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# Supplement to the NAACP Legal Defense and Educational Fund, Inc.'s Report on the Civil Rights Record of Judge Brett Kavanaugh

## I. Introduction

On August 30, 2018, the NAACP Legal Defense and Educational Fund, Inc. (LDF) released a detailed, 94-page report analyzing those aspects of Judge Brett Kavanaugh's record then available for review.[1]

As we explained throughout the report, the review was limited because of the restrictions on documents stemming both from the rushed process (before the National Archives completes its nonpartisan review of even the limited number of documents requested by the Chairman of the Senate Judiciary Committee) and from the Judiciary Committee majority's unprecedented use of "Committee Confidential" designations to render documents secret.[2]

After Judge Kavanaugh's hearings began on September 4, 2018, members of the Judiciary Committee made available certain documents that had previously been restricted due to Committee Confidential designations.[3] In addition, the New York Times and other media outlets released additional documents they received from their own sources.[4] As we expected, many of these documents provide valuable further insight on Judge Kavanaugh's views, particularly on issues of civil rights and racial justice.

It is important to stress, however, that thousands of documents remain unexamined. As our report explained, the National Archives' process could not provide the full body of documents to the Committee before the end of October.[5] Rather than follow the longstanding process in which the National Archives manages

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[1] LDF, *The Civil Rights Record of Judge Brett Kavanaugh* (Aug. 30, 2018), http://www.naacpldf.org/files/our-work/FINAL_Report%20on%20Brett%20Kavanaugh_FINAL_11_22.pdf (hereinafter "Kavanaugh Report").

[2] *See, e.g.*, *id.* at 6–8.

[3] *See* Li Zhou & Kay Steiger, *A Republican Senator Threatened to Kick Cory Booker Out of the Senate Over Releasing "Confidential" Emails*, VOX, Sept. 6, 2018, https://www.vox.com/2018/9/6/17825596/cory-booker-brett-kavanaugh-hearing-emails.

[4] *See, e.g.*, Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. TIMES, Sept. 6, 2018, https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html.

[5] *See* Kavanaugh Report at 6.

the release of documents, the Judiciary Committee outsourced the review of these documents to a private lawyer who works for President George W. Bush, to identify and screen documents for release. Even under this unprecedented arrangement, as of August 28, 2018, approximately 500,000 pages of the Chairman's requested documents had still not yet been produced.[6] Additionally, thousands of pages hidden under the "Committee Confidential" designation unilaterally imposed by Chairman Grassley remain unavailable.[7] Therefore, any review of Judge Kavanaugh's record is necessarily incomplete.

Thus, this brief supplement to Part IV.B of our report corresponds only to a very small fraction of documents released since the beginning of the hearings that are relevant to Judge Kavanaugh's qualifications. Nevertheless, these documents do provide further insight into Judge Kavanaugh's views on racial justice and race-conscious government action.

## II. Analysis of New Documents

LDF's report described Judge Kavanaugh's work to support the anti-affirmative action Center for Equal Opportunity's attack on Hawaii's efforts to aid indigenous Hawaiians.[8] As part of this effort, Judge Kavanaugh engaged in a zealous media campaign in which he assailed Hawaii's program as a "naked racial-spoils system" and stated that "there can be no such thing as either a creditor or debtor race," language directly borrowed from Justice Scalia's concurrence in *Adarand Constructors, Inc. v. Pena*.[9]

Since Judge Kavanaugh's hearing began, emails previously marked Committee Confidential have been released that confirm the conclusions we reached in our report. For example, in an April 2001 email, Judge Kavanaugh states that he is "trouble[d]" that a proposed education bill seemed to incentivize States to take race-conscious educational efforts, and advocated for the addition of language stressing that the bill did not do so.[10] Commenting in August 2001 on a Department of

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[6] *See* Letter from Ranking Member Dianne Feinstein, and Senators Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie K. Hirono, Cory A. Booker, and Kamala D. Harris, to Senator Charles E. Grassley, Chairman, Committee on the Judiciary to Jud. Comm. Chairman Charles E. Grassley, at 2 *(Aug. 28, 2018),* https://www.feinstein.senate.gov/public/_cache/files/4/1/41748a5c-8069-4f4f-b938-c36b8a071628/5896693BA3D621868590005E18910237.feinstein-to-grassley-on-kavanaugh-process.pdf. On the night of September 3, approximately 42,000 more pages were made available.

