

MEMORANDUM

To: United States Senate Judiciary Committee, Interested Persons
From: EPIC President Marc Rotenberg, Senior Counsel Alan Butler, Policy Director
Caitriona Fitzgerald, Open Government Counsel Enid Zhou
Date: September 4, 2018
Re: Nomination of Judge Brett Kavanaugh to the United States Supreme Court

This memorandum provides a brief overview of Judge Brett Kavanaugh’s White House years and his judicial opinions in subject areas related to EPIC’s work, including privacy, the Fourth Amendment, Article III standing, and the Freedom of Information Act.¹ Based on EPIC’s review, there is considerable concern about Judge’s Kavanaugh’s commitment to constitutional protections against government surveillance and his specific understanding of the privacy threats in the digital age.

We urge the Senate Judiciary Committee to ask the nominee about these topics. We are particularly interested in whether Judge Kavanaugh still stands by his opinion in the *Klayman* case in which he set out two very unsettling views of the Fourth Amendment – one that relied on a case partly overturned by the Supreme Court; the other offered a view of the “special needs” doctrine that would permit ongoing, suspicionless surveillance in the United States.

¹ The Electronic Privacy Information Center (“EPIC”) was established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC participates in a wide range of activities, including research and education, litigation, and advocacy. The EPIC Advisory Board includes leading experts in law, technology, and public policy. EPIC regularly files amicus briefs in the U.S. Supreme court, and EPIC routinely shares its views with the Senate Judiciary Committee regarding nominees to the Supreme Court. *See, e.g.*, amicus curiae briefs of EPIC in *United States v. Microsoft*, 138 S. Ct. 1186 (2018) (arguing that human rights law and privacy standards should govern law enforcement access to personal data stored abroad); *Dahda v. United States*, 138 S. Ct. 1491 (2018) (arguing that it is not for the courts to create atextual exceptions to federal privacy laws); *Byrd v. United States*, 584 U.S. (2018) (arguing that relying on rental contracts to negate Fourth Amendment standing would undermine legitimate expectations of privacy); *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (arguing that the violation of a consumer’s privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that the search of a cell phone incident to arrest requires a warrant); *United States v. Jones*, 132 S. Ct. 945 (2012) (arguing that a warrant is required for the use of GPS tracking techniques). *See generally* EPIC, EPIC Amicus Curiae Briefs: Supreme Court, <https://epic.org/amicus/?c=Supreme+Court>. *See, e.g.*, Letter from EPIC to Senator Chuck Grassley, Chairman, & Senator Dianne Feinstein, Ranking Member (Mar. 20, 2017) (concerning the nomination of Justice Neil Gorsuch), <https://epic.org/privacy/gorsuch/EPIC-SJC-Gorsuch-Mar2017.pdf>; Letter from EPIC to Senator Patrick Leahy, Chairman, & Senator Jeff Sessions, Ranking Member (June 28, 2010) (concerning the nomination of Justice Elena Kagan), https://epic.org/privacy/kagan/EPIC_Kagan_Ltr.pdf; EPIC, 1972 Alito Princeton Privacy Report (2005), <https://www.epic.org/privacy/justices/alito/princeton/>; Letter from EPIC to Senator Arlen Specter, Chairman, & Senator Patrick Leahy, Ranking Member (Sept. 9, 2005) (concerning the nomination of Chief Justice John Roberts), <https://epic.org/privacy/justices/roberts/0905letter.pdf>.

I. BACKGROUND

A. Career

On July 9, 2018, Judge Brett M. Kavanaugh was nominated to the U.S. Supreme Court, following the resignation of Judge Anthony Kennedy.² Judge Kavanaugh currently sits on the U.S. Court of Appeals for the District of Columbia Circuit.³

After graduating from Yale Law School in 1990, Judge Kavanaugh served as a law clerk to Judge Walter King Stapleton of the United States Court of Appeals for the Third Circuit and Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. He then served a one-year fellowship with the Solicitor General of the United States, Ken Starr, before clerking for Supreme Court Justice Anthony Kennedy. Judge Kavanaugh worked alongside current Supreme Court Justice Neil Gorsuch during that time.⁴

After his Supreme Court clerkship, Judge Kavanaugh worked for Ken Starr again as Associate Counsel in the Office of the Independent Counsel, where he served as the principal author of the Starr Report to Congress on the Monica Lewinsky-Bill Clinton and Vincent Foster investigation. Judge Kavanaugh then became a partner at the law firm of Kirkland & Ellis.⁵

Brett Kavanaugh joined the Bush White House in June 2001 and left in May 2006. White House Counsel Alberto Gonzales hired him in 2001 as Associate White House Counsel. Starting in June 2003, he served as Assistant to the President and White House Staff Secretary.⁶ As Staff Secretary, Judge Kavanaugh controlled the flow of documents in and out of the Oval Office and circulated documents to senior administration officials for comment. As subsequent reporting and document releases have revealed, Kavanaugh also played a key role in both enactment of the Patriot Act and the defense of the warrantless wiretapping program.

B. White House and Surveillance Programs

Many of the surveillance systems that were initiated and implemented after the September 11 attacks occurred during Judge Kavanaugh's time in the White House – mass surveillance systems such as the warrantless wiretapping program, Total Information Awareness, airport body scanners,⁷ passenger profiling,⁸ and the passage of the PATRIOT Act⁹ and the

² *President Donald J. Trump Announces Intent to Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States*, White House (July 9, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/>.

³ *Brett M. Kavanaugh*, District of Columbia Circuit, U.S. Court of Appeals, <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ EPIC, *Whole Body Imaging Technology and Body Scanners (“Backscatter” X-Ray and Millimeter Wave Screening)* (2018), <https://epic.org/privacy/airtravel/profiling.html>.

REAL ID provisions.¹⁰ These programs sparked widespread public opposition, and many were shut down after they were brought to light.

Many of these programs were subject to high-profile public scrutiny, including intense media coverage, and would likely have been reviewed within the White House. For example, in November 2002, the New York Times reported that the Defense Advanced Research Projects Agency was developing a massive surveillance system called “Total Information Awareness,” that would “peek at personal data of Americans.”¹¹ John Poindexter, head of DARPA’s new “Information Awareness Office”, spearheaded the program. Admiral Poindexter resigned under increasing Congressional scrutiny and, on September 24, 2003, the President signed a budgetary bill that eliminated funding for the project and closed the Pentagon component office that developed the system.¹²

The warrantless wiretapping program, which was first revealed by the New York Times during Judge Kavanaugh’s tenure as Staff Secretary, was one of the most controversial scandals of the Bush Presidency.¹³ The program was first created in November 2001 and was tightly controlled by the White House until 2004, when Department of Justice officials were informed of its existence and questioned the legality of the program.¹⁴ This led to a dramatic encounter between White House and Justice Department officials at the hospital bed of then-Attorney General John Ashcroft in March of 2004.¹⁵ Reporters were prepared to publish an expose of the program in fall of 2004, but officials working in the Bush White House convinced the New York Times to hold the story for over 13 months.¹⁶ Some have suggested that the decision affected the outcome of the 2004 election.¹⁷

⁸ EPIC, *Passenger Profiling* (2017), <https://www.epic.org/privacy/airtravel/profiling.html>.

⁹ See EPIC, *USA PATRIOT Act* (2015), <https://www.epic.org/privacy/terrorism/usapatriot/>.

¹⁰ See EPIC, *National ID and the REAL ID Act* (2017), https://www.epic.org/privacy/id_cards/.

¹¹ John Markoff, *Threats and Responses: Intelligence; Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, N.Y. Times (Nov. 9, 2002), <https://www.nytimes.com/2002/11/09/us/threats-responses-intelligence-pentagon-plans-computer-system-that-would-peek.html>.

¹² H.R. Rep. 108-283, at 327 (2003) (Cof. Rep.), <https://www.congress.gov/108/crpt/hrpt283/CRPT-108hrpt283.pdf>.

