



## **Brett Kavanaugh**

President Trump nominated Brett Kavanaugh to the U.S. Supreme Court on July 9, 2018. Kavanaugh is anti-choice.

### **Career**

- Law clerk, Hon. Judge Walter K. Stapleton, Third Circuit Court of Appeals, 1990-1991
- Law clerk, Hon. Alex Kozinski, Ninth Circuit Court of Appeals, 1991-1992
- Staff Attorney, U.S. Office of the Solicitor General, 1992-1993
- Law clerk, Associate Justice Anthony Kennedy, U.S. Supreme Court, 1993-1994
- Associate Counsel, Office of Independent Counsel Kenneth W. Starr, 1994-1997, 1998
- Partner, Kirkland & Ellis, 1997-1998, 1999-2001
- Associate Counsel to President George W. Bush, 2001-2003
- Senior Associate Counsel to President George W. Bush, 2003
- Assistant and Staff Secretary to President George W. Bush, 2003-2006
- Judge, U.S. Court of Appeals for the D.C. Circuit, 2006-present

### **Record on Choice-Related Issues**

#### **Court Cases Since 2006 Senate Confirmation Vote**

- Kavanaugh issued a strongly worded dissent against a D.C. Circuit decision that allowed an undocumented young woman to access abortion care. Kavanaugh argued that despite the fact that the girl had already met all of Texas' burdensome requirements for young women seeking abortion care (a mandatory delay between when she received state-mandated counseling and when she could get the procedure, a judge's approval that she had met all of the requirements for judicial bypass in the absence of parental consent, etc.), she still should have to wait until she had an immigration sponsor to make "that momentous life decision."<sup>1</sup> He wrote, "The en banc majority...reflects a philosophy that unlawful immigrant minors have a right to immediate abortion on demand, not to be interfered with even by Government efforts to help minors navigate what is undeniably a difficult situation by expeditiously transferring them to their sponsors."<sup>2</sup>
- In a heated dissent in *Priests for Life v. HHS*, Kavanaugh argued that the Affordable Care Act's existing accommodation for religious employers who wanted an exemption from the contraceptive-coverage policy still placed a substantial burden on the

employers' beliefs, even "if the religious organizations are misguided in thinking that this scheme...makes them complicit in facilitating contraception or abortion."<sup>3</sup>

As Sen. Mazie Hirono (D-HI) and witness Prof. Melissa Murray pointed out during Kavanaugh's confirmation hearing before the Senate Judiciary Committee, the only common thread among Kavanaugh's reproductive rights cases is that there is no burden too big for women to bear when it comes to accessing healthcare.<sup>4</sup> Whether it was a delay so long that it threatened to prevent a young woman from getting the abortion she desired or the inability to access contraception, Kavanaugh always sided with the entity seeking to disrupt a woman's access to care, never bothering to give any real consideration to the severe burden placed on the women in these cases.

### **Notable Information**

- President Trump has repeatedly promised to put "pro-life justices on the court" who would overturn *Roe v. Wade* "automatically."<sup>5</sup> Thus Trump's list of 25 potential Supreme Court nominees, including Kavanaugh, must have passed this unprecedented litmus test. This is likely the reason Trump has said he will not ask nominees about overturning *Roe* - because he already knows the answer.
  - After Kavanaugh and four others were added to the list in late 2017, anti-choice groups praised the additions:
    - Concerned Women for America President Penny Nance said, "[Trump's] selections have been spot on at every level, and we are so thankful to him for delivering for the American people in such a crucial area... The thousands of women I represent applaud President Trump on this announcement and will continue to support him in the selection of constitutional judges who respect their limited roles as jurists and not legislators."<sup>6</sup>
    - Susan B. Anthony List President Marjorie Dannenfelser said, "These five judges are exceptionally qualified and any one of them would make an outstanding Supreme Court justice. President Trump set a high standard with Justice Neil Gorsuch and continues to impress with his excellent list of nominees for future vacancies. President Trump continues to nominate only judges who are loyal to the Constitution, not to an activist pro-abortion agenda."<sup>7</sup>
- Shortly after Kavanaugh's nomination to the Supreme Court was announced, anti-choice groups celebrated the pick:
  - Brian Fisher of the Human Coalition said, "Kavanaugh gives great hope to the pro-life movement that the end of *Roe v. Wade* and legal abortion is in sight. We are grateful to the President for his continued commitment to defending human life."<sup>8</sup>

