Expert Analysis - Opinion

It's Prime Time For A Dose Of Reality On Brett Kavanaugh

By **Daniel Karon** August 2, 2018, 3:59 PM EDT

Daniel Karon

Had you not known better, the other week you'd have thought you were watching "The Bachelor." Because the other week, in made-for-prime-time fashion, District of Columbia Circuit Court Judge Brett Kavanaugh won the rose when President Donald Trump nominated him to succeed retiring U.S. Supreme Court Justice Anthony Kennedy.

The news networks played along, scrupulously profiling the eligible suitors in the name of high ratings, never mind that the contestants were largely fungible in their common belief that only wealthy white men count and human rights no longer matter, especially women's. When the clamor died down, Kavanaugh had won this season's "Who Wants to Be a Supreme Court Justice," courtesy of our presidential reality-TV autocrat.

Of course, no one can deny Kavanaugh's pedigree and credentials. No one can rightly insist that he's not thoughtful or that he hasn't written many compelling decisions. Conservatives describe him as an originalist and not necessarily pro-business. They argue that he's a judge who is likely to restrain government agencies from overreaching by interpreting the law too broadly and by unfairly imposing far-reaching regulations.

When described in soundbites, Kavanaugh's record and intentions appear laudable. After all, who doesn't support allegiance to the Constitution and allowing businesses to make consumers' lives better? All of this sounds sensible. But that's the rub. It only sounds

sensible. In fairness, we must consider Kavanaugh's record to correctly decide whether he should win the amazing Supreme Court race or is, instead, the deadliest catch.

To begin understanding why Kavanaugh scares liberals you could start by considering his job history. He worked for the Republicans on the Bush v. Gore election recount, helped investigate President Bill Clinton's relationship with Monica Lewinsky, drafted grounds for impeachment with Ken Starr, served as Jeb Bush's counsel and spent five years as a top official in the George W. Bush White House.

But so what? I have plenty of friends who have worked in Republican posts. They're wonderful people whose opinions I respect, value and trust. Kavanaugh's appointments don't show me why he frightens people. They merely tell me that he does. His job history means nothing. Kavanaugh is entitled to his politics, and he deserved jobs that supported them. After all, who doesn't want to be happy at work?

Instead of critiquing Kavanaugh's resume, let's examine his record. That's the sincerest way to decide whether to support his nomination. And his record concerns me. That's not to say his record need necessarily concern you. If it doesn't, I'm not judging. I'm simply saying that many of Kavanaugh's attitudes, to me, are highly troubling.

Kavanaugh has been on the bench long enough that I could start pretty much anywhere. I could start with reproductive rights and emphasize that he passes President Trump's litmus test for gutting and overturning Roe v. Wade. One of his former law clerks recently explained that where it comes to enforcing restrictions on abortion, no appellate court judge has a stronger record.

Or I could begin with the environment and highlight that he has consistently overturned protections for clean air and put corporate interests ahead of people's health and the environment. For instance, in EME Homer City Generation LP v. U.S. Environmental Protection Agency,[1] he rejected an EPA rule holding upwind states responsible for their fair share of pollution they cause in downwind states. The Supreme Court reversed him 6-2, chiding him for reading unwritten requirements into the Clean Air Act: "However sensible (or not) the Court of Appeals' position, a reviewing court's task is to apply the text [of a statute], not to improve upon it."[2]

Or I could lead with gun violence and describe his narrow view of the lawfulness of modern gun-safety measures. For example, after the Supreme Court's District of Columbia v. Heller[3] decision, the District of Columbia sensibly updated its firearm regulations to prohibit possession of certain military-style semiautomatic rifles and to require firearm registration. When Kavanaugh's court upheld several of those regulations, he dissented, expressing that "[i]n my judgment, both D.C.'s ban on semi-automatic rifles and its gun registration requirements are unconstitutional . . . ."[4] He insisted that "holding these D.C. laws unconstitutional would not lead to nationwide tumult. Rather, such a holding would maintain the balance historically and traditionally struck in the United States between public safety and the individual right to keep arms[.]"[5]

All of these would be perfectly sensible areas to explore (as would health care, presidential power, workers' rights, civil rights, immigration and national security), but I'm not going to do that. I'm a consumer attorney, so I'm going to focus on his attitudes on civil justice — attitudes that affect my clients, my job and the jobs of every plaintiffs and defense (yes, defense) lawyer reading this essay.

In SeaWorld of Florida LLC v. Perez,[6] an orca dismembered and killed a SeaWorld trainer during a live performance. Noting that the orca had previously killed a trainer and recognizing the hazard that the orca posed to employees, the majority agreed with the administrative law judge's findings that substantial evidence existed to show that SeaWorld had committed a safety violation.