¹³ James Risen & Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

¹⁴ See Office of Inspector General, Report No. 2009-0013-AS *Unclassified Report on the President’s Surveillance Program 1* (July 10, 2009), available at <https://oig.justice.gov/special/s0907.pdf>; EPIC, *EPIC v. DOJ – Warrantless Wiretapping Program* (2017), <https://epic.org/privacy/nsa/foia/>.

¹⁵ Colleen Shalby, *Comey, Mueller and the Showdown at John Ashcroft’s Hospital Bed*, L.A. Times (May 17, 2017), <http://www.latimes.com/politics/la-na-pol-mueller-comey-ashcroft-domestic-surveillance-20170517-story.html>.

¹⁶ James Risen, *The Biggest Secret*, The Intercept (Jan. 3, 2018), <https://theintercept.com/2018/01/03/my-life-as-a-new-york-times-reporter-in-the-shadow-of-the-war-on-terror/>. See also, Paul Fahri, *At the Times, a Scoop Deferred*, Wash. Post (Dec. 17, 2005) (“the Times said in its story that it held off publishing the 3,600-word article for a year after the newspaper’s representatives met with White House officials.”), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121601716.html>.

¹⁷ Margaret Sullivan (Public Editor), *Lessons in a Surveillance Drama Redux*, N.Y. Times (Nov. 9, 2013), <https://www.nytimes.com/2013/11/10/public-editor/sullivan-lessons-in-a-surveillance-drama-redux.html>.

II. THE NOMINEE’S POSITIONS

A. The Fourth Amendment

Judge Kavanaugh has authored a number of Fourth Amendment opinions that have consistently favored law enforcement and government surveillance over the privacy of individuals.

1. *Klayman v. Obama*

In *Klayman v. Obama*, Judge Kavanaugh stated that the government’s “bulk collection of telephony data” is “entirely consistent with the Fourth Amendment.”¹⁸ He set out two justifications: (1) relying on *Smith v. Maryland*, a case that partly overturned by the Supreme Court in *Carpenter*, he said there was no constitutional protection for telephone records; and (2) the “special needs” doctrine could include mass surveillance, even when there was no empirical showing to suspend the warrant requirement. The opinion was surprising because the denial of a petition for a rehearing en banc is a procedural matter, and rarely produced an opinion by panel members. In issuing an opinion as Judge Kavanaugh did, he not only broke with tradition but also set out views in defense of post 9-11 surveillance that no judge had previously stated.

The recent Supreme Court decision in *Carpenter v. United States*¹⁹ limited *Smith* as applied to a particular category of metadata – cell site location information.²⁰ In light of this development, it could be said that Judge Kavanaugh opinion in *Klayman* reflected a backward looking view of the Fourth Amendment in the digital age. By contrast, his colleague on the D.C. Circuit, Judge Douglas Ginsburg, set out views regarding the need for a warrant in the use of GPS devices that was later embraced by the Supreme Court in *U.S. v. Jones*.²¹

Second, Judge Kavanaugh stated in *Klayman* that “the Government’s metadata collection program readily qualifies as reasonable” even if it constitutes a search under the “special needs” doctrine.²² He noted that “[t]he Government’s program for bulk collection of telephony metadata serves a critically important special need—preventing terrorist attacks on the United States.”²³ This “critical national security need,” he argued, outweighs the threat to privacy of this program.²⁴ Professor Orin Kerr, one of the nation’s most widely regarded Fourth Amendment scholars, was surprised by Kavanaugh’s special needs argument in *Klayman*. Kerr wrote, “I would think the question is how much the program actually advances the interest in preventing terrorist attacks, not just the importance of its goal in the abstract.”²⁵ Kerr went on to explain,

¹⁸ *Klayman v. Obama*, 805 F.3d 1148 (2015).

¹⁹ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

²⁰ *Id.*

²¹ *United States v. Jones*, 565 U.S. 400 (2012).

²² *Klayman*, 805 F.3d at 1149

²³ *Id.*

²⁴ *Id.*

²⁵ Orin Kerr, *Judge Kavanaugh on the Fourth Amendment*, Lawfare (July 21, 2018, 11:07 AM), <https://www.lawfareblog.com/judge-kavanaugh-fourth-amendment>.

“Kavanaugh applied the special-needs exception in ways that construed the government interests as very weighty and the privacy interests as comparatively light.”²⁶

Judge Kavanaugh’s striking bias toward national security over individual privacy may jeopardize important privacy protections recently established by the Supreme Court’s Fourth Amendment cases concerning digital privacy.

2. *United States v. Jones*

Judge Kavanaugh dissented in *United States v. Jones*,²⁷ a case that was later appealed to the Supreme Court. Here he showed greater sympathy towards “a narrower property-based Fourth Amendment” jurisprudence than one based on “the aggregation of the information obtained.”²⁸ Although this view was adopted by a narrow majority of the Supreme Court,²⁹ it is a narrower conception of privacy than the “reasonable expectation of privacy” standard that the Court has followed in cases involving digital privacy, such as *Carpenter* and *Riley v. California*,³⁰ and which is better suited to the digital age.

In *Jones*, the D.C. Circuit refused to rehear en banc a panel decision holding that the government’s warrantless use of a global positioning system (“GPS”) device to track the public movements of an appellant’s vehicle for approximately four weeks was an unreasonable search in violation of the Fourth Amendment.³¹ The panel decision is based on the lengthy period of time during which the GPS was installed on the vehicle and the amount of personal data collected.³²

Judge Kavanaugh, dissenting from the denial of rehearing, noted that the police’s initial installation of the GPS device on the appellant’s car without a warrant raised an important question over whether that installation was an “unauthorized physical encroachment within a constitutionally protected area.”³³ He found this to be an “important question [that] deserves careful consideration” while dismissing the panel opinion’s reliance on the amount of information obtained by the police as a “novel aggregation approach to Fourth Amendment analysis.”³⁴ Without regard to the vast stores of private data collected on users these days, however, serious privacy violations might happen with no Fourth Amendment redress.

²⁶ *Id.*

²⁷ *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010).

²⁸ *Id.* at 770.

²⁹ *United States v. Jones*, 565 U.S. 400 (2012).

³⁰ *Riley v. California*, 134 S. Ct. 2473 (2014).

³¹ *Jones*, 625 F.3d 766.

³² *Id.*

³³ *Jones*, 625 F.3d at 771, quoting *Silverman v. United States*, 365 U.S. 505, 510 (1961).

³⁴ *Id.* at 770.

3. Other Fourth Amendment Cases

Judge Kavanaugh's other Fourth Amendment opinions do not directly touch on digital privacy. However, Judge Kavanaugh has routinely sided with law enforcement over Constitutional and statutory privacy claims.

In *Wesby v. District of Columbia*,³⁵ he dissented from a decision denying a petition for rehearing en banc and found that the police had probable cause to arrest a group of party-goers for trespassing when the police had no evidence about their state of mind. Writing for the majority in *United States v. Burnett*,³⁶ Judge Kavanaugh determined that the police had probable cause to search a rental car for heroin based on defendants' travel activity. In *United States v. Washington*,³⁷ he held that police officers had a reasonable fear for their safety during a traffic stop when defendants ran the stop sign, and that their search of defendants' car thus does not violate the Fourth Amendment.

Writing for the majority in a panel opinion in *U.S. v. Askew*,³⁸ and dissenting from a rehearing en banc of the same case in *U.S. v. Askew*,³⁹ Judge Kavanaugh found it reasonable for the police to unzip the jacket of a suspected armed robber to facilitate a show-up even though the unzipping would neither establish nor negate his identification as the robber. In *United States v. Spencer*,⁴⁰ he ruled for the police and held that their search of defendant's house was permissible under the Fourth Amendment.

In all his authored Fourth Amendment opinions, Judge Kavanaugh has sided with government surveillance and police search with no exception. This bias against privacy claims raises troubling concerns about Judge Kavanaugh's commitment to constitutional safeguards.