- Marjorie Dannenfelser, President of Susan B. Anthony List, said, “Moments ago, President Trump announced his Supreme Court pick: Judge Brett Kavanaugh. In doing so, President Trump has kept his promise to the Pro-Life Movement to only nominate pro-life judges to the Supreme Court.”<sup>9</sup>
- Troy Newman of Operation Rescue said, “Times have changed and a new day when abortion will finally be relegated to the ash heap of history where this barbarism truly belongs.”<sup>10</sup>
- In 2017 Kavanaugh gave a speech praising former Chief Justice Rehnquist, who dissented in *Roe v. Wade*, for rejecting “a wall of separation between church and state.”<sup>11</sup> He went on to refer to *Roe* as part of a “general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.”<sup>12</sup> He also called Rehnquist his “judicial hero” and praised his disdain for the exclusionary rule, a critical tenant of our justice system.<sup>13</sup>
- He served as Senior Associate Counsel and in various other positions in the anti-choice George W. Bush White House. In these roles, he was responsible for “marshaling the fleet” of George W. Bush’s far-right, anti-choice judicial nominees, including Priscilla Owen and William Pryor.<sup>14</sup> In fact, Kavanaugh oversaw the nomination of the most extreme anti-choice judicial nominees seen until that time. Only Donald Trump has surpassed Bush in appointing extremist nominees.
- Kavanaugh clerked for Judge Walter Stapleton on the Third Circuit Court of Appeals in 1991 while *Planned Parenthood v. Casey* was before the court.<sup>15</sup> That same year Stapleton wrote the majority opinion in *Casey*, upholding much of the severe anti-choice Pennsylvania law at issue including biased counseling provisions and restrictions on young women’s access to abortion care.<sup>16</sup>
- In 2017, Kavanaugh gave a speech in which he said the following about the right to abortion:
 

Consider next the Fourteenth Amendment and abortion. The Supreme Court said in *Roe v. Wade* that there was a right to abortion in certain circumstances. But that has raised a follow-on issue that has come up again and again in the years since *Roe*. What regulations of abortion are permissible? Informed consent, waiting periods, partial-birth bans, doctor licensing, parental notice, and the like. What is the answer and more importantly for present purposes, what is the nature of the test we should use to figure out the answer? Since 1992, the Court has settled on an undue burden test. That test is very much a common-law kind of test. Does the law burden the woman's right? And if so, is that burden "undue"? The word "undue" calls for a classic assessment of the pros and cons of the regulation in question. And not surprisingly, that is how Justice Breyer articulated the test in the most recent abortion case, *Whole Woman's Health*.<sup>17</sup>

- Kavanaugh is active in the conservative Federalist Society.<sup>18</sup> In fact, he co-chaired the group's School Choice Subcommittee of the Religious Liberties Practice Group.<sup>19</sup> The Federalist Society is led by Leonard Leo, the anti-choice activist who is heavily involved in selecting Trump's Supreme Court and lower court nominees. Leo has been outspoken in his anti-choice views, calling abortion "an act of force" and "a threat to human life,"<sup>20</sup> and serves as co-chairman of Students for Life,<sup>21</sup> a group whose mission is to "abolish abortion."<sup>22</sup>
- Kavanaugh has made campaign contributions to anti-choice politicians including Henry Hyde and Orrin Hatch - both vehemently anti-choice.<sup>23</sup>

