

Seven Reasons Confirming Brett Kavanaugh Would Be **Terrible** for Women

JULY 2018

On July 9, 2018, President Donald Trump nominated Judge Brett Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit to a seat on the U.S. Supreme Court. That's seriously bad news for women. Judge Kavanaugh was handpicked by extreme, right-wing groups to further an anti-choice, anti-LGBTQ, anti-immigrant, anti-worker, anti-civil rights and anti-science agenda.¹ His elevation to the country's highest court would be devastating for all who care about protecting women's health and rights, ending discrimination, securing the rights of workers and preserving the role of government agencies in protecting women and families.

Below are just seven of the many reasons confirming Judge Kavanaugh would be terrible for women.

1. He'll be a disaster for abortion rights.

President Trump has been clear about his goal from day one: he will *only* appoint justices who will overturn *Roe v. Wade* "automatically"² and undo the legal right to abortion care. Judge Kavanaugh was selected for that very reason. Just last year, he made his disdain for *Roe* clear when he went out of his way to praise former Chief Justice Rehnquist's dissent in the case.³ And when Judge Kavanaugh had the opportunity to block access to abortion care, he jumped at it. As a member of a three-judge panel, he voted to prevent a young immigrant woman from accessing abortion care she wanted, indicating that he believed the federal government could delay her time-sensitive care past the time when she could legally access abortion in the state where she was being held.⁴ When the majority of his colleagues later overruled him, Judge Kavanaugh wrote that the other judges had "badly erred" in allowing the young woman to access the care she sought.⁵ His actions showed clear disregard for the rights of women, immigrants and communities of color. Shortly thereafter, President Trump added Judge Kavanaugh to the list of nominees who met his anti-*Roe* litmus test.⁶ Make no mistake – given the first opportunity, Judge Kavanaugh would do grave damage to women's access to safe and legal abortion, denying women autonomy over their bodies, lives and futures.

When asked about overturning *Roe v. Wade* during the October 19, 2016 presidential debate, then-candidate Donald Trump said, "[T]hat'll happen automatically, . . . because I am putting pro-life justices on the court."

2. He'll sabotage health care for millions of people.

Another part of President Trump's litmus test for Supreme Court justices is a willingness to gut and eliminate the Affordable Care Act (ACA).⁷ This would leave millions more people uninsured and would destroy critical health care protections – such as requiring coverage for pre-existing conditions and maternity care and prohibiting discriminatory practices like gender rating (charging women more than men for the same insurance coverage) – all provisions of the ACA that improve the health of women and children. Judge Kavanaugh openly criticized Chief Justice Roberts for his decision to uphold the health care law⁸ and, from the bench, repeatedly voiced his opposition to the ACA,⁹ including by suggesting that a president could “decline to enforce” this lifesaving legislation if he personally deems it unconstitutional.¹⁰ Health care access for millions of people, and critical programs like Medicaid, hang in the balance, and Judge Kavanaugh has shown he cannot be trusted with this responsibility.

3. He'll undermine people's rights in the name of religious liberty.

Judge Kavanaugh has promoted a judicial philosophy that the personal beliefs of some should be allowed to dominate the rights and lives of others, granting a license to discriminate against women and LGBTQ people. In a public speech, Judge Kavanaugh praised former Chief Justice Rehnquist for rejecting the notion of “a strict wall of separation between church and state.”¹¹ And from the bench, Judge Kavanaugh favored allowing an employer's religious beliefs to override employees' access to birth control, essentially allowing a woman's boss to dictate decisions about her health care.¹² Judge Kavanaugh has demonstrated that, under the guise of religious liberty, he would openly encourage employers, health care providers and others to discriminate against women and LGBTQ people, undermining their rights and health.