B. Standing

Judge Kavanaugh is relatively friendly to plaintiffs seeking standing, particularly when those plaintiffs are suing a regulatory agency. In the majority of standing cases he has authored, Kavanaugh has found standing. And on multiple occasions he has either dissented or written a separate concurrence to find that standing exists.⁴¹ He even once chided his colleagues in a dissent by noting, "we have a tendency to make standing law more complicated than it needs to be."⁴²

³⁵ *Wesby v. District of Columbia*, 816 F.3d 96 (D.C. Cir. 2016).

³⁶ *United States v. Burnett*, 827 F.3d 1108 (D.C. Cir. 2016).

³⁷ *United States v. Washington*, 559 F.3d 573 (D.C. Cir. 2009).

³⁸ *U.S. v. Askew*, 482 F.3d 532 (D.C. Cir. 2007).

³⁹ *U.S. v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008).

⁴⁰ *United States v. Spencer*, 530 F.3d 1003 (D.C. Cir. 2008).

⁴¹ *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 190 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (finding that the "zone of interest" test did not apply because the defense waived the argument). *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684 (D.C. Cir. 2015) (Kavanaugh, J. dissenting) (finding that individuals have standing to sue to strike down agency rule when that rule directly regulates them).

⁴² *Id.* at 698.

Kavanaugh has asserted that prudential standing is a low bar that is not jurisdictional; believes that “risk of injury” must be proven with sworn facts; and maintains a standard view of organizational injury.

1. Prudential Standing

Judge Kavanaugh believes “prudential” or “statutory” standing is not jurisdictional, meaning it is not constitutionally required and defendants can lose that argument if they do not specifically make it — a view in opposition to some colleagues.⁴³ Kavanaugh has also said specifically “prudential standing is a low bar.”⁴⁴

An individual has prudential standing when an agency rule directly regulates the individual at issue.⁴⁵

2. Article III Standing

Injury in Fact (Abstract Injury)

Kavanaugh has written multiple opinions about abstract injury. He has ruled that the “increased risk” of accidents is concrete and particularized (however, “increased risk” is not actual or imminent without solid evidence).⁴⁶ He has also ruled that a government agency’s decision not to recognize a group (denying a group the “privileges of recognition”) is an injury in fact.⁴⁷

Judge Kavanaugh ruled that taxpayers do not have standing when they merely take offense to — rather than being directly discriminated by — the government’s indirect action that conveys an unconstitutional religious message.⁴⁸ However, if the religious message is conveyed “actively and directly,” that confers standing on anyone who hears it and is offended.⁴⁹

⁴³ *Grocery Mfrs. Ass’n*, 693 F.3d at 190 (Kavanaugh, J. dissenting).

⁴⁴ *Id.* (“The Supreme Court has repeatedly emphasized that prudential standing is a low bar.”); *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (finding standing for truckers to sue strike down regulation because “in authorizing the pilot program, Congress balanced a variety of interests, including safety, American truckers’ economic well-being, foreign trade, and foreign relations.”).

⁴⁵ *Grocery Mfrs. Ass’n*, 693 F.3d at 190 (Kavanaugh, J., dissenting); *Morgan Drexen, Inc.*, 785 F.3d at 698 (Kavanaugh, J. dissenting) (“We have a tendency to make standing law more complicated than it needs to be. When a regulated party such as Pisinski challenges the legality of the regulating agency or of a regulation issued by that agency, ‘there is ordinarily little question’ that the party has standing, as the Supreme Court has indicated.”).

⁴⁶ *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1297 (D.C. Cir. 2007) (finding that expert probability evidence was needed to prove the “increased risk” of car accidents resulting from a new regulation).

⁴⁷ *Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Employees of Library of Cong., Inc. v. Billington*, 737 F.3d 767 (D.C. Cir. 2013) (finding standing for employees to sue Library of Congress because library failed to recognize their organization).

⁴⁸ *In re Navy Chaplaincy*, 534 F.3d 756, 764–65 (D.C. Cir. 2008).

⁴⁹ *Id.*; *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010).

Actual or Imminent Harm

Judge Kavanaugh explicitly ruled out the theory that an “increased risk” of injury is an actual harm. For “increased risk” to become imminent and confer standing, the plaintiff must supplement the record with expert opinion and sworn affidavits that the risk will turn into actual harm.⁵⁰

3. Organizational Standing

Kavanaugh has a standard view of organizational injury, ruling that an organization has standing when: 1) at least one of its members would have standing, and 2) the issue is germane to the organization’s mission.⁵¹

C. Open Government

1. Summary

There are eleven opinions of note regarding FOIA and/or transparency in which Judge Kavanaugh participated while on the D.C. Circuit. Case briefs are provided below. The last case, *In re Kellogg Brown & Root, Inc.*, is the only one that does not involve FOIA; instead, it concerns the attorney-client privilege. Kavanaugh wrote the majority opinion in eight of the cases (*Environmental Integrity Project v. EPA*; *Abteu v. DHS*; *Blackwell v. FBI*; *CREW v. FEC*; *Sack v. DOD*; *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary and Water Commission, U.S.-Mexico*; *National Security Archive v. CIA*; and *In re Kellogg Brown & Root, Inc.*), concurring opinion in two of the cases (*Morley v. CIA* and *Clemente v. FBI*), and dissenting opinion one case (*Roth v. DOJ*).

Kavanaugh decided (or would have decided, had he been in the majority) against the FOIA requester in five of the cases (*Environmental Integrity Project v. EPA*; *Abteu v. DHS*; *Roth v. DOJ*; *Blackwell v. FBI*; and *National Security Archive v. CIA*). Kavanaugh decided in the FOIA requester’s favor in one case (*CREW v. FEC*). In *Sack v. DOD*, Kavanaugh resolved one issue in favor of the FOIA requester and one against the FOIA requester. In *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary and Water Commission, U.S.-Mexico*, he remanded the case for further fact-finding. *Morley v. CIA* and *Clemente v. FBI* are different, and significant, because in both concurrences, Kavanaugh argued that the D.C. Circuit should get rid of the four-part test for deciding whether a substantially prevailing party in a FOIA case is entitled to attorney’s fees. In *Morley*, he said that “the text of FOIA does not require this four-factor standard . . . the four-factor standard adopted by this

⁵⁰ *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1297 (D.C. Cir. 2007) (“The Supreme Court has repeatedly held that disputes about future events where the possibility of harm to any given individual is remote and speculative are properly left to the policymaking Branches, not the Article III courts.”).

⁵¹ *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (finding standing because the organization’s “members are hurt by increased competition, and the groups exist to protect the economic interests of their members”).

Court is arbitrary and inconsistent with the structure and purposes of FOIA.”⁵² Instead, he thinks that the D.C. Circuit should adopt one of two alternatives: either “prevailing plaintiffs should receive attorney’s fees—with only a very narrow exception for ‘special circumstances’ such as bad faith by a prevailing plaintiff” or “we could simply continue to use the one factor from the current four-factor standard that makes some sense in the FOIA context: the reasonableness of the agency’s conduct.”⁵³ This argument from *Morley* and *Clemente* appears to be his most strongly-held and significant belief regarding FOIA. And, based on his writing in several cases—including *Environmental Integrity Project v. EPA*, *Roth v. DOJ*, and *CREW v. FEC*—he seems to be a strict textualist who prefers to defer to the other branches of government. Also, in *Roth*, he discusses privacy concerns; namely, those of third parties mentioned in law enforcement files requested under FOIA.

Finally, in *In re Kellogg Brown & Root, Inc.*, he decided that the attorney-client privilege applied. He acknowledged the costs that can come with this privilege, but said “our legal system tolerates those costs because the privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”⁵⁴

D. Congress and the Courts

Judge Kavanaugh is extremely deferential to Congressional and Executive Authority, especially in the area of national security. In *United States v. Opportunity Fund*,⁵⁵ Judge Kavanaugh notes that “Congress’s deliberate [word] choices must be respected,” because it would be difficult to believe that Congress would enact a significant measure without clear indication of its purpose to do so. Deference in these cases is primarily reserved for the actual statutory text, not legislative history.