[7] *See id.*

[8] *See* Kavanaugh Report at 30–32.

[9] *See id.* at 31 (citations omitted); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

[10] E-mail from Brett M. Kavanaugh to Jay P. Lefkowitz, Noel J. Francisco, and Joel D. Kaplan (April 20, 2001). All emails discussed herein are on file with LDF.

Transportation affirmative-action program that Justice John Paul Stevens had previously described as an effort to "eradicate racial subordination,"[11] Judge Kavanaugh complained that it was "a naked racial set-aside."[12] The next year, in an email remarking on a bill dealing with Native American small businesses, he asserted that the "desire to remedy societal discrimination is not a compelling interest" that would permit the use of race-conscious measures.[13] Finally, in June 2002, he commented on potential Congressional testimony that it "need[ed] to make clear that any program targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution."[14] These comments are consistent with the troubling rhetoric Judge Kavanaugh employed in his advocacy in the *Rice* case.

Also of concern is Judge Kavanaugh's failure to condemn a colleague's suggestion that reliance on *Korematsu v. United States*[15] might be justified. In a January 2002 email, a colleague outlined possible rationales for certain airport security approaches. She stated that her view was that "we must at least consider how to construct a race-neutral system" but observed that "[a]nother school of thought is that if the use of race renders security measures more effective, th[e]n perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as Korematsu."[16] Although Judge Kavanaugh's reply did not endorse *Korematsu*, he failed to condemn the suggestion that this anticanonical case could ever be the basis for a government policy of racial profiling.[17] That should have been an easy response in 2001 as it should be today; as Chief Justice Roberts recently declared, *Korematsu* "was gravely wrong the day it was decided" and "has no place in law under the Constitution[.]"[18]

This is all the more disturbing in light of Judge Kavanaugh's refusal during his testimony before the Committee to say whether the government can ban individuals from entering the United States on the basis of race (citing "pending litigation"), or whether *Chae Chan Ping v. United States*[19] (more commonly known as

[11] *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).
[12] E-mail from Brett M. Kavanaugh to Timothy E. Flanigan, Noel J. Francisco, Alberto R. Gonzales, and Brett M. Kavanaugh (Aug. 8, 2001).
[13] E-mail from Brett M. Kavanaugh to Patrick J. Bumatay & James A. Brown (April 23, 2002).
[14] E-mail from Brett M. Kavanaugh to Lisa J. Macecevic (June 4, 2002).
[15] 323 U.S. 214 (1944).
[16] E-mail from Helgard C. Walker to Alberto R. Gonzales, Timothy E. Flanigan, & Distribution List (Jan. 17, 2002).
[17] *See* E-mail from Brett M. Kavanaugh to Helgard C. Walker (Jan. 17, 2002).
[18] *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).
[19] 130 U.S. 581 (1889).

*The Chinese Exclusion Case*) was correctly decided.[20] That case, as the name suggests, upheld a law that barred Chinese laborers previously present in the United States from returning.[21] In language that can only be described as racist, the Court said that Chinese immigration was occurring "in numbers approaching the character of an Oriental invasion," and suggested that the United States was the subject of "foreign aggression" from China's "vast hordes. . . crowding in upon us."[22] Judge Kavanaugh was asked clearly and explicitly to answer whether he "would be willing to say that [the *Chinese Exclusion Case*] was incorrectly decided?"[23] He refused to answer. Thus, despite asserting during in his testimony that *Plessy v. Ferguson*, the 1896 decision upholding state laws mandating racial segregation was "wrong on the day it was decided,"[24] Judge Kavanaugh would not give a similar answer for the similarly egregious *Chinese Exclusion Case*.

