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August 30, 2018

MEMORANDUM

To: Tribal Leaders
National Congress of American Indians – Project on the Judiciary

From: Joel West Williams, Senior Staff Attorney, Native American Rights Fund

RE: The Nomination of Brett Kavanaugh to the Supreme Court of the United States:
An Indian Law Perspective

I. Introduction

On July 9, 2018, President Trump nominated Judge Brett M. Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to be an Associate Justice on the Supreme Court of the United States (U.S. Supreme Court), to fill the seat opened by the retirement of Justice Anthony Kennedy. On September 4, 2018, the Senate Judiciary Committee will convene hearings to consider his nomination. Senate Majority Leader Mitch McConnell has expressed his desire to have a full Senate vote on Judge Kavanaugh's confirmation in late September 2018, shortly before the U.S. Supreme Court begins its October 2018 Term.

Many observers view Judge Kavanaugh as likely more conservative than Chief Justice Roberts, but less conservative than Justice Thomas. He has described the late Chief Justice William Rehnquist as his "first judicial hero." A Congressional Research Service report on Judge Kavanaugh identified three hallmarks of his judicial philosophy: (1) the primacy of the text of the law being interpreted, (2) an awareness of history and tradition, and (3) adherence to precedent.¹ Anonymous evaluations in the

¹ CONG. RESEARCH SERV., R45293, JUDGE BRETT M. KAVANAUGH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 23 (2018).

Almanac of the Federal Judiciary from attorneys who practiced in front of Judge Kavanaugh describe him as “extremely well prepared,” “careful[,]” and “thorough” in his approach.²

This memorandum is intended to provide Tribal leaders with background on Judge Kavanaugh, and in particular his record on Indian law. As more fully discussed below, Judge Kavanaugh heard eight cases involving Indian law, Indian tribes or individual Indians during his time on the D.C. Circuit, and authored opinions in four of those cases. In addition, as a private attorney he wrote one U.S. Supreme Court amicus brief that opposed Native Hawaiian interests. He also likely had exposure to Indian law as a judicial law clerk; but due to the nature of law clerk positions, we cannot know his views on, or even whether he was involved in, those cases. Also, very little information has been released regarding his six years at the George W. Bush White House. Although records from his time at the White House do not indicate any involvement with Indian law or policy, a full evaluation of his White House record is not possible at this time. The National Congress of American Indians and Native American Rights Fund sent a joint letter to the Senate Judiciary Committee voicing their concerns over the committee’s hearings going forward without a full record of Kavanaugh’s work experience at the White House.

II. A Brief Biography

Kavanaugh was born on February 12, 1965, in Washington, D.C., and grew up in Bethesda, Maryland. His mother was a high school history teacher, who later graduated from American University Washington College of Law and served as a Maryland Circuit Court judge from 1995-2001. His father was the president of a cosmetics trade association for more than 20 years. He met his wife, Ashley Estes, while both served in the George W. Bush White House, and they have two daughters.

Kavanaugh attended Georgetown Preparatory School, a Jesuit university preparatory school, two years ahead of future-Justice Neil Gorsuch. He earned a B.A. from Yale College in 1987, and his J.D. from Yale Law School in 1990. During law school, he was roommates with future-Judge James Boasberg of the United States District Court for the District of Columbia, and he was a notes editor for the Yale Law Journal.

After graduating from law school, Kavanaugh was a law clerk for Judge Walter King Stapleton of the United States Court of Appeals for the Third Circuit. Next, he clerked for Judge Alex Kozinski on the United States Court of Appeals for the Ninth Circuit. Although he interviewed with Chief Justice William Rehnquist, he was not offered a clerkship. Instead, after completing his clerkship with Judge Kozinski, Kavanaugh served a one-year fellowship with the United States Solicitor General’s Office, and then clerked for Justice Anthony Kennedy during the same year that Neil Gorsuch clerked for Justice Kennedy.

Upon completing his clerkship with Justice Kennedy, Kavanaugh joined the Office of Independent Counsel, where he worked as an Associate Counsel for Independent Counsel Kenneth Starr. There he assisted with the investigation of the Clinton White House, including the suicide of Vincent Foster, the Clinton’s real estate investments, and allegations of perjury against President Clinton.

² *Id.* at 11.

After three years with the Office of Independent Counsel, Kavanaugh joined the law firm of Kirkland & Ellis LLP as a partner in 1997. He worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation. He worked on matters for some of the firms most significant corporate clients, including Verizon, America Online, General Motors and Morgan Stanley.

In 1998, Kavanaugh returned to the Independent Counsel's Office. Among his duties, he was a principal author of the *Starr Report* to Congress on investigations into legal issues of President Clinton. During that time, Kavanaugh argued his only case before the U.S. Supreme Court, *Swidler & Berlin v. United States*, in which he argued for an exception to attorney-client privilege in the investigation of Vincent Foster's death.