4. He's no friend to workers.

In case after case, Judge Kavanaugh has sided against workers, and that's more bad news for women. Judge Kavanaugh's record shows that he has no regard for the rights of workers, consistently ruling against them and the agencies charged with protecting them in cases involving discrimination, worker safety and union representation.¹³ Judge Kavanaugh dissented – in favor of the employer and against the worker – in several workplace discrimination cases.¹⁴ Women face persistent workplace discrimination and harassment – pregnancy discrimination, pay discrimination and sexual harassment to name a few – and they must be able to depend on fair adjudication under civil rights law. Judge Kavanaugh has also authored numerous opinions and dissents undermining workers' collective bargaining rights, eroding the power of unions to advocate for and protect workers.¹⁵ Women – and particularly women of color – benefit greatly from the protection of unions and rely upon the benefits they receive from collective bargaining agreements.¹⁶ With the U.S. Supreme Court just undermining unions in *Janus v. AFSCME Council 31*,¹⁷ we don't need another justice who would further stack the deck against workers and strengthen the power of corporations to disregard their own workers' safety and dignity and deny them economic opportunity.

5. He sides with big business and big polluters over families.

When corporations have challenged government protections, Judge Kavanaugh has sided with big business and tried to undermine the laws that protect the health and economic security of women and families. He has shielded polluters and opposed Environmental

Protection Agency regulations that improve the air we breathe and the water we drink, explicitly prioritizing the financial interests of corporations over the health of families. This endangers communities of color, children and our environment for generations to come.¹⁸ In another dissent, Judge Kavanaugh disparaged the existence of the Consumer Financial Protection Bureau, which was created to protect families' economic security after the largest financial crisis since the Great Depression.¹⁹ Judge Kavanaugh has repeatedly questioned federal agencies' authority, demonstrating a disregard for scientific integrity and the critical role of government protections.²⁰

6. He has opposed commonsense policies that curb gun violence.

When the D.C. Circuit Court upheld a ban on assault weapons, Judge Kavanaugh authored a dissent stating that the Second Amendment guarantees a person's right to own a semi-automatic weapon and rejecting the idea that public safety should be considered when ruling on guns – blatantly ignoring clear evidence that gun safety policies protect the lives of women and children.²¹ Women in the United States are 16 times more likely to be killed by guns than are women in other developed countries.²² Judge Kavanaugh doesn't believe public safety arguments should be considered when deciding on gun matters, making his appointment even more dangerous for the health of our communities.

7. He believes the president is above the law.

In his personal writing, Judge Kavanaugh has repeatedly demonstrated that he won't stand up to President Donald Trump, allowing President Trump's abuses of power to go unchecked. He has argued that a president should have "absolute discretion" and be able to dismiss any counsel "out to get him,"²³ that a president need not comply with laws that he personally deems to be unconstitutional,²⁴ and that a president is protected from "criminal prosecution and investigation" while he or she is in office.²⁵ We need a Supreme Court that will be a check on the president's abuses – not a rubber stamp. This is fundamental to our constitutional system of checks and balances.

Our rights and future are on the line. If the United States Senate confirms Judge Kavanaugh, the balance of the Court will turn against the well-established constitutional rights of women, workers, LGBTQ people, communities of color, immigrants and others. The Senate must reject him for a lifetime appointment on our highest court.