Our review of these documents solidifies our conclusion that Judge Kavanaugh's judicial philosophies demonstrate his "fail[ure] to recognize the reality of race in America."[25]

Moreover, the release of these documents underscores the importance of receiving all of the documents from Judge Kavanaugh's work in government. As documents continue to be released and analyzed over the course of the next several months, we will learn about Judge Kavanaugh's decision-making and fitness to serve on the Supreme Court. Any effort to hold a vote on Judge Kavanaugh's confirmation without a comprehensive review of these still-unreviewed documents reinforces the deeply flawed nature of this confirmation process. And it underscores the woefully inadequate evaluation of Judge Kavanaugh's full record by the Senate Judiciary Committee, which has prevented it from fulfilling its duty to fully assess the fitness of the nominee. It remains unclear how many documents of interest and relevance to Judge Kavanaugh's qualifications have not been released. We will continue to monitor document releases and evaluate whether the public interest would be served by further supplements to our report.

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[20] *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 3*, C-SPAN (Sept. 6, 2018), at 49:42-52:00, https://www.c-span.org/video/?449706-3/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-3-part-3.

[21] Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1187 (2018).

[22] *The Chinese Exclusion Case*, 130 U.S. at 595, 606.

[23] C-SPAN, *supra* note 20, at 50:33–51:30.

[24] Seung Min Kim, Ann E. Marimow, Robert Barnes, and Elise Viebeck, *Supreme Court Nominee Brett Kavanaugh Won't Commit to Removing Himself from Cases Directly Affecting Trump*, WASH. POST, Sept. 5, 2018, https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-senate-grilling/2018/09/05/97fda1ac-b081-11e8-9a6a-565d92a3585d_story.html?noredirect=on&utm_term=.2dd711aa49e7.

[25] Kavanaugh Report at 33.

## III. Analysis of Nominee Testimony

Unfortunately, during his confirmation hearing, Judge Kavanaugh provided few if any meaningful, substantive answers to questions asked by Senators on racial justice or other issues. Nevertheless, some of Judge Kavanaugh's testimony is worth discussing. We noted above one set of questions that provided insight, which related to *The Chinese Exclusion Case* and whether Congress or the President could ban entry into the United States. Several more responses by Judge Kavanaugh are also worth noting.

- Judge Kavanaugh refused to answer whether "race can [ever] be used to remediate clearly proven discrimination[.]"[26]
- Asked what, in 1999, led him to assert that in no more than 20 years the Supreme Court could say that "we are all one race in the eyes of government," Judge Kavanaugh pointed only to his "hope" that it would occur.[27] Yet, given this country's history, hope—while important—is not a sufficient basis on which to proclaim that the need for the government to take account of race will disappear in 20 years. It is concerning that this was the best answer Judge Kavanaugh could give.
- He refused to answer whether the Supreme Court's cases upholding the use of affirmative action in higher education "were rightly decided[.]"[28]
- He declared that he was "proud" of his decision in *South Carolina v. United States*.[29] As our report explained, that decision upheld the validity of a voter identification law that disproportionately burdened African Americans and discounted evidence that the law was enacted with discriminatory purpose.[30]
- Citing "the independence of the judiciary, he refused to answer whether he agreed with President Trump's statement that there was "blame on both sides" at the Charlottesville white supremacist rally at which a young woman was killed.[31]
- He refused to explain what he meant when, in 1999, he called a Hawaiian voting system a "naked racial spoils system," which has long been a phrase associated with those most vehemently opposed to