Kavanaugh returned to Kirkland & Ellis in 1999 and focused primarily on appellate practice. During this stint at the firm, he represented the Miami relatives of Elian Gonzales, a young Cuban boy found floating on an inner tube in the Gulf of Mexico and later returned to his father in Cuba over his Miami relatives' objection. In addition, Kavanaugh was part of the legal team that represented George W. Bush in the Florida recount in the 2000 presidential election. He also was counsel of record on an amicus brief filed in *Rice v. Cayetano*, 528 U.S. 495 (2000), which is discussed below.

In 2001, Kavanaugh joined the George W. Bush White House, first serving as an associate White House Counsel. In that capacity he worked on issues related to the Enron scandal and the nomination of John Roberts as Chief Justice of the United States. He later became George W. Bush's Staff Secretary, and was responsible for coordinating all documents to and from the President. The Staff Secretary is often referred to as the "gatekeeper" for the President, who vets all executive orders, decision memos, bills, and nominations before reaching the President.

In 2003, George W. Bush nominated Kavanaugh to serve as a judge on the D.C. Circuit. However, his nomination stalled; he was re-nominated, and finally confirmed by a 57-36 vote in 2006.

III. Kavanaugh's Indian Law Record and Experience

Judge Kavanaugh's Indian law record and experience is summarized below, beginning with his most recent position as a judge on the D.C. Circuit.

A. D.C. Circuit Court of Appeals (2006-present):

During his twelve years on the D.C. Circuit, Judge Kavanaugh heard 676 cases that resulted in reported opinions. He authored more than 300 reported opinions, but only four of his opinions involve Indian law, Indian Tribes, or individual Indians. And only one involves a squarely Indian law issue (*Vann v. Dep't of the Interior*, in which he ruled against the tribe), while the other three cases were decided on procedural grounds or other areas of substantive law. The only other case in which he was called upon to decide a squarely Indian law question (*Citizens Exposing Truth About Casinos v. Kempthorne*) was a

matter involving interpretation of the Indian Gaming Regulatory Act; he voted in favor of the tribal interest, but did not author the opinion.

Judge Kavanaugh heard eight cases involving Indian law, Indian Tribes, or individual Indians. He authored two unanimous opinions in matters involving Indian Tribes or Indian law:

1. *Hoopa Valley Tribe v. F.E.R.C.* (09-1134), 629 F. 3d 209 (D.C. Cir. 2010). Judge Kavanaugh authored a unanimous opinion denying a Tribe’s petition for review of a Federal Energy Regulatory Commission (FERC) decision that denied the Tribe’s request to impose conditions on a license issued to a hydroelectric dam operator. The hydroelectric dam was located on the Klamath River, where the Hoopa Valley Tribe holds fishing rights and subsists on trout from the river. As part of FERC’s annual relicensing, the Tribe requested that FERC include new ramping rates and minimum flow requirements in order to protect the fishery. FERC denied the Tribe’s request, and the Tribe petitioned for review with the D.C. Circuit. Judge Kavanaugh’s opinion held that FERC applied the correct standard consistent with the agency’s regulations, and that FERC’s decision was supported by evidence.

2. *Vann v. U.S. Dep’t of the Interior* (11-5322), 701 F. 3d 927 (D.C. Cir. 2012). Judge Kavanaugh authored a unanimous opinion, which held that a tribe’s Principal Chief may be sued in his official capacity for alleged violations of federal law despite the Tribe’s sovereign immunity. The case was brought by descendants of “Cherokee Freedmen,” African-Americans including former slaves who lived in the Cherokee Nation at the end of the U.S. Civil War. An 1866 treaty with the U.S. established the descendants’ tribal citizenship, but a 2007 tribal constitutional amendment extinguished it. Although the D.C. Circuit affirmed the trial court’s holding that the Tribe was entitled to sovereign immunity, it reversed the trial court’s holding that the Tribe itself was a required party under Federal Rule of Civil Procedure 19 and that the Tribe’s interests could not be adequately represented by the Principal Chief. The D.C. Circuit’s holding rested primarily on applying the *Ex Parte Young* Doctrine to Tribal officials. The *Ex Parte Young* Doctrine is an exception to Eleventh Amendment *state* government immunity that allows lawsuits against state officials to prevent them from acting in violation of federal law. While Judge Kavanaugh wrote that the doctrine’s principle is equally applicable to tribal officials, he did not explain why tribes, who are not parties to the U.S. Constitution, should be subject to the doctrine.

