



# President Trump Nominates Judge Brett Kavanaugh: Initial Observations

July 10, 2018

On July 9, 2018, President Trump announced the [nomination](#) of Judge [Brett M. Kavanaugh](#) of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to fill the impending vacancy on the Supreme Court caused by Justice Kennedy's scheduled [retirement](#) on July 31, 2018. As noted in this earlier [Sidebar](#), Justice Kennedy's retirement is likely to have significant implications for the Court, Congress, and the nation as a whole. Justice Kennedy, as the Roberts Court's [median vote](#), was often at the epicenter of legal debates on the High Court, casting decisive votes on issues ranging from the powers of the federal government vis-à-vis the states, to separation-of-powers disputes, to key civil liberties issues. A critical question now before the Senate as it considers providing its advice and consent to the President's nomination to the High Court is how Judge Kavanaugh may view the many legal issues in which Justice Kennedy's vote was often determinative.

This Sidebar provides some initial observations on Judge Kavanaugh's nomination to the Supreme Court, noting his background and some initial clues as to how the nominee may impact the future of the Court. CRS is preparing products that discuss Judge Kavanaugh's views on the law in greater detail. [Existing CRS products](#) discuss Justice Kennedy's jurisprudence and other aspects of the Court vacancy.

## Who is Judge Kavanaugh?

[Nominated](#) to the D.C. Circuit by President George W. Bush, Judge Kavanaugh has served on that court—a court once described by President Franklin Roosevelt as the “[the second most important court in the country](#)”—for more than 12 years. Because it is located in the nation's capital and various statutes grant it jurisdiction over specific matters, the D.C. Circuit is [widely seen](#) to issue a greater number of significant opinions than other appellate courts, on account of the D.C. Circuit's outsized role reviewing decisions of federal agencies whose rules and practices impact the entire nation. As a result of his membership on this court, Judge Kavanaugh has [authored](#) roughly 300 opinions (either for the court or through a concurrence or dissent) and adjudicated numerous high-profile cases concerning, among other things, the [status](#) of wartime detainees held by the United States at Guantanamo Bay, Cuba; the constitutionality of the current structure for the [Consumer Financial Protection Bureau](#); the validity of rules issued by the Environmental Protection Agency under the [Clean Air Act](#); and the legality of the Federal Communications Commission's [net neutrality](#) rule. Since joining the D.C. Circuit, Judge Kavanaugh has also [taught](#)

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[courses](#) on the separation of powers, national security law, and constitutional interpretation at Harvard Law School, Yale Law School, and the Georgetown University Law Center.

Prior to his appointment to the federal bench in 2006, Judge Kavanaugh [served](#) in the George W. Bush White House, first as an associate and senior associate counsel, before becoming an assistant and staff secretary to the President. Before his service in the Bush Administration, the nominee worked in private practice at the law firm of Kirkland & Ellis, LLP for three years, which followed service in the Office of the Independent Counsel, Ken Starr, from 1994 until 1998, and the Office of the Solicitor General from 1992 until 1993. Judge Kavanaugh began his legal career with three federal clerkships—two for judges on the federal appellate courts and one for the jurist he is nominated to succeed, Justice Kennedy. (One of Judge Kavanaugh’s co-clerks with Justice Kennedy was future-Justice [Neil Gorsuch](#)). Judge Kavanaugh is a graduate of Yale College and Yale Law School.

## What Would Judge Kavanaugh’s Appointment to the Court Mean?

Predicting how a nominee to the Supreme Court could affect the Court’s jurisprudence is notably difficult. For example, Felix Frankfurter, who had a reputation as a “progressive” legal scholar prior to his appointment to the Court in 1939, [disappointed](#) some early supporters because he advocated judicial restraint and caution when the Court reviewed laws that restricted civil rights and civil liberties during [World War II](#) and the [early Cold War era](#). Similarly, Harry Blackmun, who had served on the U.S. Court of Appeals for the Eighth Circuit for more than a decade before his appointment to the Supreme Court in 1970, was initially [considered by](#) President Nixon to be a “strict constructionist” who viewed a judge’s role as narrowly interpreting the law, rather than recognizing new constitutional rights in line with the approach of the Warren Court. However, following his appointment, Justice Blackmun authored the majority opinion in *Roe v. Wade* holding that the Due Process Clause protected the right of a woman to terminate a pregnancy. Justice Blackmun was generally [considered](#) one of the more liberal voices on the Court by the time of his retirement in 1993.