¹ For example, the Family Research Council (FRC), which has been designated a hate group by the Southern Poverty Law Center, has vocally supported and advocated for Kavanaugh's judicial ascent, including by mobilizing its supporters when Kavanaugh was first nominated to the federal bench. See, e.g., Rev. Dr. Chuck Currie. (2005, May 31). Brett Kavanaugh: Unqualified to sit on a federal court but still supported by the religious right [Blog post]. Retrieved 14 July 2018, from http://chuckcurrie.blogs.com/chuck_currie/2005/05/brett_kavanaugh.html (describing an email alert sent by FRC in 2005 urging subscribers to contact Senators in support of Brett Kavanaugh's nomination to the D.C. Circuit). The Family Research Council has a clear anti-LGBTQ agenda, claiming "homosexuality" is "harmful" and "unnatural," and promoting discrimination against LGBTQ people. For background on the Family Research Council and its designation as hate group, see Southern Poverty Law Center. (n.d.). *Family Research Council*. Retrieved 14 July 2018, from <https://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council>. Kavanaugh's path to the Supreme Court "short list" and to nomination was also backed by the Heritage Foundation, the Federalist Society and other extremist, right-wing organizations. See, e.g., The Heritage Foundation. (2018, July 10). *Trump hits another home run with Supreme Court pick Brett Kavanaugh* [Blog post]. Retrieved 14 July 2018, from <https://www.heritage.org/courts/commentary/trump-hits-another-home-run-supreme-court-pick-brett-kavanaugh>; Barnes, R. (2017, November 18). Federalist Society, White House Cooperation on Judges Paying Benefits. *Washington Post*. Retrieved 14 July 2018, from https://www.washingtonpost.com/politics/courts_law/federalist-society-white-house-cooperation-on-judges-paying-benefits/2017/11/18/4b69b4da-cb20-11e7-8321-481fd63f174d_story.html?utm_term=.88a530e2ce55; Suen, B. (2018, July 11). Extreme

Anti-LGBTQ Groups are Uniting Behind Supreme Court Nominee Brett Kavanaugh. *Media Matters*. Retrieved 14 July 2018, from <https://www.mediamatters.org/blog/2018/07/11/extreme-anti-lgbtq-groups-are-uniting-behind-trump-supreme-court-nominee-brett-kavanaugh/220638>

² In the final October 2016 presidential debate, Trump replied to a question about whether he would appoint judges to overturn *Roe v. Wade* by saying, “Well, if we put another two or perhaps three justices on, that’s really what’s going to be — that will happen, . . . And that’ll happen automatically, in my opinion, because I am putting pro-life justices on the court. I will say this: It will go back to the states, and the states will then make a determination.” Berman, M. (2017, March 21). Trump Promised Judges Who Would Overturn *Roe v. Wade*. *Washington Post*. Retrieved 14 July 2018, from <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/>

³ American Enterprise Institute. (2017, September 18). *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* (pp. 12–13, 20). Retrieved 14 July 2018, from <https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf>. See also Kavanaugh, B. M. (2017). Keynote address: Two challenges for the judge as umpire: Statutory ambiguity and constitutional exceptions (p. 1917). *Notre Dame Law Review*, 92(5), 1907–1920.

⁴ Garza v. Hargan, No. 17–5236, 2017 WL 4707112 (Oct. 19, 2017).

⁵ Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018) (claiming that the majority created “a new right for unlawful immigrant minors . . . to obtain immediate abortion on demand . . .”).

⁶ Compare the Supreme Court nominee shortlist that President-elect Trump released on January 12, 2017, with the shortlist released on November 17, 2017, just weeks after Judge Kavanaugh’s dissent in *Garza v. Hargan*. See de Vogue, A. (2017, January 12). CNN’s Donald Trump Supreme Court Nominee Shortlist. *CNN*. Retrieved 14 July 2018, from <https://www.cnn.com/2016/12/06/politics/donald-trump-supreme-court-nominee-shortlist/index.html>; White House. (2017, November 17). *President Donald J. Trump’s Supreme Court List*. Retrieved 14 July 2018, from <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/>

⁷ See, e.g., Bedford, T. (2016, February 8). Donald Trump: Litmus Tests for Supreme Court Justices, Less Taxes for Big Business. *WGBH*. Retrieved 14 July 2018, from <https://www.wgbh.org/news/2016/02/08/news/donald-trump-litmus-tests-supreme-court-justices-less-taxes-big-business-0>; Donald J. Trump [realDonaldTrump]. (2015, June 26). If I win the presidency, my judicial appointments will do the right thing unlike Bush’s appointee John Roberts on ObamaCare [Tweet]. Retrieved 14 July 2018, from https://twitter.com/realDonaldTrump/status/614472830969880576?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E614472830969880576&ref_url=https%3A%2F%2F

⁸ The Heritage Foundation. (2017, October 25). *The Joseph Story Distinguished Lecture*. Retrieved 14 July 2018, from <https://www.heritage.org/josephstory2017>

⁹ *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *cert. denied*, 567 U.S. 951 (2012); *Sissel v. U.S. Dep’t of Health & Human Servs.*, 799 F.3d 1035 (D.C. Cir. 2015) (Kavanaugh, J., dissenting), *cert. denied*, 136 S. Ct. 925 (2016).