Kavanaugh dissented from the majority's decision to uphold SeaWorld's safety citation. Describing SeaWorld's show as a "sport," he argued it was unreasonable for the U.S. Department of Labor to regulate it, likening the majority's ruling to regulating "punt returns in the NFL, [or] speeding in NASCAR."[7]

Though the majority explained that close physical contact between players is intrinsic to football and close contact with orcas is not integral to SeaWorld's workplace, Kavanaugh insisted that SeaWorld should be exempt from U.S. Occupational Safety and Health Administration regulations that require employers to protect their employees from recognized hazards. As he put it, "[w]hen should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves — that the risk of significant physical injury is simply too great even for eager and willing participants?"[8]

The majority expressed its concern that Kavanaugh's view would likely mean that employers in other dangerous OSHA-regulated industries, such as construction, metal pouring, welding and firefighting, could claim that their employers were also "willing participants . . . in the face of known physical risk."[9]

Rollins v. Wackenhut Services Inc.[10] involved a mother who brought products liability, negligence, wrongful death and survival claims against her son's employer and a pharmaceutical company. Her son was taking prescription medication when he committed suicide with a gun that his employer provided. The district court dismissed the plaintiff's case for failing to state a plausible claim against each defendant and denied leave to amend. The circuit court affirmed.

In a concurring opinion, Kavanaugh took the court's ruling a step further. He insisted that where the court dismisses a complaint without specifying whether the dismissal is with or without prejudice, plaintiffs may not bring another claim or amend their claim since "a district court order that dismisses a case under Rule 12(b)(6) without stating whether it is with or without prejudice operates as a dismissal with prejudice."[11] This countered the majority's observation that long-standing precedent mandates that "judicial prejudice is the exception, not the rule, in federal practice"[12] and ignored Rule 15(a)(2)'s instruction that "[t]he court should freely give leave when justice so requires."[13]

In Miller v. Clinton,[14] the plaintiff claimed that the U.S. Department of State violated the Age Discrimination Employment Act when it fired him on his 65th birthday because of a mandatory retirement policy. The department believed the Basic Authorities Act made it exempt from the ADEA, meaning it could terminate elderly employees.

The majority held that nothing in the BAA "abrogates the ADEA's broad proscription against personnel actions that discriminate on the basis of age."[15] Kavanaugh dissented, insisting that the BAA trumps existing antidiscrimination laws and that the State Department was free to impose a mandatory retirement age. He accused the majority of "stacking the deck with inapposite interpretive presumptions, and raising the specter of rampant race, sex, and religious discrimination by the U.S. State Department."

The majority responded that Kavanaugh's position would free the department from "any statutory bar against terminating an employee like Miller solely on account of his disability or race or religion or sex,"[16] adding that if the BAA "creates an exemption from the ADEA,

we would have to reach the same conclusion regarding both Title VII of the Civil Rights Act of 1964 . . . and the Americans with Disabilities Act."[17]

United States v. Anthem,[18] concerned an effort by the U.S. Department of Justice, 11 states and the District of Columbia to enjoin the Anthem-Cigna merger because it was likely to substantially lessen competition in at least two markets in violation of Section 7 of the Clayton Act.

Following a bench trial, the district court enjoined the merger. The court found that Anthem had failed to demonstrate that its plan was achievable and that the merger would benefit consumers as Anthem claimed.

Anthem appealed and asserted that the merger's efficiencies outweighed any anticompetitive effects. The circuit court affirmed, holding that "Congress has decided that any merger that 'substantially . . . lessen[s] competition' is forbidden."[19]

Kavanaugh dissented, concluding that the merger would be beneficial to the employer-customers who obtained insurance services from Anthem and Cigna. He alleged that antitrust law required the court to take account of the efficiencies and consumer benefits that would result from the merger. The majority replied that Kavanaugh sought to "appl[y] the law as he wishe[d] it were, not as it currently is."[20]

Cohen v. United States [21] was a class-action lawsuit regarding an illegal IRS refund mechanism that caused millions of American to pay billions of dollars in excise tax collections on long-distance phone calls. The circuit court agreed that the refund mechanism was invalid under the Administrative Procedure Act, recognizing that the Internal Revenue Service had "set up a virtual obstacle course for taxpayers to get their money back."[22] The court believed the plaintiffs' lawsuit was "not about the excise tax, its assessessment [sic], or its illegal collection. Nor [was] it about the money owed the taxpayers. Th[e] suit [wa]s about the obstacle course, and the decisions made by the IRS while setting it up."[23]