### **Revealed in Confirmation Hearings**

- Asked by Sen. Ted Cruz (R-TX) to discuss his dissent in the *Priests for Life* case, Kavanaugh referred to the religious accommodation to the contraceptive-coverage policy that was at issue, which required religious objectors to fill out a two-page form to be exempted, as providing contraception "on the backs of the religious objector."<sup>24</sup> He went on to refer to contraception as "abortion-inducing drugs," a scientifically false notion that is regularly parroted by anti-choice extremists.<sup>25</sup>
- Asked by Sen. Kamala Harris (D-CA) and others if the Supreme Court's decisions in *Griswold* and *Eisenstadt* were correctly decided, he declined to answer directly but instead repeatedly said that he found Justice White's concurrence in *Griswold* "persuasive."<sup>26</sup> This is deeply troubling. In that concurrence, Justice White recognized the "State's policy against all forms of promiscuous or illicit sexual relationships" as a "permissible and legitimate legislative goal," and agreed that "the fear of conception operates as a deterrent to such relationships."<sup>27</sup> He only sided with the majority because he "wholly fail[ed] to see how the ban on the use of contraceptives by married couples in any way reinforce[ed] the State's ban on illicit sexual relationships."<sup>28</sup> White's concurrence was a far cry from the recognition of a meaningful right to use contraception.
- A series of emails deemed "committee confidential" were released by the New York Times and Sens. Booker (D-NJ) and Hirono (D-HI) during Kavanaugh's confirmation hearing before the Senate Judiciary Committee. These emails revealed various new and troubling aspects of Kavanaugh's record:
  - In one email, Kavanaugh questioned whether *Roe* is really "settled law."<sup>29</sup> In editing an op-ed that stated, "it is widely accepted by legal scholars across the board that *Roe v. Wade* and its progeny are the settled law of the land," Kavanaugh pushed back against that assertion, writing, "I am not sure that all legal scholars refer to *Roe* as the settled law of the land at the Supreme Court level since Court can always overrule its precedent, and three current Justices

on the Court would do so.”<sup>30</sup> In light of this email, Kavanaugh’s repeated assertions throughout his testimony that Roe is “precedent on precedent” ring empty.<sup>31</sup>

- In 2003, Kavanaugh forwarded an article to several colleagues entitled *Roe vs. Judicial Sense, Forget briefly its immorality - it's just bad law*.<sup>32</sup> Of the article, Kavanaugh wrote, “Interesting piece from Stephen Carter, who is not conservative.”<sup>33</sup>
- Sen. Leahy (D-VT) raised that Kavanaugh received a series of emails containing information stolen from Senate Judiciary Committee Democrats via hacking. In one email entitled “spying,” a Republican staffer wrote the following to Kavanaugh: “I have a friend who is a mole for us on the left. ‘It’ just called to tell me the following news: The Group of 9 (called the G9) which is composed of 9 prochoice groups (Planned Parenthood and NARAL among them) just formed the Joint Emergency Campaign Fund which is solely for the Supreme Court battle. They have put an initial \$ THREE MILLION into it which is to be used just for media.”<sup>34</sup> The email went on to reveal the alleged source and amount of an anonymous donation to Planned Parenthood and other information that was not public at the time. Kavanaugh testified to Sen. Leahy that neither the contents of the email nor its subject line raised any red flags for him as to whether that information may have been obtained improperly.<sup>35</sup>
- A series of emails from 2002 and 2003 show that Kavanaugh worked fairly extensively on the nomination of Bill Pryor to the Eleventh Circuit Court of Appeals. Pryor was an extremely controversial nominee in large part because of his staunch opposition to abortion rights - he’s called Roe “the worst abomination of constitutional law in our history.”<sup>36</sup> But Kavanaugh’s emails about Pryor are notable not just for the polarizing nature of his nomination, they clearly indicate that Kavanaugh perjured himself during his 2004 confirmation hearing for a seat on the D.C. Circuit.<sup>37</sup> In that 2004 hearing, Kavanaugh told Sen. Ted Kennedy that he, “was not involved in handling his nomination.”<sup>38</sup> However several emails to and from Kavanaugh regarding plans to “discuss nominee Bill Pryor’s hearing” and “coordinate plans and efforts” indicate that he absolutely was involved.<sup>39</sup> In fact, the emails show that Kavanaugh recommended Pryor to the White House,<sup>40</sup> a fact he didn’t deny in his 2018 hearing.

