9d8269c3cd2.

<sup>10</sup> *Id.*

<sup>11</sup> Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <https://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>.

<sup>12</sup> *US Mid-Term Elections: What is at Stake?*, BBC NEWS (Nov. 6, 2018), <https://www.bbc.com/news/world-us-canada-29412354>.

<sup>13</sup> See Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, THE ATLANTIC (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/>.

<sup>14</sup> *Id.*

<sup>15</sup> William Cummings, *McConnell Appears Open to Election Year Nomination if Supreme Court Seat Vacant in 2020*, USA TODAY (Oct. 8, 2018, 7:34 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/10/08/supreme-court-mitch-mcconnell-2020/1563328002/>.

<sup>16</sup> Berman, *supra* note 13.

only one of the three sexual assault allegations against Justice Kavanaugh. The scope of the FBI investigation was limited, and the number of persons of interest interviewed was only a portion of those named by Dr. Ford.<sup>17</sup> A single copy of the report was made available for senators to review the day before the vote.<sup>18</sup>

Senate Republicans also did not think it appropriate to probe his background as a government lawyer, preventing Democrats from reviewing the many million pages of documents relating to his role as a White House lawyer under President George W. Bush.<sup>19</sup> The Senate Judiciary Committee received only 10% of the documents from Justice Kavanaugh's time in the Bush White House.<sup>20</sup> Bill Burck, who worked under Kavanaugh in the White House, was tasked with leading a team to review documents before they were sent to the Committee.<sup>21</sup> Republicans alleged that the number of documents received, around 100,000, was similar to those obtained for Justice Kagan's hearing, and therefore should be sufficient.<sup>22</sup>

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<sup>17</sup> See Abigail Abrams, *Here Are All the People We Know the FBI Talked to for the Kavanaugh Report*, TIME (Oct. 4, 2018), <http://time.com/5415845/kavanaugh-fbi-investigation-witnesses/>; Jeremy Herb et al., *Sources Describe FBI's Limited Investigation on Kavanaugh*, CNN (Oct. 4, 2018, 7:36 PM), <https://www.cnn.com/2018/10/04/politics/fbi-investigation-parameters-kavanaugh/index.html>.

<sup>18</sup> Morgan Chalfant & Lydia Wheeler, *Five Things to Know About the FBI's Kavanaugh Investigation*, THE HILL (Oct. 3, 2018, 4:25 PM), <https://thehill.com/homenews/senate/409759-five-things-to-know-about-the-fbis-kavanaugh-investigation?amp>.

<sup>19</sup> See Erin Kelly, *Senate Digs Through Record 1 Million Pages of Documents on Supreme Court Nominee Brett Kavanaugh*, USA TODAY (July 31, 2018, 7:55 AM), <https://www.usatoday.com/story/news/politics/2018/07/31/senate-digs-through-record-1-million-pages-documents-kavanaugh/864516002/>.

<sup>20</sup> Letter from all 10 Democratic Members of the Senate Judiciary Committee (Dianne Feinstein, Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie Hirono, Cory A. Booker, and Kamala D. Harris) to Chairman Chuck Grassley (Aug. 28, 2018), available at *Judiciary Committee Democrats Protest Withholding of Kavanaugh Documents*, COMMITTEE ON THE JUDICIARY (Aug. 28, 2018), <https://www.judiciary.senate.gov/press/dem/releases/judiciary-committee-democrats-protest-withholding-of-kavanaugh-documents>.

<sup>21</sup> See Seung Min Kim, *Clearinghouse for Kavanaugh Documents is a Bush White House Lawyer, Angering Senate Democrats*, WASHINGTON POST (Aug. 15, 2018), [https://www.washingtonpost.com/politics/clearinghouse-for-kavanaugh-documents-is-a-bush-white-house-lawyer-angering-senate-democrats/2018/08/15/224973dc-a082-11e8-b562-1db4209bd992\\_story.html?utm\\_term=.c7272d71646e](https://www.washingtonpost.com/politics/clearinghouse-for-kavanaugh-documents-is-a-bush-white-house-lawyer-angering-senate-democrats/2018/08/15/224973dc-a082-11e8-b562-1db4209bd992_story.html?utm_term=.c7272d71646e).