When executive and congressional power conflict, Judge Kavanaugh has stated that while a treaty should be given the same weight as congressional laws, distorting statutory language simply to avoid conflicts with treaties would elevate treaties above statutes in contravention with the Constitution.⁵⁶

Judge Kavanaugh also considered the interplay of Congressional and Executive power in *El-Shifa Pharm. Indus. Co. v. United States*.⁵⁷ Here the owners of a Sudanese pharmaceutical plant sued the US for unjustifiably destroying the plant, failing to compensate them for its destruction, and defaming them by asserting they had ties to Osama Bin Laden. Kavanaugh dissented from the majority opinion that dismissed the claim against the federal government under the political question doctrine. Kavanaugh agreed with the dismissal, but found that the plaintiffs had not alleged a cognizable cause of action. Kavanaugh found the majority’s application of the political question theory incorrect saying,

⁵² *Morley v. CIA*, 719 F.3d 689, 691 (D.C. Cir. 2013).

⁵³ *Id.* at 692.

⁵⁴ *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 764 (D.C. Cir. 2014).

⁵⁵ *United States v. Opportunity Fund*, 613 F.3d 1122, 1127 (D.C. Cir. 2010).

⁵⁶ *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006).

⁵⁷ *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010).

“There is good reason the political question doctrine does not apply in cases alleging statutory violations. If a court refused to give effect to a statute that regulated Executive conduct, it necessarily would be holding that Congress is unable to constrain Executive conduct in the challenged sphere of action. As a result, the court would be ruling (at least implicitly) that the statute intrudes impermissibly on the Executive's prerogatives under Article II of the Constitution. In other words, the court would be establishing that the asserted Executive power is exclusive and preclusive, meaning that Congress cannot regulate or limit that power by creating a cause of action or otherwise.”⁵⁸

Judge Kavanaugh also notes in this opinion that the Executive Branch’s conduct in national security and foreign affairs matters should not be unduly hampered by the other political branches and should allow for flexibility and discretion.

E. Other Opinions of Note

1. Consumer Financial Protection Bureau

In multiple cases, Judge Kavanaugh expressed his view that the Consumer Financial Protection Bureau (CFPB) is unconstitutional. Judge Kavanaugh finds the CFPB’s structure to violate Article II of the Constitution because it operates as an independent agency headed by a single director. In *Doe Co. v. Cordray*,⁵⁹ Judge Kavanaugh dissented in favor of hearing the John Doe’s Company’s constitutional challenge against the CFPB. “The public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency.”⁶⁰ Judge Kavanaugh considered the constitutional challenge to be ripe because CFPB issued binding rules that governed the company’s conduct and can bring enforcement actions against the company for violations of these rules.

Judge Kavanaugh also dissented in *PHH Corp. v. CFPB*,⁶¹ where he described independent agencies as the headless fourth branch of government. “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.”⁶² Here, because of the Dodd-Frank Act’s express severability clause and the fact that the CFPB could act without the for-cause removal provision, Judge Kavanaugh recommended severing the for-cause removal provision from the statute. Doing this would place the Director of the CFPB under the supervision and direction of the President and would make them removable for cause. Judge Kavanaugh’s dissent on this opinion built on his majority

⁵⁸ *Id.* at 857.

⁵⁹ *Doe Co. v. Cordray*, 849 F.3d 1129 (D.C. Cir. 2017).

⁶⁰ *Id.* at 1137.

⁶¹ *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018).

⁶² *Id.* at 165.

opinion in *PHH Corp. v. CFPB*,⁶³ and suggested that to remedy the constitutional flaw, the court should sever the unconstitutional for-cause provision so the president would have the power to remove the director at will and to supervise and direct the director (overturned in an en banc hearing).

2. *Antitrust*

In his only authored opinion on antitrust law, Judge Kavanaugh sided with the big corporations. In *FTC v. Whole Foods Mkt.*,⁶⁴ he dissented from a decision granting preliminary injunction to block the Whole Foods-Wild Oats merger. Here Whole Foods would win the case if the relevant market is all supermarkets and lose if it is organic supermarkets. Judge Kavanaugh found enough evidence supporting the former based on Whole Foods' lack of pricing power even when it dominates organic supermarkets.

Judge Kavanaugh disagreed with the majority on legal standards for: (1) market definition; and (2) preliminary injunction.

1. He found the majority's reliance on "loose antitrust standards" from *Brown Shoe Co. v. United States*,⁶⁵ for defining a market problematic. The *Brown Shoe* standard "lists 'distinct prices' as only one of a non-exhaustive list of seven 'practical indicia' that may be examined to determine whether a separate market exists."⁶⁶ Judge Kavanaugh preferred a focus on distinct prices for determining the relevant market, which unlike "*Brown Shoe*'s brand of free-wheeling antitrust analysis . . . sufficiently account[s] for the basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine."⁶⁷
2. He also found the majority applied a "relaxed serious questions standard," which "the Supreme Court unanimously rejected . . . as too weak and not equivalent to the 'likelihood of success' necessary for a preliminary injunction to issue."⁶⁸

Judge Kavanaugh's legal views on both points favor the big corporations. A single-minded focus on distinct prices standard makes it easy for companies to define away their dominant market. A stricter standard for preliminary injunction makes it hard to stop anti-competitive mergers. In a world where big tech companies like Google and Facebook present serious threats to Americans' privacy rights, such an attitude will only encourage their market abuse and jeopardize important privacy protections.

⁶³ *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016).

⁶⁴ *FTC v. Whole Foods Mkt.*, 548 F.3d 1028 (D.C. Cir. 2008).

⁶⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁶⁶ *Whole Foods*, 548 F.3d at 1046.

⁶⁷ *Id.* at 1058-59.

⁶⁸ *Id.* at 1060-61, quoting *Munaf v. Geren*, 553 U.S. 674, 690 (2008).

3. First Amendment

a. Political Contributions

Writing for the court in *Bluman and Steiman v. Federal Election Commission*, Judge Kavanaugh upheld the right for the government to bar non-permanent resident foreign citizens from participating in the campaign process to influence how voters would cast their ballots in the election.⁶⁹ “In other words, the government may reserve participation in its democratic political institutions for citizens of this country.”⁷⁰ The court did not consider this a violation of the non-citizens first amendment rights because, “although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engaged in licensed professions, the right to govern is reserved for citizens.”⁷¹ Because of *Citizens United*, the *Bluman* decision is notable for two reasons: (1) it is hard to reconcile with *Citizens United*, and (2) it is very limited.⁷² It is hard to reconcile with *Citizens United* because Justice Kennedy wrote that First Amendment protections do not depend on the speaker’s financial ability to engage in public discussion.⁷³ Further, this was how the decision was interpreted by the Obama Administration.⁷⁴ Second, the decision is limited because it allowed non-citizens and non-permanent residents the freedom to spend money on issue advocacy.⁷⁵ The Supreme Court affirmed *Bluman* without comment in 2012.⁷⁶

In other cases, Judge Kavanaugh’s decisions have narrowly affirmed *Citizens United*. In *Republican Nat’l Comm. v. FEC*,⁷⁷ Judge Kavanaugh wrote that the Supreme Court’s First Amendment jurisprudence establishes several principles regarding campaign finance. First, Congress may impose limits on contributions to federal candidates and political parties because of the *quid pro quo* corruption or appearance of *quid pro quo* corruption that can be associated with such contributions. Second, Congress may not limit expenditures by candidates and political parties. And third, Congress may not limit non-connected entities, including individuals, unincorporated associations, nonprofit organizations, labor unions, and for-profit corporations, from spending or raising money to support the election or defeat of candidates.⁷⁸ Referring to the Bipartisan Campaign Reform Act of 2002 (BCRA), which limits contributions to national, state, and local political parties, the court found that *Citizens United* did not disturb McConnell’s holding regarding the constitutionality of BCRA’s limits on contributions to political parties. The court granted summary judgement to the plaintiff’s because the district court had no authority to overturn or clarify the Supreme Court’s decision in *McConnell v. FEC*.⁷⁹

⁶⁹ *Benjamin Bluman and Asenath Steiman v. Federal Election Comm’n*, 800 F.Supp.2d 281 (2011).

