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Legal Sidebar

The Essential Judge Brett M. Kavanaugh Reader: What Cases Should You Read?

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Judge Brett M. Kavanaugh, whom President Trump has nominated to fill the impending Supreme Court vacancy caused by Justice Anthony M. Kennedy's retirement from the Court, has amassed a voluminous record of judicial writings during his legal career. These writings are certain to be a key topic of interest as the Senate prepares to hold hearings and a possible vote on Judge Kavanaugh's nomination to the High Court. CRS has published a report, *Judicial Opinions of Judge Brett M. Kavanaugh*, which provides a tabular listing of every judicial opinion authored by Judge Kavanaugh during his time on the federal bench, briefly describing each opinion (and the contrasting approach taken in any separate judicial opinion authored by another member of the panel on which Judge Kavanaugh served) and the primary legal subject the ruling addresses. While the report provides succinct descriptions of more than 300 judicial opinions authored by Judge Kavanaugh (the overwhelming majority as part of a D.C. Circuit panel, though a handful were authored as part of three-judge district court panels), some of the judicial opinions might be particularly useful to Members, congressional committees, and staff seeking to better understand Judge Kavanaugh's approach to different subjects. The following table, adapted from the larger report, highlights many of Judge Kavanaugh's judicial opinions that have received the greatest degree of attention from legal observers.

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Area of Law	Case	Key Takeaway of Judge Kavanaugh's Opinion
Administrative Law	U.S. Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017) (denying rehearing en banc)	*Dissenting from denial of rehearing en banc:* Federal Communications Commission lacked authority to issue the "net neutrality" rule because agencies may not issue regulations with vast economic and political significance (i.e., major rules) without clear congressional authorization. The net neutrality rule was also invalid because it violated the First Amendment rights of Internet Service Providers to exercise editorial discretion and control over the content they carry.
	SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202 (D.C. Cir. 2014)	*Dissenting*: The Occupational Safety and Health Review Commission decision to cite Sea World for violating the General Duty Clause of the Occupational Safety and Health Act, based on a determination that SeaWorld employees' interaction with killer whales was an employment hazard, was arbitrary and capricious and in excess of the agency's statutory authority. In addition, Congress did not intend for the agency to use the General Duty Clause "to regulate and re-make some undefined swath of America's sports and entertainment" industries, and thus the agency lacked the authority to issue the citation.
	Ne. Hosp. Corp. v. Sebelius, 657 F.3d 1 (D.C. Cir. 2011)	*Concurring in the judgment:* The interpretation by Health and Human Services (HHS) of a statute governing the proper methodology for calculating certain Medicare reimbursement rates contradicted the language of the Medicare statute. This language, contrary to the view of the majority, was not ambiguous.
Business Law	Lorenzo v. Securities and Exchange Commission, 872 F.3d 578 (D.C. Cir. 2017), *cert. granted*, No. 17-1077, 2018 U.S. LEXIS 3813 (June 18, 2018)	*Dissenting*: Banker should not be liable under Securities and Exchange Commission Rule for the false statements because they were drafted by his boss and sent at the direction of his boss, negating the required element of a willful intent to defraud.
	United States v. Anthem, 855 F.3d 345 (D.C. Cir. 2017)	*Dissenting*: District court's permanent injunction against the merger of two of the four major national health insurance carriers was based on clear factual error because the record conclusively showed that the merger would benefit consumers through lower provider rates.