<sup>22</sup> See generally Salvador Rizzo, *Fact-Checking the Bipartisan Spinfest on Brett Kavanaugh's Time at the White House*, WASHINGTON POST (Aug. 15, 2018), [https://www.washingtonpost.com/politics/2018/08/15/fact-checking-bipartisan-spinfest-brett-kavanaughs-time-white-house/?utm\\_term=.c53b4490ae7c](https://www.washingtonpost.com/politics/2018/08/15/fact-checking-bipartisan-spinfest-brett-kavanaughs-time-white-house/?utm_term=.c53b4490ae7c) (discussing that Justice Kagan had 170,000 pages of White House documents reviewed for her Supreme Court nomination hearing; whereas for Kavanaugh's hearing a comparable number of pages were reviewed, however, his grand total of White House documents was significantly more than Kagan, with over 3 million pages of documents).

Among these documents are the significant policy decisions by the George W. Bush White House, including signing statements.<sup>23</sup> Bush's administration pushed an aggressive view of the presidency through these statements, claiming that over 1000 provisions were unconstitutional incursions on Article II powers.<sup>24</sup> In fact, when Kavanaugh was nominated in 2006 to the U.S. Court of Appeals, he was grilled on the statement dealing with torture of detainees, but there are many other statements that collectively lay out breathtaking claims—and “baseless, unprecedented, and sometimes bizarre assertions of presidential power” according to constitutional scholar Peter Shane.<sup>25</sup>

But as much as the process should concern those who think we should know the background of someone ensconced in a job for life, especially one with so much power, we should be even more concerned about our new justice's approach to constitutional and statutory interpretation. Justice Kavanaugh's approach to constitutional interpretation could be defined as “loose” originalism and textualism. That is, he resorts to the theories when they lead to the right conclusions, conservative ones. His opinions as an appellate judge and his other writings wave the flag for those theories without being strict in their application. This is the most dangerous and utilitarian approach to constitutional theory.

In his book, *The Living Constitution*, Professor David Strauss provides a thorough rebuke to originalism, pointing out the many flaws and problematic outcomes.<sup>26</sup> For example, Strauss explains that under an originalist approach, the Supreme Court could not have found “separate but equal” unconstitutional as it did in *Brown v. Board of Education*.<sup>27</sup> Few people could seriously argue that the nineteenth-century framers of the Fourteenth Amendment meant to attack segregated schools in the Amendment.<sup>28</sup> Even Justice Scalia had to admit that his approach did not always work, calling himself a “faint-hearted originalist.” After all, he confessed, “I am an originalist. I am not a nut.”<sup>29</sup> Other died-in-the-wool originalists confess that it is a leaky vessel. According to Georgetown Law Professor Randy Barnett, sometimes the words alone do not answer a contemporary question due to facts that would not have been thought

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<sup>23</sup> Peter M. Shane, *The Senate Must Closely Examine These Documents from Kavanaugh's Bush Years*, SLATE (Aug. 17, 2018, 4:59 PM), <https://slate.com/news-and-politics/2018/08/brett-kavanaughs-bush-documents-show-how-much-power-hed-grant-donald-trump.html>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (Oxford Univ. Press 2010).

<sup>27</sup> *Id.*; see also *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>28</sup> STRAUSS, *supra* note 26, at 25.

<sup>29</sup> Molly McDonough, *Scalia: 'I Am Not a Nut,'* ABA JOURNAL (Apr. 8, 2008, 2:09 PM), [http://www.abajournal.com/news/article/scalia\\_im\\_not\\_a\\_nut](http://www.abajournal.com/news/article/scalia_im_not_a_nut).

possible to the eighteenth-century authors.<sup>30</sup> The text is often vague, how are we to understand what is a reasonable search under the Fourth Amendment when customs agents grab someone's cell phone? Barnett admits that the Constitution "does not say everything one needs to know to resolve all possible cases and controversies."<sup>31</sup> How judges evaluate cases under these circumstances is something even originalists do not agree on among themselves.<sup>32</sup> However, they do tend to agree that all the results should be conservative.

Similarly, on federalism, Kavanaugh favors state power and limits on the federal government—except when he doesn't. "If we get a textualist, originalist justice, then we're likely to get a judge who thinks federalism is important, and that means someone who thinks diversity among the 50 states is a part of our constitutional structure," says Barnett.<sup>33</sup> Which could mean "an increased reigning in of one-size-fits-all federal policies."<sup>34</sup> Kavanaugh is likely to allow states and localities to use aggressive law enforcement tactics instead of supporting a protective Fourth Amendment, and he believes states can restrict reproductive rights for women.

In his first case in the Court dealing with abortion, Kavanaugh revealed his interest in cutting back on access to abortion. By a 5–4 vote, in *June Medical Services v. Gee*, the Court enjoined a Louisiana statute that would have ended almost all abortions in the state.<sup>35</sup> Chief Justice John Roberts and the four liberals blocked the law.<sup>36</sup> It should have been a unanimous decision as the Louisiana law was virtually the same as the one struck down in the Supreme Court's 2016 ruling, *Whole Woman's Health v. Hellerstedt*.<sup>37</sup> To express his disagreement with upholding a precedent of less than two-years-old, Kavanaugh penned a dissent arguing that the law should be allowed to stand;<sup>38</sup> something Mark Joseph Stern in Slate calls "an opinion that should not be taken as anything less

<sup>30</sup> Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 71-72 (2011).

