

Supreme Court nominee Brett Kavanaugh backed US militarism in his appeals court rulings

John Burton
14 July 2018

Donald Trump's second Supreme Court nominee, Brett Kavanaugh, has served for 12 years as a judge on the United States Court of Appeals for the District of Columbia, generally considered the second highest federal court. Because its jurisdiction includes the seat of US government, the DC Circuit is dominated by litigation concerning federal authority, including the power to wage war and otherwise inflict violence and deprivation of liberty overseas.

Virtually without exception, Kavanaugh has ruled in favor of the US government in cases he has heard which gave him the opportunity to expand its war powers.

Take the case filed by Jennifer Harbury, a Harvard-educated lawyer who has relentlessly campaigned to expose those responsible for the March 1992 "disappearance" of her husband Efraín Bámaca Velásquez, a Guatemalan opposition leader. As a result of her efforts, a State Department whistleblower, Richard Nuncio, revealed that Bámaca was kidnapped and tortured for more than a year by CIA mercenaries trained at the notorious School of the Americas.

In 2008 Kavanaugh upheld the dismissal of Harbury's lawsuit against the CIA officials who funded her husband's killers, holding that legal claims based on allegations that "U.S. officials were responsible for physically abusing and killing foreign nationals in their home country" are barred by "the political question doctrine," which holds that most questions of foreign policy are political and not legal, and not subject to the jurisdiction of the courts.

Kavanaugh then gave the CIA defendants an extra layer of immunity, ruling that "their jobs involved hiring and managing informants, conducting covert operations, and gathering intelligence. In performing those responsibilities, they allegedly gathered information related to a decades-long civil war in Guatemala and worked with individuals in Guatemala who abused and killed Harbury's husband. Under D.C. law, those actions were incidental to their authorized conduct: The actions were 'foreseeable' as a 'direct outgrowth' of their responsibility to gather

intelligence and were 'undertaken on the Government's behalf.'"

Because federal law prohibits private lawsuits against US officials acting within the scope of their employment, where the suit is based on an injury that occurred outside the United States, Harbury's claim was barred for that reason as well, Kavanaugh ruled.

Again favoring the CIA, in 2014 Kavanaugh reversed a lower court and prevented the release of the fifth volume of the CIA's own history of the 1961 "Bay of Pigs" invasion of Cuba—this after the first four volumes were released publicly.

Kavanaugh disingenuously claimed that the historical compilation, which had been written 30 years earlier about events that occurred 20 years before, fell within the Freedom of Information Act's exception for official deliberations. The document being withheld, as the dissenting judge explained, dealt with historical questions, not future decisions.

In 2004, Shawqi Omar, a dual citizen of Jordan and the United States, was detained by the US military in Baghdad, Iraq. The Iraqi puppet government accused Omar of working with al Qaeda and the US military agreed to turn him over. Omar's wife filed a *habeas corpus* petition to block Omar's transfer to Iraqi custody "because he is likely to be tortured after his transfer." In 2011 Kavanaugh dismissed Omar's argument that the Foreign Affairs Reform and Restructuring Act, which Congress enacted to implement Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, created a right for him to seek judicial review of the transfer decision. Omar's wife claims that her husband, a Sunni Muslim, has been beaten and denied medications in the Shiite-run Iraqi prison.

In 2011, Kavanaugh expanded the right of the US government to hold prisoners at Guantanamo, reversing a lower court ruling that granted a *habeas corpus* petition and ordered the release of Uthman Abdul Rahim Mohammed

Uthman after nearly ten years in custody. Kavanaugh ruled against the requirement that the US government had to prove that a prisoner was part of a terrorist organization's "command structure" to keep them locked up indefinitely. Instead he applied a "functional test" that allows the government to imprison anyone with alleged al Qaeda or Taliban contacts indefinitely.

Ali v. Obama is a typical example of Kavanaugh's contempt for due process and lack of any human sympathy. In 2013, twelve years after the World Trade Center attacks and long after the debacles in Iraq and Afghanistan degenerated into corrupt neo-colonial occupations, Kavanaugh continued to maintain that "the United States is engaged in an ongoing war against al Qaeda, the Taliban, and associated forces." As a result, Kavanaugh denied *habeas corpus* for a Guantanamo detainee captured in 2002 in Pakistan where, according to Kavanaugh, he participated in a "terrorist training program by taking English lessons" while allegedly staying at an al Qaeda "guesthouse."

Kavanaugh wrote, "This is not a federal criminal trial or a military commission proceeding for war crimes. Rather, this case involves military detention. The purpose of military detention is to detain enemy combatants for the duration of hostilities so as to keep them off the battlefield and help win the war. Military detention of enemy combatants is a traditional, lawful, and essential aspect of successfully waging war."

"We are of course aware that this is a long war with no end in sight," Kavanaugh continued. Brushing off the concern about "lifetime detention," Kavanaugh wrote, "The 2001 AUMF [Authorization for the Use of Military Force] does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities."

In *Hamdan v. United States* (2012), Kavanaugh appeared to rule against the United States and in favor of Guantanamo prisoner Salim Ahmed Hamdan, who had been convicted by a military commission of providing material support for terrorism, a violation of the 2006 Military Commissions Act. The law did not exist when the alleged conduct occurred, however, so Kavanaugh ruled that the US Constitution's prohibition of "ex post facto" laws expressly forbids the retroactive application of criminal statutes.

When one digs deeper, however, it becomes apparent that Kavanaugh cynically used an apparent pro-prisoner ruling to cover for his pressing forward on a major expansion of US war powers. Hamdan had been returned to his native Yemen years before and released. The decision has no actual consequences for him, and the one concurring judge was unsure whether Hamdan would even hear about it. Nevertheless, Kavanaugh added an ominous footnote that

neither of the other judges on the panel joined.

"Judge Kavanaugh would conclude that Congress has authority under Article I, § 8 [of the Constitution] to establish material support for terrorism as a war crime that, when committed by an alien, may be tried by military commission. Although material support for terrorism is not yet an international-law war crime, Congress's war powers under Article I are not defined or constrained by international law ... The U.S. Constitution does not give the international community—either directly, or indirectly through the vehicle of international law—a judicially enforceable veto over Congress's exercise of its war powers. Put simply, the United States may be a leader in the international community, not just a follower, when Congress authorizes war against a terrorist organization or makes crimes such as material support for terrorism war crimes triable by military commission. To be sure, it is often prudent for Congress and the President to coordinate closely with the international community and pay careful attention to international law when authorizing war and enacting war crimes. But those policy factors, political realities, and international-law considerations are not constitutional constraints incorporated into the Article I war powers clauses and thereby enforceable in U.S. courts."

Kavanaugh used an admittedly meaningless ruling on the retroactivity of a war crime statute to hold that the US Congress can establish "war crimes triable by military commission," that is, create new crimes that can be enforced without any regard for the due-process right to a public or a jury trial, supposed "war crimes" defined outside of the Geneva Conventions and other international treaties.

Characterizing the US as "a leader in the international community, not just a follower," means, in this context, that the rest of the world must adapt to the unilateral demands of US imperialism or suffer the consequences. Such views reflect the fundamental needs of the US ruling class, as its diminishing economic hegemony thrusts it deeper into conflicts with international rivals.



To contact the WSWs and the Socialist Equality Party visit:

wsws.org/contact