Kavanaugh dissented, needlessly rebuking plaintiffs for having brought a class-action lawsuit for their small-damage claims. He believed the APA should have barred plaintiff's lawsuit, and that an individual suit was an adequate remedy to contest the refund procedure. The majority commented that "it would be cold comfort to direct [the taxpayers]

to proceed in a series of individual suits, submitting themselves one by one to the very refund procedures that they claim[ed] to be unlawful."[24]

Despite the recognized impracticality of taxpayers filing millions of small-value claims, and that "[p]laintiffs' ultimate objectives are class certification and a court order that the U.S. Government pay billions of dollars in additional refunds to millions of as-yet-unnamed individuals who never sought refunds from the IRS or filed tax refund suits,"[25] Kavanaugh condemned plaintiffs for doing what Rule 23 allows.

Kavanaugh insisted that "plaintiffs ha[d] deliberately avoided filing individual refund claims with the IRS and fil[ed] tax refund suits because they [thought] they ha[d] a better chance of obtaining class certification if they [didn't] take those steps."[26] In his opinion, plaintiffs' sensible and legally supported effort to obtain "class certification [wa]s a necessary prerequisite to the class-wide jackpot plaintiffs [were] seeking. . . ."[27]

That's a glimpse into Kavanaugh's record: a dissent denying workplace safety, a concurrence proposing stricter pleading standards, a dissent encouraging employee discrimination, a dissent supporting a merger that would restrain competition and a dissent disparaging plaintiffs for bringing a class action to pursue their small-damage claims.

I showcased these cases because I think they demonstrate Kavanaugh's social, political and judicial proclivities. Although you can't disagree with my observations (his cases say what they say), you're free to dispute my choices. If you think I've stacked the deck to support an anti-Kavanaugh rant, I invite you to respond with your own essay.

Kavanaugh has written many thoughtful opinions. But he has also taken some positions that, while rooted in commendable intellect and committed philosophy, are out of step with my beliefs and the beliefs of many Americans.

That said, I'm not naïve. I'm not expecting the appointment of a liberal justice. I'm merely asking for the appointment of someone who reflects the values of more than half of all Americans. In asking this, I won't vilify, demonize or denigrate Kavanaugh, as that type of ineffective and ugly rhetoric only appeals to the other half of all Americans.

And please don't take any of this as suggesting that I'm not pro-corporation. I'm as pro-corporation as I am pro-consumer, which positions, I believe, can coexist. I'm just anti-cheater. To my mind, Kavanaugh's jurisprudence doesn't reflect a sensible corporate-consumer balance. It favors corporations, which jurisprudential tilt often allows cheaters to thrive.

Sadly, these days, essays, speeches and marches have little effect on encouraging people to move off their dangerously committed liberal and conservative marks. Maybe my respectful commentary will help people think about their positions, remembering that fairness — to everyone — matters and that everyone's interests merit consideration. It's time we remember that persuasion comes from listening, not from shouting the loudest.

I'm not saying Kavanaugh's supporters are wrong and his detractors are right or vice versa. I'm merely saying they're different and that's OK. President Trump should not make his Supreme Court appointment a partisan reality show. He needs to respect all Americans' needs and interests and nominate a Supreme Court justice who will respect these needs and interests too.

Daniel R. Karon is a class-action attorney with Karon LLC. He chairs the American Bar Association's National Institute on Class Actions and teaches complex litigation at Columbia Law School.

[1] 696 F.3d 7 (D.D.C. 2012).
[2] Environmental Protection Agency v. EME Homer City Generation LP, 134 S.Ct. 1584, 1600 (2014).
[3] 554 U.S. 570 (2008)
[4] Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1269 (D.C. Cir. 2011).
[5] Id. at 1271.
[6] 748 F.3d 1202 (D.D.C. 2014).
[7] Id. at 1221.
[8] Id. at 1217.

[9] Id. at 1213.
[10] 703 F.3d 122 (D.D.C. 2012).
[11] Id. at 132.
[12] Id. at 131.
[13] Id. at 130.
[14] 687 F.3d 1332 (D.D.C. 2012).
[15] Id. at 1335.
[16] Id.
[17] Id. at 1338.
[18] 855 F.3d 345 (D.D.C. 2017).
[19] Id. at 371.
[20] Id. at 354
[21] 650 F.3d 717 (D.C. Cir. 2011).
[22] Id. at 736.
[23] Id.
[24] Id. at 733.
[25] Id. at 737.
[26] Id.
[27] Id.