[26] *Day Two of Brett Kavanaugh's Supreme Court Confirmation Hearing*, WASH. POST, YouTube (Sept. 5, 2018), at 11:06:30–11:07:22, https://www.youtube.com/watch?v=uZBOy6pLj-k.
[27] *Id.* at 10:59:15–11:00:36.
[28] *Id.* at 11:07:22–11:09:08.
[29] *Id.* at 11:35:26–11:35:35.
[30] *See* Kavanaugh Report at 57–61.
[31] *Senator Harris Questions SCOTUS Nominee Judge Brett Kavanaugh—Day 2*, C-SPAN (Sept. 5, 2018), at 8:16–10:16, https://www.c-span.org/video/?c4747596/senator-harris-questions-scotus-nominee-judge-brett-kavanaugh-day-2.

affirmative action and other civil rights measures targeted at protecting African Americans.[32] Indeed, he purported to "not [be] sure what [he] was referring to" when he used it.[33] His use of this language is of particular concern given that, as we explained in our report, Hawaii's decision to permit only Native Hawaiians to vote for the Office of Hawaiian Affairs trustees was part of Hawaii's effort to remedy the past mistreatment of indigenous Hawaiians.[34]

- He refused to answer whether he believed that judges should be attacked based on their heritage.[35]
- On more than one occasion, Judge Kavanaugh spoke glowingly about *Brown v. Board of Education*.[36] But *Brown* did not end the struggle for racial equality in or outside of the courtroom. And Judge Kavanaugh failed to praise or even reference key cases in which the Court endeavored to ensure that *Brown* actually worked on the ground, such as the LDF-litigated *Green v. County School Board* and *Swann v. Charlotte-Mecklenburg Board of Education*. At the very least, this is telling of a failure to appreciate the necessity of continued judicial involvement in advancing racial equality.

In sum, although Judge Kavanaugh's responses were in large part uninformative, the questions that he refused to answer underscore the fears we raised in our report, and the questions he did answer suggested an inadequate understanding of the continued salience of the struggle for racial justice and the judiciary's role in that fight.

## IV. Questions for the Record Responses

On September 12, 2018, Judge Kavanaugh returned responses to Questions for the Record submitted by members of the Judiciary Committee. These questions permit nominees to provide thoughtful, responsive, contextualized answers outside of the hearing setting.

Unfortunately, Judge Kavanaugh elected to be just as unresponsive and evasive in text as he was in the hearing, including in his responses to straightforward questions about allegations of sexual harassment that were made last year against

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[32] *Id.* at 10:25–14:40.
[33] *Id.* at 12:01–12:20.
[34] *See* Kavanaugh Report at 30–31.
[35] *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 2*, C-SPAN (Sept. 6, 2018), at 2:37:50–2:39:30.
[36] *See, e.g.*, *Day Two of Brett Kavanaugh's Supreme Court Confirmation Hearing*, *supra* note 26, at 9:06:30–9:06:45.

Judge Alex Kozinski, one of the judges for whom Kavanaugh clerked. For example: Judge Kavanaugh was asked whether he "ever s[aw] Judge Kozinski mistreat a law clerk or law clerk candidate [.]"[37] He responded that "I never saw him sexually harass a law clerk or law clerk candidate."[38] That does not answer the question. His answers to other, more-technical legal questions were similarly nonresponsive, and he continued to invoke amorphous concepts like the need to avoid "political controversy" and improperly asserted "judicial independence" as excuses to not answer.

## V. Conclusion

In sum, after a careful review of Judge Kavanaugh's testimony, newly released documents, and his questions for the record responses, we conclude that he has failed to allay—and in some instances confirmed—the serious concerns highlighted in our report. We, therefore, reiterate our opposition to his confirmation to the Supreme Court.

[37] Hon. Brett M. Kavanaugh, Responses to Questions for the Record from Senator Coons (Sept. 12, 2018), at 13, https://www.judiciary.senate.gov/imo/media/doc/Kavanaugh%20Responses%20to%20Questions%20for%20the%20Record.pdf.

[38] *Id.*