⁷⁰ *Id.* at 287.

⁷¹ *Id.* at 288.

⁷² Adam Liptak, *How to Tell Where Brett Kavanaugh Stands on Citizens United*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/politics/brett-kavanaugh-citizens-united-campaign-finance.html>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Bluman et al. v. Federal Election Comm’n*, 565 U.S. 1104 (2012).

⁷⁷ *Republican Nat’l Comm. v. FEC*, 698 F.Supp.2d 152 (D.C. Cir. 2010).

⁷⁸ *Id.*

⁷⁹ *McConnell v. FEC*, 540 U.S. 93 (2003).

b. Judicial Proceedings

During an investigation of a crime, the Government arrested two juvenile victims on material witness warrants. Per the Government's request the court sealed all documents related to these warrants and the subsequent proceedings. In *United States v. Brice*,⁸⁰ the defendant sought these records under the First and Six Amendment. Judge Kavanaugh, writing for the court, held that the court did not need to decide whether the First Amendment right of access to judicial proceedings extends to material witness proceedings, because the defendant would not have been entitled to the records. Judge Kavanaugh wrote that in this context, "Where there is a First Amendment right of access to a judicial proceeding, the "presumption [of access] can be overridden only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest."⁸¹

c. Forum Analysis

In *Bryant v. Gates*,⁸² the Court considered whether the Department of Defense's refusal to allow private advertisements to be published in its civilian enterprise newspaper (CEN) violated the First Amendment. The majority completed a forum analysis and concluded that the CEN was a nonpublic forum and are intended solely to facilitate accomplishment of the command or installation mission.⁸³ Judge Kavanaugh concurred in the opinion but found the forum analysis to be unnecessary because the CEN was instead the Government's own speech. Therefore, the government may favor or espouse a particular viewpoint. Judge Kavanaugh found that in cases like this, the government "has largely unlimited power to control what is said in its official organs, or in organs that it official endorses, even if this control is exercised in a viewpoint-based way."⁸⁴

d. Ban on Computer/ Internet Usage as a Criminal Punishment

Judge Kavanaugh has found banning computer/internet usage as a condition of supervision to be permissible. In *United States v. Malenya*,⁸⁵ Malenya placed a personal ad on the "Men Seeking Men" section of Craigslist.com and communicated via text message with a 14-year-old, pretending to be 18 years-old, who responded to the post. Malenya was arrested after he arranged to meet up with the minor child in-person for a second time. Malenya pled guilty to a DC Code violation for "Arranging for a sexual contact with a real or fictitious child" and was sentenced to 36 months in jail and 36 months of supervised release with special conditions. Malenya objected to the conditions imposed for his supervised release and the majority found that the sweeping nature of several of the conditions demonstrates that the court failed to weigh the burden on Malenya's liberty against their likely effectiveness. Specifically, noting the

⁸⁰ *United States v. Brice*, 649 F.3d 793 (D.C. Cir. 2011).

⁸¹ *Id.*

⁸² *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008).

⁸³ *Id.* at 896.

⁸⁴ *Id.* at 899.

⁸⁵ *United States v. Malenya*, 736 F.3d 554 (D.C. Cir. 2013).

ubiquity of computers in modern society and their essentialness for employment, the majority found that a ban on computer and internet usage without permission from a probation office was a significant deprivation of liberty.

Judge Kavanaugh dissented in favor of the district court’s discretion to impose discretionary supervised released conditions if the special conditions are statutorily permitted. Here, Judge Kavanaugh considered whether the conditions were “reasonably related” and “reasonably necessary.” He considered diversity in sentencing to be permissible because different district courts have distinct sentencing philosophies. Judge Kavanaugh focused on four overreaching considerations in this sentencing. First, the court must impose special conditions of supervised release to prevent Malenya from sexually exploiting future under-age victims. Second, the special conditions imposed are common for sex offenders. Third, they are reasonably short in brevity. Finally, they are less restrictive on Malenya’s liberty than a longer prison sentence.⁸⁶

F. FAA

With the increased use of drones by public citizens the FAA promulgated a rule known as the Registration Rule, requiring owners of small unmanned aircraft operated for recreational purposes to register with the FAA. After passing the FAA Modernization and Reform Act stating that the “FAA may not promulgate any rule or regulation regarding a model aircraft,” Petitioner Taylor is a model aircraft hobbyist who contested the requirement that he register his drone. *Taylor v. Huerta*.⁸⁷ Judge Kavanaugh, writing for the court found that the Registration Rule violated this provision and was therefore unlawful. The court found that the Registration Rule was not merely an update to previous regulations, but instead makes a new regulatory structure.

III. Appendix (Case Briefs)

Environmental Integrity Project v. EPA, 864 F.3d 648 (D.C. Cir. 2017)

Facts: Environmental groups—the Environmental Integrity Project, Sierra Club, and Earthjustice—requested certain records from the EPA. 864 F.3d 648, 649 (D.C. Cir. 2017). The EPA had obtained those records from power plants, pursuant to Section 308 of the Clean Water Act (excerpted below). *See id.* The EPA declined to disclose the records, arguing that they were exempt as “commercial or financial information” under Exemption 4 of FOIA (excerpted below). *See id.* The environmental groups argued that the records must be disclosed under Section 308 because they were not “trade secrets.” *See id.*

Procedural History: The opinion does not explicitly discuss the procedural history, but based on the disposition, it seems that the District Court entered judgment in the EPA’s favor and the environmental groups appealed the judgment to the D.C. Circuit. *See id.* at 650.

⁸⁶ *Malenya*, 736 F.3d at 562 (Kavanaugh, J. dissenting).

⁸⁷ *Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017).

Issue: Whether the requested EPA records were exempt from disclosure under Exemption 4 of FOIA or required for disclosure under Section 308 of the Clean Water Act? *See id.* at 649.

Holding: Section 308 of the Clean Water Act: This provision permits the EPA to get records from power plants, but says that the records “shall be available to the public,” except if the EPA finds that the records “would divulge methods or processes entitled to protection as trade secrets.” 33 U.S.C. §§ 1318(a), (b) (2012).

Exemption 4 of FOIA: This exemption allows agencies to withhold “trade secrets and commercial or financial information obtained from a person and privileged and confidential.” 5 U.S.C. § 552(b)(4) (2012).

Kavanaugh held that because “Section 308 of the Clean Water Act does not expressly supersede Exemption 4 of FOIA,” then the “EPA permissibly invoked Exemption 4 to withhold the records at issue in this case.” 864 F.3d 648, 650 (D.C. Cir. 2017).

Language: “If Congress had wanted Section 308 to supersede Exemption 4, Congress could have drafted express language to that effect, as it has in other statutes.” *Id.* at 649.

***Abteu v. DHS*, 808 F.3d 895 (D.C. Cir. 2015)**

Facts: Anteneh Abteu was a man from Ethiopia who applied for asylum in the United States. DHS denied his asylum claim, and he appealed. While his case was pending in immigration court, he filed a FOIA request for the “Assessment to Refer”—a document that DHS officials create after they interview asylum applications—for his case. DHS declined to produce the Assessment, claiming that it was exempt under the deliberative process privilege in Exemption 5 to FOIA. *See* 808 F.3d 895, 897–98 (D.C. Cir. 2015).

Procedural History: Abteu filed this FOIA litigation in the district court. The district court ruled that the Assessment was exempt under Exemption 5. Abteu appealed to the D.C. Circuit. *See id.* at 898.