Judge Kavanaugh authored one concurring opinion in a matter involving an Indian Tribe:

***Navajo Nation v. United States Dep’t of the Interior* (16-5117), 852 F. 3d 1124 (D.C. Cir. 2017).** The Navajo Nation sued the Department of the Interior (DOI), alleging that it violated the Indian Self-Determination Act (ISDEAA) by failing to disperse certain funding. The Tribe submitted an ISDEAA funding proposal to a local Bureau of Indian Affairs employee during a federal government shutdown. Under the statute, the agency has 90 days to act on a funding proposal or it is deemed approved. The issues in the case were whether the employee “received” the funding proposal during the government shutdown, and on what date the 90 day period began

to run against the agency in light of the government shutdown. The D.C. Circuit ruled in favor of the Tribe. It rejected DOI's argument that it had not "received" the funding proposal because the employee who accepted it was not authorized to "receive" the document. It also rejected DOI's position that the Tribe should be equitably estopped from disputing the timeliness of the declination because it remained silent in the face of DOI's repeated assertions for the deadline for declination. On this point, the court wrote, "It thus ill-behooves the government to seek to impose such an uncommon action against another sovereign, especially one to which it owes a 'distinctive obligation of trust.'" Because the agency failed to instruct employees to not receive funding proposals during the federal government shutdown, the court also rejected DOI's position that the time for responding to the funding proposal should be equitably tolled during that time. Judge Kavanaugh joined the majority opinion, and also wrote a concurring opinion stating his position that equitable tolling may apply in certain government shutdown situations, but did not apply in this case because the DOI had sufficient time after it reopened to meet its statutory deadline.

Judge Kavanaugh wrote one opinion where he concurred and dissented in a case involving an Indian party:

***Gordon v. Holder* (Nos. 12-5031 and 12-5051), 721 F. 3d 638 (D.C. Cir. 2013).** A Native American cigarette vendor brought an action against the United States Attorney General to enjoin enforcement of the Prevent All Cigarette Trafficking Act (PACT Act). This federal law regulates tobacco sales that are not "face-to-face" and requires tobacco sellers to ensure all state and local taxes are paid in advance of delivery, even if the seller is located in a different state than the buyer. It also bans shipment of tobacco products in the U.S. Mail. The federal district court preliminarily enjoined key tax-related provisions of the PACT Act as potentially unconstitutional under the Due Process Clause's minimum contacts principle. The D.C. Circuit affirmed. Judge Kavanaugh filed an opinion dissenting in part and concurring in part. He took the position that when the Federal government initiates suit, minimum contacts analysis is not necessary, and therefore the plaintiff's claim was without merit. He agreed with the majority insofar as it affirmed the district court's denial of the injunction with regard to PACT Act's ban on use of the mail to send tobacco products.

In addition to his written opinions, Judge Kavanaugh joined four majority opinions in matters involving Indian tribes or Indian law:

1. *Amador Cty., Cal. v. U.S. Dep't of the Interior* (13-5245), 772 F. 3d 901 (D.C. Cir. 2014). An Indian Tribe sought to intervene in a suit by a county government against the DOI that challenged the agency's "no action" approval of a gaming compact between the State of California and the Tribe. The Tribe argued that DOI did not adequately represent its interests, that the Tribe was an indispensable party, and that the Tribe was protected by sovereign immunity, thus requiring dismissal of the county's suit. The federal district court denied the Tribe's motion to intervene. On appeal, Judge Kavanaugh joined a majority opinion affirming

and holding that the district court did not abuse its discretion in denying the Tribe's motion because it was not timely filed.

2. *Citizens Exposing Truth About Casinos v. Kempthorne* (06-5354), 492 F. 3d 460 (D.C. Cir. 2007). A group filed suit against the DOI challenging its decision to take land into trust for a Michigan tribe for operation of a Class III gaming facility and claiming that DOI erred in its determination that the acquisition fell under the IGRA's "initial reservation" exception to gaming on lands acquired after October 17, 1988. The federal district court granted partial summary judgment in favor of DOI. On appeal, the D.C. Circuit ruled as a threshold matter that the group had standing to sue under IGRA. Applying *Chevron* deference, the D.C. Circuit affirmed the district court's ruling that DOI's interpretation of the "initial reservation" exception was a permissible interpretation of IGRA.

3. *Felter v. Kempthorne* (06-5092), 473 F. 3d 1255 (D.C. Cir. 2007). Former members of the Ute Indian Tribe and their descendants sued the federal government, claiming that in the 1950s and 1960s the federal government improperly terminated their status as federally-recognized Indians and breached its fiduciary duty to them in the process of partitioning tribal assets prior to the Tribe's termination. The federal district court concluded that the plaintiffs' claims were barred by a six-year statute of limitations and dismissed the suit. The D.C. Circuit affirmed, but remanded the case for the district court to consider the applicability of recently enacted legislation providing that the statute of limitations "shall not commence to run" on Indian claims of trust fund mismanagement until the United States has provided an accounting.