	FTC v. Whole Foods Market, Inc., 548 F.3d 1028 (D.C. Cir. 2008)	*Dissenting:* The Federal Trade Commission's case against the merger of grocery chains was from a bygone era of antitrust enforcement. Because the record failed to show that the merged entity could exercise meaningful market power, there was no sound basis on which to block the merger.
Civil Rights Law	Ayissi-Etoh v. Fannie Mae, 712 F.3d 572 (D.C. Cir. 2013)	*Concurring*: A single discriminatory act could be sufficient to create a hostile work environment under federal anti-discrimination laws if that act was sufficiently severe.
	Ortiz-Diaz v. Dep't of Hous. & Urban Dev., Office of Inspector Gen., 867 F.3d 70 (D.C. Cir. 2012)	*Concurring*: Because circuit precedent holds that discriminatory transfers are ordinarily not actionable under Title VII, the en banc court should resolve the uncertainty and hold that all discriminatory transfers, or denials of transfers, are actionable.
	South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012)	*Majority:* South Carolina's voter identification law satisfied the federal Voting Rights Act's preclearance requirements with respect to elections beginning in 2013, but not with respect to the 2012 elections because the state law could not be properly implemented in time to ensure it did not have retrogressive effects.
Criminal Law & Procedure	United States v. Askew, 529 F.3d 1119 (D.C. Cir. 2013) (en banc)	*Dissenting:* Police officer who unzipped a criminal suspect's jacket did not engage in an unlawful search. Such action was an objectively reasonable protective step to ensure officer safety, and police may permissibly maneuver a suspect's outer clothing when doing so would help facilitate the witness's identification.
	United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012) (en banc)	*Dissenting (Kavanaugh, J.):* The majority erred in concluding that a 30-year minimum sentence attached to a person who committed a crime of violence carrying a machine gun regardless of whether the person was aware the firearm was an automatic weapon. The presumption of a *mens rea* requirement should have applied to each element of the offense, and the automatic character of the gun was an element of the crime at issue.
	United States v. Jones, 625 F.3d 766 (D.C. Cir. 2010) (denying rehearing en banc)	*Dissenting from denial of rehearing en banc*: After a three-judge panel ruled that the warrantless use of a Global Positioning System (GPS) device by police to track a suspect's vehicle for several weeks was unreasonable under

		the Fourth Amendment, the en banc court should have reconsidered the panel's novel aggregation approach to Fourth Amendment searches, as well as whether the police, by touching and manipulating the outside of the defendant's car to install the GPS tracking device, physically encroached "within a constitutionally protected area."
Environmental Law	White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd,* Michigan v. EPA, 135 S. Ct. 2699 (2015)	*Dissenting:* EPA acted unreasonably and outside of its authority when it failed to consider the costs of regulating power plants in determining that it was appropriate to set new emissions standards.
	EME Homer City Generation, LP v. EPA, 696 F.3d 7(D.C. Cir. 2012), *rev'd and remanded*, EPA v. EME Homer City Generation, LP, 134 S. Ct. 1584 (2014)	*Majority:* The sulfur dioxide and nitrogen oxide emissions budgets under EPA's Cross-State Air Pollution Rule were invalid, as they required petitioner-states "to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked," and the budgets were remanded without vacatur to EPA for the agency's reconsideration. However, petitioner's various facial challenges to the Rule were denied, as EPA had authority to promulgate the Rule's Federal Implementation Plans.
	Coal. for Responsible Regulation, Inc. v. EPA, Nos. 09-1322 et al., 2012 U.S. App. LEXIS 25997 (Dec. 20, 2012) (denying rehearing en banc)	*Dissenting from the denial of rehearing en banc:* Case should be reheard en banc because the panel incorrectly concluded that EPA's interpretation of the term "air pollutants" as including greenhouse gases in the context of the Prevention of Significant Deterioration Program was not grounded in statute and was legally impermissible.
Freedom of Religion	Priests for Life v. HHS, 808 F.3d 1 (D.C. Cir. 2015) (denying rehearing en banc)	*Dissenting from the denial of rehearing en banc:* HHS regulations violated the Religious Freedom and Restoration Act because they substantially burdened plaintiff religious organizations' exercise of religion by requiring them to submit a form notifying employees that they had opted out of providing contraceptive coverage and identifying or notifying their insurers. Although the government has a compelling interest in facilitating access to contraception, it did not employ the least restrictive means of furthering that interest.
	Newdow v. Roberts, 603 F.3d 1002 (D.C. Cir. 2010)	*Concurring in the judgment*: The plaintiffs had standing to challenge the presidential oath and inaugural prayers because they pled a sufficiently concrete, particularized, and