Issue: Whether the Assessment to Refer was exempt from disclosure under Exemption 5 to FOIA? *See id.* at 898.

Holding: Exemption 5 to FOIA: This exemption exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5) (2012).

Under D.C. Circuit precedent, an intra-agency memorandum must be both “predecisional” and “deliberative” in order to qualify for the deliberative process privilege. *See Senate of the Commonwealth of Puerto Rico v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987); *see also Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

Kavanaugh held that “[i]n *Abtew*’s case, the Assessment to Refer was both pre-decisional and deliberative;” therefore, it qualified for the deliberative process privilege and was exempt under Exemption 5 of FOIA. *See* 808 F.3d 895, 899 (D.C. Cir. 2015).

Language: “Put simply, an agency does not forfeit a FOIA exemption simply by releasing similar documents in other contexts.” *Id.* at 900.

***Roth v. DOJ*, 642 F.3d 1161 (D.C. Cir. 2011)**

Facts: Roth was convicted of a quadruple homicide in Texas and sentenced to death. While on death row, his attorney and he came to believe that the FBI, which worked with Texas officials on the prosecution of his case, had information that demonstrated that someone else had committed the homicide. His attorney filed a FOIA request to obtain the information. The FBI answered the request with a *Glomar* response, refusing to confirm or deny that it possessed records regarding three of the four men (the fourth man had died by that point), and argued that this response was justified under Exemptions 6, 7(C), and 7(D) to FOIA. *See* 642 F.3d 161, 1166 (D.C. Cir. 2011).

Procedural History: The district court reviewed the disputed documents in camera. It found that the *Glomar* response was appropriate and, largely, the FBI could refuse to disclose the information based on various FOIA exemptions. Roth appealed to the D.C. Circuit. *See id.* at 1172.

Issue: Whether the FBI’s *Glomar* response and refusal to disclose additional documents could be justified under Exemptions 6, 7(C), and/or 7(D) to FOIA? *See id.* at 1172–73.

Holding: Exemption 6 to FOIA: This exemption exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6) (2012).

Exemption 7(C) to FOIA: This exemption exempts from disclosure “records or information compiled for law enforcement purposes” if disclosure of the data “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *Id.* § 552(b)(7)(C).

Exemption 7(D) to FOIA: This exemption exempts from disclosure records “compiled by criminal law enforcement authorit[ies] in the course of a criminal investigation” that “could reasonably be expected to disclose the identity of a confidential source” or “information furnished by” a confidential source. *Id.* § 552(b)(7)(D).

In evaluating an invocation of Exemption 7(C), the D.C. Circuit must “balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.” *Davis v. DOJ*, 968 F.3d 1276, 1281 (D.C. Cir. 1992).

The majority first rejected the FBI's attempt to justify the *Glomar* response using Exemption 7(C).⁸⁸ It said, "Weighing the competing interests, we conclude that the balance tilts decidedly in favor of disclosing whether the FBI's files contain information linking [the three men] to the FBI's investigation of the killings. As a result, we shall reverse the district court's rejection of Roth's challenge to the FBI's *Glomar* response and remand for further proceedings." *Id.* at 1181. The court then responded to the FBI's refusal to disclose the information that it redacted from the documents under Exemption 7(D) by stating that "the FBI has generally struck an appropriate balance" but that in two instances, "the FBI has failed to bear its burden of proving that the information redacted . . . falls within the scope of Exception 7(D)." *Id.* at 1185–86.

Kavanaugh dissented solely from the section of the majority's opinion regarding Exemption 7(C), holding that Exemption 7(C) should apply in this case. He stated: "I believe it essential for judicial and executive officials to ensure—particularly in death penalty cases—that claims of innocence based on newly discovered evidence are properly explored. But given FOIA's critical protection for personal privacy and the many other processes available for vindicating a defendant's innocence claim, the Supreme Court and this Court have held that FOIA ordinarily is not an appropriate tool to obtain information from law enforcement files relating to a criminal prosecution when disclosure would infringe the privacy interests of third parties. That settled principle controls this case." 623 F.3d 1161, 1191 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Language: "As the courts have explained, the public interest in ensuring that innocent people are not wrongly convicted or subjected to prosecutorial or investigative misconduct is properly vindicated in the ordinary criminal and civil litigation processes—where personal privacy is not as weighty a consideration as it is under FOIA." *Id.* at 1188.

"The FOIA precedents set forth a clear juridical principle—namely, that FOIA ordinarily cannot be used to obtain *private* information from law enforcement files relating to a criminal prosecution." *Id.* at 1188–89 (emphasis in original).

"The privacy interests of third parties who are named in law enforcement documents are invariably strong." *Id.* at 1189.

"In the end, the majority opinion distinguishes away a slew of applicable precedents by decreeing a new death penalty exception that overrides Exemption 7(C)'s protection of personal privacy. . . . Creating any such exception is a decision properly left to Congress and the Executive Branch." *Id.* at 1190.

***Blackwell v. FBI*, 646 F.3d 37 (D.C. Cir. 2011)**

Facts: Blackwell was convicted of federal insider trading, along with other related crimes. The direct appeal and habeas proceedings affirmed his conviction and sentence. But, he

⁸⁸ The majority said that because Exemption 7(C) is broader than Exemption 6, it had "no need to consider Exemption 6 separately because all information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C)." 642 F.3d 1161, 1173 (D.C. Cir. 2011).

claimed that he was innocent and that the FBI prosecuted him unfairly. Accordingly, he filed several FOIA requests with the FBI regarding its investigation and prosecution of him. The FBI responded and gave Blackwell more than a thousand pages of responsive documents, but withheld 209 pages and made other redactions. *See* 646 F.3d 37, 39 (D.C. Cir. 2011).

Procedural History: Blackwell filed a complaint in district court, alleging that the FBI’s redactions and withholdings were unjustified. The district court entered summary judgment in the FBI’s favor. Blackwell appealed to the D.C. Circuit. *See id.*

Issue: Whether the FBI’s redactions and withholdings were justified under Exemptions 7(C) and/or 7(E) to FOIA? *See id.* at 39.

Holding: Exemption 7(C) to FOIA: *See Roth v. DOJ*, above.

Exemption 7(E) to FOIA: This exemption exempts from disclosure law enforcement records “to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E) (2012).

In the D.C. Circuit, to show that requested documents were “compiled for law enforcement purposes” under Exemption 7, the government must “establish a rational nexus between the investigation and one of the agency’s law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law.” *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998).

Kavanaugh first held that the requested documents “easily qualify” as compiled for law enforcement purposes under that standard. 646 F.3d 37, 40 (D.C. Cir. 2011). He then rejected Blackwell’s challenges under both Exemption 7(C) and 7(E), stating “Blackwell has not come close to meeting the demanding *Favish* standard for challenging the FBI’s invocation of FOIA Exemption 7(C)” and “[the FBI’s] statements logically explain how the data could help criminals circumvent the law, and that suffices here to justify invocation of Exemption 7(E).” 646 F.3d 37, 41–42 (D.C. Cir. 2011).

Language: “Under our precedents, Exemption 7(E) sets a relatively low bar for the agency to justify withholding.” *Id.* at 42.

***Morley v. CIA*, 719 F.3d 689 (D.C. Cir. 2013)**

Facts: Morley, a reporter, filed a FOIA request with the CIA to obtain records related to CIA officer George E. Joannides. He wanted these records as a part of his investigation into the JFK assassination, because Joannides was the CIA case officer who was in charge of a Cuban group that had communicated with Lee Harvey Oswald shortly before the assassination. The CIA did not produce the requested records. *See* 719 F.3d 689, 689–90 (D.C. Cir. 2013).

Procedural History: Morley initiated this FOIA litigation in the district court. The court decided in his favor and, accordingly, he sought attorney’s fees as a substantially prevailing party. Using the four-factor test, the district court decided that Morley was not entitled to attorney’s fees. He appealed to the D.C. Circuit. *See id.* at 690.