<sup>31</sup> *Id.* at 69.

<sup>32</sup> MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 10 (2013).

<sup>33</sup> Graham Vyse, *What Brett Kavanaugh Means for States*, GOVERNING (Sept. 4, 2018, 2:45 PM), <http://www.governing.com/topics/politics/gov-kavanaugh-states-confirmation-hearing-justice.html>.

<sup>34</sup> *Id.*

<sup>35</sup> *June Med. Servs. v. Gee*, 139 S. Ct. 663 (2019).

<sup>36</sup> *Id.*; Mark Joseph Stern, *Brett Kavanaugh Just Declared War on Roe v. Wade*, SLATE (Feb. 7, 2019, 11:15 PM), <https://slate.com/news-and-politics/2019/02/brett-kavanaugh-june-medical-services-louisiana-john-roberts.html>.

<sup>37</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>38</sup> *June Med. Servs.*, 139 S. Ct. 663.

than a declaration of war on *Roe v. Wade*.”<sup>39</sup> He asserted in his dissent that the Fifth Circuit was correct that Louisiana should have been allowed to enforce the law because the plaintiffs had not worked hard enough to get the surgical privileges required by the law.<sup>40</sup> As Stern writes,

This is classic Kavanaugh. On the U.S. Court of Appeals for the District of Columbia Circuit, Kavanaugh had a penchant for pretending to apply *Roe* while finding arbitrary reasons to uphold abortion restrictions. Kavanaugh let the Trump administration prevent an undocumented minor from terminating her pregnancy, on the laughable theory that she could find a sponsor who would remove her from government custody, where she could reassert control over her body. It was a pseudo-moderate procedural solution that had the effect of denying the undocumented minor abortion access altogether. Here, Kavanaugh made the same play, pretending like he’d found a reasonable middle ground that, in reality, serves to rubber-stamp unconstitutional abortion laws.<sup>41</sup>

However, when it comes to gun regulation, Justice Kavanaugh has a different view and federalism goes out the window. Similarly, he favors business interests over localism; for example, supporting the position that the First Amendment protects the rights of internet service providers whose speech rights apparently suffer from net neutrality.<sup>42</sup> And employers will find a willing ally in their efforts to preempt local minimum wage and sick leave ordinances.<sup>43</sup>

On executive power, what we know so far of Justice Kavanaugh’s record suggests he will be extremely deferential to the President. The new Justice replaces Justice Anthony M. Kennedy, who helped affirm detainee rights in landmark cases during the George W. Bush administration.<sup>44</sup> Kavanaugh brings a long record in this area, very different from that of Kennedy’s. His 12-year tenure on the D.C. Circuit Court shows broad deference to presidential powers on national security and war.<sup>45</sup> He consistently embraced a limited view of the courts’ ability to chal-

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<sup>39</sup> Stern, *supra* note 36; *see also* *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>40</sup> *June Med. Servs.*, 139 S. Ct. 663.

<sup>41</sup> Stern, *supra* note 36.

<sup>42</sup> Vyse, *supra* note 33.

<sup>43</sup> *See id.*

<sup>44</sup> Stephen I. Vladeck, *One Huge Difference Between Kavanaugh and Kennedy: Their Guantanamo Records*, WASHINGTON POST (July 11, 2018), [https://www.washingtonpost.com/opinions/one-huge-difference-between-kavanaugh-and-kennedy/2018/07/11/469b995e-852a-11e8-9e80-403a221946a7\\_story.html?utm\\_term=.a0ddde34da7b](https://www.washingtonpost.com/opinions/one-huge-difference-between-kavanaugh-and-kennedy/2018/07/11/469b995e-852a-11e8-9e80-403a221946a7_story.html?utm_term=.a0ddde34da7b).

<sup>45</sup> *Id.*

lenge the executive branch in that area.<sup>46</sup> Kavanaugh could be the critical vote on questions that arise from the government's controversial use of the law known as the Authorization for Use of Military Force (AUMF), to justify military incursions against the Islamic State. Critics say the law does not provide justification for such operations.<sup>47</sup> Of singular importance in Kavanaugh's jurisprudence is his skepticism of the relevance of international law in establishing limits to presidential powers. In a lengthy opinion in *Al-Bihani v. Obama*, Kavanaugh wrote that international law cannot limit presidential power to fight Al-Qaeda, and other militant groups, or to hold detainees.<sup>48</sup> These views could spill over to other areas, including privacy and surveillance.