		redressable injury under the Establishment Clause that could be traced to the defendants. The Establishment Clause allowed the use of "so help me God" in concluding the official presidential oath as well as the court's invocation, "God save the United States and this honorable Court."
Freedom of Speech	Bluman v. FEC , 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012)	*Majority:* A provision of the Bipartisan Campaign Reform Act prohibiting certain foreign nationals from making political contributions did not violate the First Amendment.
	Cablevision Sys. Corp. v. FCC, 597 F.3d 1306 (D.C. Cir. 2010)	*Dissenting:* The FCC's exclusivity rule, allowing the continuation of a prohibition against exclusive contracts between cable operators and cable affiliated programming networks, was no longer necessary to further competition and, therefore, no longer met intermediate scrutiny as required of a content-neutral restriction on editorial and speech rights. The rule therefore violated the First Amendment and, as a result, the Cable Act as well.
	Republican Nat'l Committee v. FEC, 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd*, 561 U.S. 1040 (2010)	*Majority:* A provision of the Bipartisan Campaign Reform Act limiting the receipt and spending of "soft money" by national political parties did not violate the First Amendment.
Health Care	Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)	*Dissenting as to jurisdiction*: In a challenge to the "individual mandate" of the Affordable Care Act, contending that the Anti-Injunction Act deprived the court of jurisdiction prior to enforcement because the plaintiffs' constitutional challenge, if successful, would prevent the IRS from assessing or collecting tax penalties from citizens who do not have health insurance required by the individual mandate.
National Security	Klayman v. Obama, 805 F.3d 1148 (D.C. Cir. 2015) (denying rehearing en banc)	*Concurring in the denial of rehearing en banc:* The Fourth Amendment does not bar the government's bulk collection of telephony metadata for national security reasons.
	Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012), *overruled by* Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014)	*Majority:* Conviction of Guantanamo detainee under the Military Commission Act of 2006 for providing material support to terrorism was vacated because the crime of material support did not exist as a war crime under international law at the time the relevant conduct occurred.

	Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012)	*Dissenting:* Under Supreme Court precedent, federal agencies' security clearance decisions, including reports or referrals to the FBI, were not judicially reviewable.
Second Amendment	Heller v. Dist. of Columbia, 670 F.3d 1244 (D.C. Cir. 2011)	*Dissenting:* Courts should assess gun bans and regulations based on the Constitution's text, history, and tradition rather than by a balancing test, such as strict or intermediate scrutiny. The District of Columbia's requirement for registration of all lawfully possessed guns and its ban on most semi-automatic rifles violated the Second Amendment.
Separation of Powers	PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2017), *vacated en banc*, 881 F.3d 75 (D.C. Cir. 2018)	*Majority:* The structure of the independent Consumer Financial Protection Bureau violated Article II of the Constitution as the agency's single director was not removable by the President at will.
	In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013)	*Majority:* Where previously appropriated money was available to the Nuclear Regulatory Commission (NRC) to perform statutorily mandated licensing processes for storage of nuclear waste in Yucca Mountain, the agency could not ignore its statutory mandates simply because Congress had not appropriated all of the money necessary to complete the project. NRC had not asserted that the mandate was unconstitutional, and the executive's prosecutorial discretion under Article II does not include the power to disregard statutory obligations imposed by Congress.
	Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010)	*Dissenting:* The Public Company Accounting Oversight Board created under the Sarbanes-Oxley Act violated separation of powers principles because neither the President nor a presidential "alter ego" possessed any power to remove Board members. Additionally, Board members were not "inferior officers" given their functions and independence, and accordingly their appointment without Senate confirmation violated the Appointments Clause.
Substantive Due Process	Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc), *cert. granted and vacated as moot*, Azar v. Garza,138 S. Ct. 1790 (2018)	*Dissenting:* An undue burden was not placed on an unlawfully present alien minor's ability to seek an abortion when HHS, which held the minor in custody, sought to expeditiously transfer her to an immigration sponsor before the minor would be permitted to make the decision to obtain an abortion.

CRS is preparing a new report that will provide an in-depth analysis of Judge Kavanaugh's approach to legal issues and the potential consequences he might have, if confirmed, upon the Supreme Court. Key CRS products related to the Supreme Court vacancy and Judge Kavanaugh's nomination are collected in CRS Legal Sidebar LSB10160, *Supreme Court Nomination: CRS Products*, by Andrew Nolan. CRS personnel can also provide briefings and other assistance related to the Supreme Court nomination upon request.