Issue: Whether the district court evaluated Morley’s request for attorney’s fees correctly?

Holding: According to the D.C. Circuit, the four-part test for deciding whether a substantially prevailing party in a FOIA case is entitled to attorney’s fees is as follows: (1) the public benefit derived from the case, (2) the commercial benefit to the requester, (3) the nature of the requester’s interest in the information, and (4) the reasonableness of the agency’s conduct.” *Id.*

But, in another case, the D.C. Circuit has explained more about (1), the public benefit factor. First, it said that “[records] about individuals allegedly involved in President Kennedy’s assassination[] serve[] a public benefit.” *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008). Additionally, it stated that the test for attorney’s fees does not “disqualify plaintiffs who obtain information that, while arguably not of immediate public interest, nevertheless enables further research ultimately of great value and interest, such as here the public understanding of a Presidential assassination.” *Id.* at 1162 n.3. Ultimately, in that case, the court decided that, “a balancing of the factors can only support the conclusion that Davy is entitled to an award of attorney’s fees.” *Id.* at 1163.

This was a per curiam opinion to which Kavanaugh wrote a concurring opinion. The per curiam opinion held that the district court’s judgment was mistaken because the district court “did not consider the *Davy* Court’s analysis of the public-benefit factor.” 719 F.3d 689, 690 (D.C. Cir. 2013). In his concurring opinion, Kavanaugh held that “[a]s a three-judge panel, we of course have to adhere to the four-factor standard set forth in our precedents. Applying that four-factor standard, I accept the Court’s decision today to vacate and remand in light of our prior decision in *Davy*.” 719 F.3d 689, 693 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

Language: “We should ditch the four-factor standard.” *Id.* at 690.

“In short, the text of FOIA does not require this four-factor standard . . . the four-factor standard adopted by this Court is arbitrary and inconsistent with the structure and purposes of FOIA.” *Id.* at 691.

“For disclosure purposes, FOIA treats all requests and requesters the same—no matter the identity of the requesters, the specific benefit that might be derived from the documents, or the requesters’ overt or subtle motives.” *Id.*

“We can do better. In an appropriate case, I think the Court should jettison the four-factor standard and adopt the rule from *Newman*, where the Supreme Court construed a similarly worded civil rights fees statute and held that prevailing plaintiffs should receive attorney’s fees—with only a very narrow exception for “special circumstances” such as bad faith by a prevailing plaintiff.” *Id.* at 692.

“As a narrower alternative, albeit one not as favorable to FOIA plaintiffs as the *Newman* rule, we could simply continue to use the one factor from the current four-factor standard that makes some sense in the FOIA context: the reasonableness of the agency's conduct.” *Id.*

“It's tempting to think that we should leave well enough alone given that we have applied the four-factor standard since our 1977 decision in *Cuneo*. Two points together convince me that inertia is not the right answer.” *Id.* at 693.

***CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013)**

Facts: Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit who advocates for governmental transparency, sent a FOIA request to the FEC in search of various records. The FEC acknowledged receipt of the request and the two parties had multiple communications, but it still had not sent any documents to CREW after two months. 711 F.3d 180, 183 (D.C. Cir. 2013).

Procedural History: CREW initiated this FOIA litigation in the district court. While the litigation was pending, the FEC produced some documents and then moved to dismiss the case as moot. The district court found that the case was not moot but granted the motion for summary judgment, deciding that CREW had failed to exhaust its administrative appeal remedies. CREW appealed to the D.C. Circuit. *Id.* at 183–84.

Issue: “When must a FOIA requester exhaust administrative appeal remedies before suing in federal district court to challenge an agency's failure to produce requested documents?” *Id.* at 182.

Holding: Before a FOIA requester can initiate FOIA litigation, the requester must exhaust the administrative appeal remedies. However, the statute states that the requester will be found to have fulfilled this exhaustion requirement if the agency does not meet certain statutory deadlines in its response. *See* 5 U.S.C. § 552(a)(6)(C)(i) (2012).

The relevant statutory deadline states that the agency must “determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination..” *Id.* § 552(a)(6)(A)(i). This deadline can be extended to thirty working days in “unusual circumstances.” *Id.* § 552(a)(6)(B)(i).

Kavanaugh held that “[i]n order to make a ‘determination’ within the statutory time periods and thereby trigger the administrative exhaustion requirement, the agency need not actually produce the documents within the relevant time period. But the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents. In this case, the FEC did not make such a “determination” within the statutory time period. As a result, CREW was not

required to exhaust administrative appeal remedies before filing its FOIA suit.” 711 F.3d 180, 182–83 (D.C. Cir. 2013).

Language: “We are intimately familiar with the difficulty that FOIA requests pose for executive and independent agencies. But contrary to the FEC’s suggestion, our reading of the statute recognizes and accommodates that reality.” *Id.* at 189.

“It is true that the statute does not allow agencies to keep FOIA requests bottled up for months or years on end while avoiding any judicial oversight. But Congress made that decision. If the Executive Branch does not like it or disagrees with Congress’s judgment, it may so inform Congress and seek new legislation.” *Id.* at 190.

***Clemente v. FBI*, 714 Fed. Appx. 2 (D.C. Cir. 2018)**

Facts: None

Procedural History: None

Issue: Whether the D.C. Circuit should rehear the case en banc? *See* 714 Fed. Appx. 2, 3 (D.C. Cir. 2018).

Holding: The main opinion is a per curiam order in which the D.C. Circuit denied the petition for rehearing en banc. *See id.* Kavanaugh wrote a concurrence to the denial in which he reiterated his view from *Morley v. CIA* (see above) that “this Court’s four-factor test for awarding attorney’s fees in FOIA cases is inconsistent with FOIA’s text and structure, and impermissibly favors some FOIA plaintiffs over other equally deserving FOIA plaintiffs.” 714 Fed. Appx. 2, 3 (D.C. Cir. 2018) (Kavanaugh, J., concurring). He further stated that “[i]n an appropriate case, I believe that the en banc Court should re-examine and jettison that four-factor test. But for reasons explained by the Government in its response to the petition for rehearing en banc, this case is not an appropriate vehicle for such reconsideration.” *Id.*

***Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2016)**

Facts: Kathryn Sack was a Ph.D. student in Politics at UVA. She was writing a dissertation about polygraph bias. Therefore, she sent a FOIA request to the DOD, seeking its reports and related documents regarding polygraph examinations. In so doing, she asked the DOD to classify her as an educational-institution requester. For one set of her requests, the DOD declined to categorize her as such and instead told her that she had to pay \$900 for the search. For the other set of her requests, the DOD informed her that there were responsive documents but that they were exempt from disclosure under Exemption 7(E) to FOIA. *See* 823 F.3d 687, 688–89.

Procedural History: Sack initiated this FOIA litigation, asking that the district court find that she should be categorized as an educational-institution requester for the first set of documents and that the DOD could not use Exemption 7(E) to FOIA to withhold the second set of

documents from disclosure. The district court granted summary judgment for the DOD, finding in its favor on both issues. *See id.* at 689.

Issue: “[W]hether FOIA requests made by students to further their coursework or other school-sponsored activities are requests made by an ‘educational institution.’” *Id.* at 689.

Whether the DOD could withhold the requested documents under Exemption 7(E) to FOIA? *See id.* at 693.

Holding: Under FOIA, agencies are to charge “fees applicable to the processing of requests.” 5 U.S.C. § 552(a)(4)(A)(i) (2012).

As relevant here, one category of requesters refers to “educational or noncommercial scientific institution” requesters. Agencies only can charge those requesters for document duplication. *See id.* § 552(a)(4)(A)(ii)(II).

The DOD regulations define “educational institution” as follows: “The term ‘educational institution’ refers to a pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.” 32 C.F.R. § 286.28(e)(4).

Exemption 7(E) to FOIA: *See Blackwell v. FBI*, above.