With respect to checks and balances—a central element of the U.S.'s constitutional structure—Kavanaugh has repeatedly questioned pivotal Supreme Court decisions that limit out-of-control presidential power (such as the Watergate tapes case) and has a history of controversial statements that suggest he believes the Constitution bars a special counsel from investigating a president.<sup>49</sup> When meeting with Leader Schumer prior to his confirmation, Kavanaugh not only refused to answer crucial questions about health care and women's reproductive rights, he also refused “to affirm that a President must comply with a duly issued subpoena, even in a criminal investigation that concerns national security.”<sup>50</sup> Many believe he was chosen *because* of these ideas—with the Mueller investigation ongoing. Kavanaugh, along with the other conservative justices, is being counted on to protect the President against charges of obstruction of justice and collusion with a foreign power.

As President Trump, his allies, and legal team continue to attack and try to undermine Special Counsel Mueller's investigation, Trump's personal attorney and former Mayor of New York City, Rudy Giuliani, has said that he plans to fight a potential subpoena all the way to the Supreme Court. It is possible that the Supreme Court could soon be faced

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<sup>46</sup> *Id.*; see *Al-Bihani v. Obama*, 619 F.3d 1, 9-53 (2010); *Al Bahlul v. United States*, 840 F.3d 757, 759-774 (2016); *In re Al-Nashiri*, No. 14-5229, 2014 U.S. App. LEXIS 22038, at \*1 (D.C. Cir. Nov. 18, 2014), <https://dccircuitbreaker.org/wp-content/uploads/2018/07/14-1203.pdf>; *Omar v. McHugh*, 646 F.3d 13 (2011); *Saleh v. Titan Corp.*, 580 F.3d 1 (2009).

<sup>47</sup> See generally Vladeck, *supra* note 44; *Al-Bihani*, 619 F.3d at 9.

<sup>48</sup> Jonathan Hafetz, *Judge Kavanaugh's Record in National-Security Cases*, SCOTUSBLOG (Aug. 29, 2018, 11:02 AM), <https://www.scotusblog.com/2018/08/judge-kavanaugh-record-in-national-security-cases/>; *Al-Bihani*, 619 F.3d at 9.

<sup>49</sup> See Hafetz, *supra* note 48.

<sup>50</sup> 164 Cong. Rec. S5873, 141 (2018), <https://www.congress.gov/crec/2018/08/23/CREC-2018-08-23-senate.pdf>.

with “a decision as to whether a sitting president can be subpoenaed or indicted,” a question the Court has yet to answer.<sup>51</sup>

His views on executive power are consistent with the extreme views he takes on administrative law. The *Chevron* decision, under which courts are supposed to give deference to agency expertise, is one he firmly disagrees with.<sup>52</sup> In a speech at Notre Dame, he said that “[t]he *Chevron* doctrine encourages agency aggressiveness on a large scale,”<sup>53</sup> repeating an argument from his Harvard Law Review article from the prior year.<sup>54</sup> “Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.”<sup>55</sup>

On many issues, the public is becoming more liberal—such as with rights pertaining to sexual orientation, gender roles, the environment, and race for example—as well as more diverse (and younger). A Supreme Court and a federal judiciary that represents an extreme minority viewpoint and has the power to thwart the majority poses a threat to the American system of checks and balances, and potentially to our democracy.

As Christopher R. Browning wrote, “No matter how and when the Trump presidency ends, the specter of illiberalism will continue to haunt American politics. A highly politicized judiciary will remain, in which close Supreme Court decisions will be viewed by many as of dubious legitimacy, and future judicial appointments will be fiercely contested.”<sup>56</sup>

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<sup>51</sup> *Schumer Floor Remarks on the Need for Republicans to Stand Up to President Trump, Delaying Judge Kavanaugh’s Hearing, and the Danger of Government Funding of Guns for Teachers*, SENATE DEMOCRATS (Aug. 23, 2018), <https://www.democrats.senate.gov/news/press-releases/schumer-floor-remarks-on-the-need-for-republicans-to-stand-up-to-president-trump-delaying-judge-kavanaughs-hearing-and-the-danger-of-government-funding-of-guns-for-teachers>.

<sup>52</sup> See generally *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

<sup>53</sup> Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017); *Chevron*, 467 U.S. 837.

<sup>54</sup> See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

<sup>55</sup> Kavanaugh, *supra* note 53.

<sup>56</sup> Browning, *supra* note 7.

