AFL-CIO Review of Judge Brett Kavanaugh's Record in Workers' Rights Cases
July 25, 2018

The U.S. Supreme Court in a 5-4 decision in *Janus v. AFSCME, Council 31*, abandoned decades of legal precedent to take away workers' rights. The *Janus* decision exposed how critical the selection the next Justice of the U.S. Supreme Court is to working men and women of this generation and for generations to come. Working families need and deserve a Supreme Court Justice who understands and respects the importance of the laws and protections for working people in this country, including the right to form unions; to be free from discrimination because of race, disability, age, gender or national origin; to have a safe workplace; and to be paid for all hours worked.

The AFL-CIO, a federation of 55 national and international unions representing approximately 12.5 million working men and women, is deeply troubled by Judge Kavanaugh's record. He routinely rules against workers and their families, regularly sides with employers against employees seeking relief from discrimination in the workplace, rejects the right of employees to receive employer-provided health care in the workplace, and promotes overturning well-established U.S. Supreme Court precedent. In 2012, a *Washington Post* columnist described Kavanaugh as "nothing more than a partisan shock trooper in a black robe waging an ideological battle against government regulation." Judge Kavanaugh sides with the privileged, including corporations, over the interests of the less powerful, such as workers and their families. Accordingly, the AFL-CIO opposes the nomination of Judge Kavanaugh.

Judge Kavanaugh Routinely Rules Against Workers and Their Families

American Fed. Of Gov't Employees, AFL-CIO v. Gates, 486 F.3d 1316 (D.C. Cir. 2007): Kavanaugh authored the majority opinion that reversed the lower court's partial blocking of Department of Defense (DOD) regulations, which had found that many of the Pentagon's regulations would "entirely eviscerate collective bargaining." Judge Kavanaugh disagreed. A partial dissent argued that Kavanaugh's majority opinion would allow the Secretary of Defense to "abolish collective bargaining altogether—a position with which even the Secretary disagrees." The *Washington Post* called these DOD regulations "some of the most dramatic workplace changes planned for civil service employees in 30 years" that would "curb union rights at Defense and overhaul how the Department's civilian employees are paid, promoted and disciplined."

Agri Processor Co. v. N.L.R.B., 514 F.3d 1 (D.C. Cir. 2008). Kavanaugh dissented from a decision that ordered a company to bargain with a union, reasoning that the employees were ineligible to vote as undocumented immigrants. The majority opinion harshly criticized Kavanaugh's "misreading" of both the plain-language of the NLRA and clear Supreme Court precedent in *Sure-Tan*, *Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) (holding that undocumented immigrants are covered by the NLRA). The majority noted, "there is absolutely no evidence that in passing IRCA Congress intended to repeal the NLRA to the extent its definition of 'employee' includes undocumented aliens. Thus, the NLRA's plain language, as applied by the Supreme

Court in *Sure-Tan*, continues to control after IRCA, as the Seventh, Ninth, and Eleventh Circuits have all held."

SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202 (D.C. Cir. 2014). Kavanaugh dissented from a majority opinion upholding a safety citation against SeaWorld following the death of a trainer who was working with a killer whale. While the majority deferred to the Occupational Safety and Health Review Commission's finding that SeaWorld had insufficiently limited the trainers' physical contact with the whales, Kavanaugh decried the citation as paternalistic: "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves . . .. And most importantly for this case, who decides that the risk to participants is too high?" He attacked the Department of Labor as not being the proper body to decide "whether to ban fighting in hockey, to prohibit the punt return in football, to regulate the distance between the mound and homeplate in baseball, to separate the lions from the tamers in the circus, or the like . . .. In this case, however, the department departed from tradition and stormed headlong into a new regulatory arena" by "issu[ing] a citation to SeaWorld that effectively bans SeaWorld from continuing a longstanding and popular—albeit somewhat dangerous—show in which SeaWorld trainers play with and interact with whales."