Notwithstanding the difficulty of predicting a nominee’s future votes, commentators often find a judge’s overarching approach or principles regarding the craft of judging to be a useful gauge of how that judge may evaluate particular matters. And on this subject Judge Kavanaugh has been fairly open, not only in his capacity on the D.C. Circuit—where Judge Kavanaugh is, according to one close follower of that court, a “[very significant figure](#)”—but also in a number of speeches and academic articles. For example, in a 2017 [speech](#) at Notre Dame Law School, he stated that he “believe[s] very deeply” in two central visions for adjudication: (1) the “rule of law as a law of rules”; and (2) the role of the judge as an “umpire.” The former view of judging references a famous [1989 speech](#) of Justice Antonin Scalia in which [the justice argued for a more formalist approach](#) that embraced clear rules and principles in lieu of balancing tests that, in the view of Justice Scalia, transformed the judge from a determiner of law to a finder of fact. The latter reference to the role of the judge as an “umpire” draws from Chief Justice John Roberts’s [confirmation hearing](#) wherein he described a judge’s “limited” job to not “make the rules,” but “apply them.” Using these concepts with respect to issues of [statutory interpretation](#), Judge Kavanaugh has, like Justice Scalia, emphasized the “centrality of the words of the statute” and counseled against the use of certain “substantive principles of interpretation”—including the use of legislative history or [Chevron deference](#)—that, in the nominee’s view, pose risks to judges’ roles as “neutral, impartial umpires in certain statutory interpretation cases.”

With regard to constitutional interpretation, Judge Kavanaugh has been less precise. In a [2014 article](#), the nominee emphasized the role of the Constitution’s text in interpretation, calling it the “one factor [that] matters above all in constitutional interpretation and in understanding the grand sweep of constitutional jurisprudence.” Nonetheless, the same article conceded that “constitutional text does not answer all questions.” In a [2017 speech](#), Judge Kavanaugh noted his broad concerns about the “vague and amorphous” tests that tend to dominate modern constitutional law, tests that he views as “antithetical to

impartial judging.” Nonetheless, Judge Kavanaugh, while suggesting that Justice Scalia’s focus on “history and tradition” “might” be consistent with the vision of a judge as an impartial umpire, stated that he does not “[a]t the moment . . . have a solution” to his concerns about the indeterminacy of constitutional interpretation.

Another critical means to gauge how a lower court judge may rule if elevated to the Supreme Court is to look at the judge’s separate writings on the bench—i.e., when the judge concurred or dissented from his colleagues. Lower court judges are often bound by Supreme Court and circuit precedent, resulting in the [vast majority](#) of federal appellate opinions being unanimous. But when a federal appellate judge takes the step to write separately, such an opinion need not accommodate the views of a colleague and can provide unique insights into a circuit judge’s judicial approach. Judge Kavanaugh has authored a [number](#) of separate opinions while on the D.C. Circuit. Of particular note are:

- *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), in which the nominee maintained in a dissenting opinion that the structure of the Consumer Financial Protection Bureau, an independent agency headed by a single person “exercising substantial executive authority,” was an unconstitutional invasion of the President’s authority under Article II. (For more on *PHH Corp.*, see these [Legal Sidebars](#)).
- *Garza v. Harden*, 874 F.3d 735 (D.C. Cir. 2017), in which Judge Kavanaugh dissented from an en banc order requiring the Department of Health and Human Services (HHS) to allow a detained 17-year-old unaccompanied alien minor to have an abortion, contending that the majority was “novel” and “wrong” in creating “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.” (For more on *Garza*, see these [Legal Sidebars](#)).
- *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017), in which the nominee argued in a dissenting opinion that the *Chevron* doctrine is reserved for review of “ordinary” agency rules and not “major agency rules of great economic and political significance,” requiring de novo review of the FCC’s net neutrality rules.
- *Priests for Life v. HHS*, 808 F.3d 1 (D.C. Cir. 2015), in which the nominee argued in a dissent from the court’s denial of a rehearing en banc that a requirement by HHS that would result in objecting religious entities filling out a form that would functionally require a third-party insurer to provide the coverage ran afoul of the Religious Freedom Restoration Act.
- *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), in which Judge Kavanaugh maintained in a dissenting opinion that Second Amendment challenges to gun laws should not be adjudicated using a “balancing test,” but instead should “assess gun bans and regulations based on text, history, and tradition.”
- *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), in which the nominee’s dissenting opinion argued that the court lacked jurisdiction to resolve the constitutionality of the Affordable Care Act’s individual mandate, maintaining that “the Anti-Injunction Act . . . carefully limits the jurisdiction of federal courts over tax-related matters,” including the dispute over the mandate.
- *Free Enterprise Fund v. PCAOB*, 537 F.3d 667 (D.C. Cir. 2008), in which Judge Kavanaugh dissented, arguing the removal provisions for members of a financial regulatory board created under Sarbanes-Oxley Act contravened the separation of powers. (Two years later, on appeal to the [Supreme Court](#), the D.C. Circuit’s ruling was reversed in a 5-4 decision that quoted extensively from Judge Kavanaugh’s dissent).

Going forward, these and other rulings and writings by Judge Kavanaugh likely will be considered by the Senate as it gauges how his elevation to the High Court, if confirmed, could change the law in any

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number of areas. As with [past](#) Supreme Court nominations, CRS will be preparing a number of products to assist Congress, and in particular the Senate, during the consideration of Judge Kavanaugh's nomination, including a report analyzing Judge Kavanaugh's jurisprudence on particular areas of the law, as well as a tabular listing of lower court decisions in which he authored opinions. CRS personnel can also provide briefings and other assistance related to the Supreme Court nomination to congressional clients upon request.

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