### **Record on Other Key Issues**

- Kavanaugh dissented when the D.C. Circuit upheld D.C.’s ban on assault weapons and large-capacity magazines, arguing that the majority should have applied a “text,

history, and tradition standard,” and that that standard would have led them to strike down the ban.<sup>41</sup>

- Kavanaugh has vigorously defended even the most questionable conduct of former independent counsel Kenneth Starr. Kavanaugh himself was responsible for drafting the office’s articles of impeachment against President Clinton, which even conservative commentators have criticized as “strain[ing] credulity” and based on “shaky allegations.”<sup>42</sup>

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<sup>1</sup> Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)

<sup>2</sup> Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)

<sup>3</sup> Priests for Life v. HHS, 808 F.3d 1, 2 (D.C. Cir. 2015) (Kavanaugh, J., dissenting)

<sup>4</sup> *Hearing on Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Days 3 & 4) Before the Senate Committee on the Judiciary, 115th Congress (2018)* (statements of Sen. Mazie Hirono and Prof. Melissa Murray)

<sup>5</sup> Mark Berman, *Trump promised judges who would overturn Roe v. Wade*, WASHINGTON POST (March 21, 2017), [https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?utm\\_term=.2fbd03383751](https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?utm_term=.2fbd03383751)

<sup>6</sup> *President Trump Delivering on Judges*, CONCERNED WOMEN FOR AMERICA (Nov. 17, 2017), <http://campaign.r20.constantcontact.com/render?m=1110014335848&ca=afb1a047-10d2-4bf2-839b-ec07440290a1>

<sup>7</sup> *SBA List Praises President Trump’s Expanded Supreme Court List*, SUSAN B. ANTHONY LIST (Nov. 17, 2017), <https://www.sba-list.org/newsroom/press-releases/sba-list-praises-president-trumps-expanded-supreme-court-list>

<sup>8</sup> Human Coalition (@HumanCoalition), TWITTER (Jul. 9, 2018, 8:16 PM), <https://twitter.com/HumanCoalition/status/1016491246326632448>

<sup>9</sup> Susan B. Anthony List email (July 9, 2018) (on file with the NARAL Pro-Choice America Research Department)

<sup>10</sup> *Trump Picks Judge Brett Kavanaugh for U.S. Supreme Court*, OPERATION RESCUE (July 9, 2018), <https://www.operationrescue.org/archives/trump-picks-judge-brett-kavanaugh-for-u-s-supreme-court/>

<sup>11</sup> Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, REMARKS TO THE AMERICAN ENTERPRISE INSTITUTE, <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>

<sup>12</sup> Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, REMARKS TO THE AMERICAN ENTERPRISE INSTITUTE, <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>

<sup>13</sup> Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, REMARKS TO THE AMERICAN ENTERPRISE INSTITUTE, <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>

<sup>14</sup> Lewis, *Bush Selects Two for Bench, Adding to Senate Fire*, NEW YORK TIMES (July 26, 2003)

<sup>15</sup> Scott Shane, Rebecca Ruiz, Adam Liptak, Charlie Savage, and Ben Protess, *Influential Judge, Loyal Friend, Conservative Warrior – and D.C. Insider*, NEW YORK TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/politics/judge-brett-kavanaugh.html>

<sup>16</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3rd Cir. 1991)

<sup>17</sup> Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017)

<sup>18</sup> *Hon. Brett M. Kavanaugh*, THE FEDERALIST SOCIETY, <https://fedsoc.org/contributors/brett-kavanaugh>