First, Kavanaugh held that “Students who make FOIA requests to further their coursework or other school-sponsored activities are eligible for reduced fees under FOIA because students, like teachers, are part of an educational institution. The student involved in this case, Kathryn Sack, therefore is eligible for reduced fees for her FOIA requests.” 823 F.3d 687, 688 (D.C. Cir. 2016).

Second, Kavanaugh held that “the polygraph reports at issue here meet the threshold requirement of FOIA Exemption 7, as well as both subsidiary requirements specific to Exemption 7(E).” *Id.* at 694

Language: “The statutory text and context lead us to this simple conclusion: If teachers can qualify for reduced fees, so can students.” *Id.* at 693.

Public Employees for Environmental Responsibility v. U.S. Section, International Boundary and Water Commission, U.S.-Mexico, 740 F.3d 195 (D.C. Cir. 2014)

Facts: Public Employees for Environmental Responsibility (PEER) is a nonprofit that informs the public about the government’s activities. It sought records about two dams that are on the border between the United States and Mexico: the Amistad Dam and Falcon Dam. Accordingly, it sent a FOIA request to the federal agency that oversees the dam: the United States Section of the International Boundary and Water Commission. The U.S. Section declined to produce the documents. *See* 740 F.3d 195, 199 (D.C. Cir. 2014).

Procedural History: PEER initiated this FOIA litigation in the district court. In response, the U.S. Section said that the records were exempt from disclosure under Exemption 2 of FOIA. Then, the Supreme Court issued its opinion in *Milner v. Department of the Navy*, which decided that records relating to critical infrastructure do not fall under Exemption 2. Subsequently, the U.S. Section claimed that the requested records were still exempt under other exceptions: it said an expert report about Amistad Dam could be withheld under Exemption 5, an emergency action plan about Amistad Dam and Falcon Dam could be withheld under Exemption 7(E), and inundation maps about the dams could be withheld under Exemption 7(F). The district court granted the U.S. Section’s motion for summary judgment. PEER appealed. *See id.* at 199–200.

Issue: Whether the records were exempt from disclosure under Exemptions 5, 7(E), and 7(F)?

Holding: Exemption 5 to FOIA: *See Abteu v. DHS*, above. Exemption 7(E) to FOIA: *See Blackwell v. FBI*, above.

Exemption 7(F) to FOIA: This exemption exempts from disclosure records if the record’s release “could reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. § 552(b)(7)(F) (2012).

As to the Exemption 5 issue, Kavanaugh said: “This is a legal issue of first impression. And it would be unnecessary to resolve it if officials of the Mexican National Water Commission did not actually assist in preparing the expert report. The problem is that we do not know if officials of the Mexican National Water Commission actually assisted in preparing the expert report. If the Mexican agency did not assist in preparing the expert report, the deliberative process privilege—and therefore Exemption 5—would cover the report. We therefore vacate the District Court’s judgment as to Exemption 5 and the expert report and remand for the District Court to determine whether officials of the Mexican agency assisted in preparing the expert report.” 740 F.3d 195, 202 (D.C. Cir. 2014). As to the Exemption 7(E) and 7(F) issue, Kavanaugh said: “We conclude that the emergency action plans and the inundation maps were ‘compiled for law enforcement purposes,’ the threshold requirement for application of Exemption 7. We also conclude that the release of the records could lead to the harms listed in Exemptions 7(E) and 7(F). Therefore, the U.S. Section permissibly withheld the emergency action plans and the inundation maps.” *Id.*

Language: “For understandable security reasons, particularly in the wake of the September 11, 2001, attacks on the United States and the threat of future attacks, federal agencies sometimes want to keep that information [about critical infrastructure] confidential. At the same time, members of the public sometimes want to review that sensitive information to see what the government is up to and to help ensure that the government is adequately protecting the country from harm. Our task here is to interpret how the Freedom of Information Act balances those competing interests.” *Id.* at 198.

***National Security Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014)**

Facts: Back in the 1970s, a CIA staff historian, Dr. Jack B. Pfeiffer, wrote about the CIA’s plans for the Bay of Pigs and his assessment of the operation. The CIA released the drafts of Volumes I-IV of the work to the public, but not the draft of Volume V. The National Security Archive, a nonprofit, sent a FOIA request to the CIA, seeking the draft of Volume V. However, the CIA did not produce the draft, claiming that it was exempt from disclosure under Exemption 5 of FOIA. 752 F.3d 460, 461–62 (D.C. Cir. 2014).

Procedural History: The National Security Archive initiated this FOIA litigation in the district court. The district court agreed that the draft of Volume V was exempt from disclosure under Exemption 5 and entered summary judgment in the CIA’s favor. The National Security Archive appealed to the D.C. Circuit. *Id.* at 462.

Issue: Whether the draft of Volume V was exempt from disclosure under Exemption 5 of FOIA? *See id.*

Holding: Exemption 5 to FOIA: *See Abtew v. DHS*, above. Kavanaugh held that “[i]n the narrow confines of this case, which involves a draft agency history, we agree with the District Court that the draft of Volume V is exempt in its entirety under Exemption 5.” 752 F.3d 460, 465 (D.C. Cir. 2014).

Language: “[T]o require release of drafts that never result in final agency action would discourage innovative and candid internal proposals by agency officials and thereby contravene the purposes of the privilege.” *Id.* at 463.

“We must adhere to the text of FOIA and cannot judicially invent a new time limit for Exemption 5.” *Id.* at 464.

***In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014)**

Facts: Harry Barko worked for KBR, which was a defense contractor. He filed a False Claims Act complaint against KBR and, as part of discovery, requested documents regarding KBR’s internal investigation of the underlying matter. KBR had completed that internal investigation in accordance with its Code of Business Conduct, which is run by its legal department. While Barko claimed that the documents were unprivileged business documents, KBR argued that they were protected by the attorney-client privilege. *See* 756 F.3d 754, 756 (D.C. Cir. 2014).

Procedural History: The district court reviewed the documents in camera and found that they were not protected by the attorney-client privilege. KBR asked the district court to both certify the issue to the D.C. Circuit for interlocutory appeal and stay the order, but the district court declined and ordered KBR to produce the documents to Barko. KBR filed a petition for a writ of mandamus with the D.C. Circuit. The D.C. Circuit stayed the district court’s order while it considered the petition. *See id.*

Issue: “[W]hether the District Court’s privilege ruling was legally erroneous.” *Id.* at 757. If so, “whether that error justifies a writ of mandamus.” *Id.* at 760.

Holding: Federal Rule of Evidence 501: This rule says that privilege claims in federal court are controlled by the “common law—as interpreted by United States courts in the light of reason and experience.” Fed. R. Evid. 501.

As relevant here, the attorney-client privilege is the “oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

In *Upjohn*, the Supreme Court determined that the attorney-client privilege applies to corporations. *See id.* at 392.

Writ of mandamus: “[T]he Supreme Court in *Cheney* stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have no other adequate means to attain the relief he desires, (2) the mandamus petitioner must show that his right to the issuance of the writ is clear and indisputable, and (3) the court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” 756 F.3d 754, 760 (D.C. Cir. 2014) (internal citations and quotation marks omitted).

First, Kavanaugh held that “[i]n this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR’s privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal advice, the District Court applied the wrong legal test and clearly erred.” *Id.* Second, Kavanaugh held that “[i]n this case, considering all of the circumstances, we are convinced that mandamus is appropriate.” *Id.* at 762.

Language: “So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.” *Id.* at 758–59.

“To be sure, there are limits to the impact of a single district court ruling because it is not binding on any other court or judge. But prudent counsel monitor court decisions closely and adapt their practices in response. The amicus brief in this case, which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court’s reasoning.” *Id.* at 762–63.

“Although the attorney-client privilege covers only communications and not facts, we acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder. Indeed, as the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs because the privilege is intended to encourage full and frank communication between attorneys and their clients and

thereby promote broader public interests in the observance of law and the administration of justice.” *Id.* at 764 (internal citations and quotation marks omitted).