¹⁰ *Seven-Sky*, 661 F.3d at 50 n.43 (Kavanaugh, J., dissenting) (“Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”).

¹¹ See note 3, American Enterprise Institute, p. 10.

¹² *Priests for Life v. Dep’t of Health & Human Servs.*, 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

¹³ E.g., *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *Miller v. Clinton*, 687 F.3d 1332 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); *Am. Fed’n of Gov’t Emps. v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007); *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *cert. denied*, 555 U.S. 1031 (2008); *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85 (D.C. Cir. 2015).

¹⁴ See generally *Miller*, 687 F.3d at 1335 (Kavanaugh, J., dissenting from majority opinion in age discrimination case brought against U.S. State Department). See also *Howard*, 720 F.3d at 953 (Kavanaugh, J., dissenting from a majority opinion allowing a Black woman to move forward on her racial discrimination action against a director in an office of the U.S. House of Representatives).

¹⁵ See *Am. Fed’n of Gov’t Emps.*, 486 F.3d at 1318–19 (in which Judge Kavanaugh authored majority opinion reversing the lower court’s partial blocking of Department of Defense regulations regarding collective bargaining). See also *Agri Processor Co., Inc.*, 514 F.3d at 10 (Kavanaugh, J., dissenting from majority decision ordering company to bargain with undocumented employees).

¹⁶ Institute for Women’s Policy Research. (2018, February). *Fact Sheet: The Union Advantage for Women*. Retrieved 14 July 2018, from https://iwpr.org/wp-content/uploads/2018/02/C463_Union-Advantage-Fact-Sheet-February-2018-1.pdf

¹⁷ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

¹⁸ See, e.g., *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev’d sub nom.* *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *rev’d*, 134 S. Ct. 1584 (2013).

¹⁹ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

²⁰ In a February 2017 speech at Notre Dame Law School, Kavanaugh made it a point to criticize a legal precedent that supports judicial deference to agency actions (known as *Chevron* deference), stating that it “encourages agency aggressiveness on a large scale” and arguing that “Courts [should] no longer defer to agency interpretations of statutes.” See note 3, Kavanaugh, pp. 1911–12.

²¹ *Heller v. District of Columbia*, 670 F.3d 1244 (2011) (Kavanaugh, J., dissenting).

²² National Partnership for Women & Families. (2018, March). *Gun Violence: A Threat to Women and Families* (p. 1). Retrieved 14 July 2018, from <http://www.nationalpartnership.org/research-library/health-care/gun-violence-a-threat-to-women-and-families.pdf>

²³ Kavanaugh, B. M. (1998, July). The President and the Independent Counsel: From Watergate to Whitewater and beyond (p. 2151). *Georgetown Law Journal*, 86, 2133–2178.

²⁴ Kavanaugh, B. M. (2014). Our anchor for 225 years and counting: The enduring significance of the precise text of the Constitution (p. 1911). *Notre Dame Law Review*, 89(5), 1907–1928 (“To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch—at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws regulating the executive branch.”); *Seven-Sky v. Holder*, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *cert. denied*, 567 U.S. 951 (2012) (“Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”).

²⁵ Kavanaugh, B. M. (2008). Separation of powers during the forty-fourth presidency and beyond (p. 1461). *Minnesota Law Review*, 93, 1454–1486 (“ . . . Congress might consider a law exempting a President – while in office – from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel. Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics.”)

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group dedicated to promoting fairness in the workplace, reproductive health and rights, access to quality health care and policies that help women and men meet the dual demands of work and family. More information is available at NationalPartnership.org.

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