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- <sup>19</sup> Confirmation Hearing on the Nomination of Brett M. Kavanaugh To Be Circuit Judge for the District of Columbia Circuit: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 16 (2004), available at <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/pdf/CHRG-108shrg24853.pdf>
- <sup>20</sup> Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, THE NEW YORKER (April 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>
- <sup>21</sup> Board of Directors, STUDENTS FOR LIFE, <http://studentsforlife.org/supporters/board-of-directors-1> (last visited July 5, 2018)
- <sup>22</sup> Mission Statement, STUDENTS FOR LIFE, <http://studentsforlife.org/about/mission-statement/> (last visited July 5, 2018)
- <sup>23</sup> Donor Lookup: Brett Kavanaugh, OPEN SECRETS, <https://www.opensecrets.org/donor-lookup/results?name=brett+kavanaugh>
- <sup>24</sup> *Hearing on Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Day 3) Before the Senate Committee on the Judiciary*, 115th Congress (2018) (statements of Brett Kavanaugh and Sen. Ted Cruz)
- <sup>25</sup> *Hearing on Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Day 3) Before the Senate Committee on the Judiciary*, 115th Congress (2018) (statements of Brett Kavanaugh and Sen. Ted Cruz)
- <sup>26</sup> *Hearing on Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Days 2 & 3) Before the Senate Committee on the Judiciary*, 115th Congress (2018) (statements of Brett Kavanaugh and Sen. Kamala Harris)
- <sup>27</sup> *Griswold v. Connecticut*, 381 U.S. 479 (U.S. 1965) (White, J., concurring)
- <sup>28</sup> *Griswold v. Connecticut*, 381 U.S. 479 (U.S. 1965) (White, J., concurring)
- <sup>29</sup> Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, NEW YORK TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html>
- <sup>30</sup> Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, NEW YORK TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html>
- <sup>31</sup> *Hearing on Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Days 2 & 3) Before the Senate Committee on the Judiciary*, 115th Congress (2018) (statements of Brett Kavanaugh).
- <sup>32</sup> Eddie Vale (@evale72), TWITTER (Sept. 6, 2018, 6:09 PM), <https://twitter.com/evale72/status/1037840123977707520>
- <sup>33</sup> Eddie Vale (@evale72), TWITTER (Sept. 6, 2018, 6:09 PM), <https://twitter.com/evale72/status/1037840123977707520>
- <sup>34</sup> Sen. Patrick Leahy (@SenatorLeahy), Twitter (Sept. 6, 2018, 12:24 PM), <https://twitter.com/SenatorLeahy/status/1037753427340795906>
- <sup>35</sup> *Hearing on Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Days 2 & 3) Before the Senate Committee on the Judiciary*, 115th Congress (2018) (statements of Brett Kavanaugh and Sen. Patrick Leahy).
- <sup>36</sup> Kimberly Kindy, *Pryor: Perhaps the most polarizing Supreme Court justice possibility*, WASHINGTON POST (Jan. 28, 2017), [https://www.washingtonpost.com/national/pryor-perhaps-the-most-polarizing-supreme-court-justice-possibility/2017/01/28/f25bb7e2-e4ae-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.7230704d53f1](https://www.washingtonpost.com/national/pryor-perhaps-the-most-polarizing-supreme-court-justice-possibility/2017/01/28/f25bb7e2-e4ae-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.7230704d53f1)
- <sup>37</sup> Tara Golshan, *The Judge Pryor controversy around Brett Kavanaugh, explained*, Vox (Sept. 6, 2018), <https://www.vox.com/2018/9/6/17828378/brett-kavanaugh-confirmation-perjury-pryor>
- <sup>38</sup> Seung Min Kim, Ann E. Marimow, and Mark Berman, *Supreme Court nominee declines to condemn Trump's attacks on judiciary*, WASHINGTON POST (Sept. 6, 2018), [https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-second-day-of-questioning/2018/09/06/3529677a-b147-11e8-aed9-001309990777\\_story.html?utm\\_term=.ea96be82c84a#PRYOR](https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-second-day-of-questioning/2018/09/06/3529677a-b147-11e8-aed9-001309990777_story.html?utm_term=.ea96be82c84a#PRYOR)
- <sup>39</sup> Seung Min Kim, Ann E. Marimow, and Mark Berman, *Supreme Court nominee declines to condemn Trump's attacks on judiciary*, WASHINGTON POST (Sept. 6, 2018), [https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-second-day-of-questioning/2018/09/06/3529677a-b147-11e8-aed9-001309990777\\_story.html?utm\\_term=.ea96be82c84a#PRYOR](https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-second-day-of-questioning/2018/09/06/3529677a-b147-11e8-aed9-001309990777_story.html?utm_term=.ea96be82c84a#PRYOR)

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<sup>40</sup> Sen. Patrick Leahy (@SenatorLeahy), Twitter (Sept. 6, 2018, 2:42 PM),  
<https://twitter.com/SenatorLeahy/status/1037788206111043587>

<sup>41</sup> *Heller v. District of Columbia*, 670 F.3d 1244, 1266 (D.C. Cir 2011) (Kavanaugh, J., dissenting)

<sup>42</sup> Glenn Simpson, *Starr's Report Makes Powerful Case - but for What?*, WALL STREET JOURNAL (Sept. 14, 1998);  
Stephen Hedges, *Starr's Case Unique and Hardly Airtight*, CHICAGO TRIBUNE (Sept. 13, 1998)