Venetian Casino Resort, LLC v. N.L.R.B., 793 F.3d 85 (D.C. Cir. 2015). Kavanaugh reversed and remanded a NLRB decision that the hotel engaged in unfair labor practices when it requested police officers to issue criminal citations to union demonstrators who were legally protesting.

Judge Kavanaugh Regularly Sides with Employers in Denying Employees Relief from Discrimination in the Workplace.

Miller v. Clinton, 687 F.3d 1332 (D.C. Cir. 2012). Kavanaugh dissented from the majority, which found that the U.S. State Department violated the Age Discrimination in Employment Act when it fired an employee simply because he turned 65. The Department argued that it could terminate employees on account of their age. The majority of the D.C. Circuit disagreed, noting "the necessary consequence of the Department's position is that it is also free from any statutory bar against terminating an employee like Miller solely on account of his disability or race or religion or sex . . . We simply do not believe [Congress] would have authorized the State Department to ignore statutory proscriptions against discrimination on the basis of age, disability, race, religion, or sex through the use of ambiguous language." In his dissent, Judge Kavanaugh insisted that the State Department clearly had the authority to fire Miler because of his age, observing, "This is not a close call."

Howard v. Office of the Chief Admin. Officer, 720 F.3d 939 (D.C. Cir. 2013). Kavanaugh, again, dissented from the majority opinion. The majority ruled that under the Congressional Accountability Act, a black woman could pursue her race discrimination suit after she was fired from her position as the deputy budget director at the U.S. House of Representatives. Kavanaugh argued otherwise in his dissent, contending that the Speech or Debate Clause of the Constitution prohibited the woman employee from moving forward with her claims, even though that clause of the Constitution protects Members of Congress' speech on the floor of the House or Senate, not employee speech.

Judge Kavanaugh Rejects the Right of Employees to Receive Employer-Provided Health Care.

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011). Kavanaugh dissented from a three-judge panel decision affirming the lower court's conclusion that the court had jurisdiction to decide the constitutionality of the ACA and that the ACA was constitutional. In his dissent, Kavanaugh argued that the court did not have jurisdiction yet to address the merits of the ACA because the Anti-Injunction Act barred the suit until the first "taxes" were imposed (2015). Kavanaugh reasoned in his dissent, however, a future Congress could repeal the Act, or a future President could declare it unconstitutional: "Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional." Jeffrey Toobin wrote in *The New Yorker* (March 26, 2012), that Kavanaugh's dissent "wasn't interpreting the Constitution; he was pandering to the base."

Judge Kavanaugh Promotes Overturning U.S. Supreme Court Precedent

> Judge Kavanaugh appears eager to overturn the well-established U.S. Supreme Court precedent of *Chevron USA, Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984). In *Chevron*, the Court held that unelected judges must defer to executive agencies' construction of a statute when Congress has given an agency primary responsibility for interpreting its mandates, so long as the agency does not act contrary to Congress' clear intent. Examples of such executive agencies include the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Occupational Safety and Health Commission.

In *United States Telecom Ass'n v. FCC,* 855 F.3d 381 (D.C. Cir. 2017). Kavanaugh dissented from the denial of rehearing en banc in a challenge to the FCC's 2015 net neutrality rule. He used his dissent as a bully pulpit to argue against court deference to the expertise of administrative agencies when matters involve "major rules."

Judge Kavanaugh Regularly Sides with the Privileged, including Corporations, Over Those of the Less Powerful

In *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017), Judge Kavanaugh dissented in an antitrust opinion in which the majority upheld a district court's decision to block the multi-billion dollar merger of health insurance companies Cigna and Anthem. The majority concluded that Anthem "failed to show the kind of 'extraordinary efficiencies' that would be needed to constrain likely price increases in this highly concentrated market, and to mitigate the threatened loss of innovation." Kavanaugh would have allowed the merger to proceed. Judge Kavanaugh dissented; he would have allowed the merger of two large health insurance companies, which would have reduced competition for consumers in 14 states. The majority criticized Judge Kavanaugh's application of "the law as he wishes it were, not as it currently is."