4. *Timbisha Shoshone Tribe v. Salazar* (11-5049), 678 F. 3d 935 (D.C. Cir. 2012). A group claiming to act in its official capacity as the Timbisha Shoshone Tribal Council brought suit asserting that a Congressional per capita distribution of Indian Claims Commission settlement funds was an unconstitutional taking of tribal property. The district court held the legislation was constitutional and dismissed the suit. Observing that shortly after the district court's decision, the federal government recognized a different faction as the Tribal Council, the D.C. Circuit held that the plaintiffs did not have standing to sue on behalf of the Tribe and remanded the case to the district court with instructions to dismiss for lack of jurisdiction.

B. White House (2001-2006)

A full evaluation of Kavanaugh's involvement in Indian law and policy issues during his time at the White House is not possible at this time. The National Archives reported that it will not have a full set of records available relevant to Kavanaugh's tenure at the White House until October 2018, and only a small fraction of documents are publicly available as of this writing. As noted above, in a joint letter to the Senate Judiciary Committee, the National Congress of American Indians and Native American Rights Fund raised their concerns about moving forward with a hearing on this nomination without these records, which can provide valuable information on a nominee's background. Senator Tom Udall, Vice Chairman of the Senate Committee on Indian Affairs, also wrote a letter to Chairman Grassley expressing similar concerns and requesting documents within the Senate Judiciary Committee's

possession so that he and other senators can “adequately consider Judge Kavanaugh’s views on Indian Affairs issues.” Similar White House documents released for past U.S. Supreme Court nominees, such as John Roberts and Elena Kagan, revealed information on their Indian law and policy involvement while working at the White House. For Kavanaugh, a review of available records provided no indication that he had any involvement with Indian law or policy issues either in the White House Counsel’s Office or as Staff Secretary to President Bush, but the limited nature of the available record prevents a full review and evaluation of his work and experience at the White House.

C. Office of Independent Counsel (1994-1997, 1998)

A review of available records did not reveal any involvement with Indian law issues.

D. Private Practice – Kirkland & Ellis (1997-1998, 1999-2001)

During his time in private practice, Kavanaugh was counsel of record on an amicus brief opposing Native Hawaiian interests at the U.S. Supreme Court. In *Rice v. Cayetano*, 528 U.S. 495 (2000), a citizen of Hawaii brought a Section 1983 claim against state officials, claiming that Native Hawaiian ancestry eligibility requirement for voting for trustees for Office of Hawaiian Affairs (OHA) was unconstitutional. The district court and United States Court of Appeals for the Ninth Circuit upheld the eligibility requirement, but the U.S. Supreme Court held that it violated the Fifteenth Amendment by using ancestry as a proxy for race.

Kavanaugh authored an amicus brief in the case on behalf of the Center for Equal Opportunity, the New York Civil Rights Coalition, and two individuals. The brief supported the position that the law violated the Fourteenth and Fifteenth Amendments. It described the Hawaii state constitution’s set-aside of 20% of proceeds from Admission Act lands, the establishment of OHA to administer those funds, and the restriction on non-Native Hawaiians from voting in OHA elections in this way: “The entire scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century.” In addition to its arguments regarding alleged Constitutional violations, the brief also attacked the State of Hawaii’s defense of the law based on its interest in cultural preservation and its trust relationship with Native Hawaiians. The brief argued that there were other “race-neutral” means the state could employ to advance these interests, and that the Court’s sanctioning of this system could also justify pernicious, discriminatory laws in the name of culture. Finally, the brief carefully distinguished the status of members of federally-recognized Indian tribes from that of Native Hawaiians: “American Indian tribes are a distinctive category in our law. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The tribes are separate sovereigns within the United States – and have been so considered since before the Constitution was ratified.” It then continued to distinguish the two groups by relying on the Constitution’s specific language in the Indian Commerce Clause and Treaty Clause, and by citing *Morton v. Mancari* for the proposition that certain preferences for Indians are reserved for members of federally-recognized tribes, rather than all those who “racially could be considered Indian.” Therefore, the brief argued, the lack of similar federal Constitutional provisions for Native Hawaiians

and their lack of federal recognition as an Indian tribe meant a similar justification was not available for the challenged law.

This case attracted many conservative groups and lawyers who saw it as an opportunity to advance a “colorblind” approach to constitutional law. In a 1999 interview about the case, Kavanaugh said, “This case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government.” Additionally, in a Wall Street Journal editorial, Kavanaugh referred to the OHA system as a “naked racial spoils system.” He went on to claim that the Department of Justice’s support of OHA’s position in the case was motivated by Democratic party political calculations, writing that “the politically correct position [in Hawaii] is to support the state’s system of racial separatism.”

In the same Wall Street Journal piece, Kavanaugh distinguished the position of Native Hawaiians from that of Indian tribes, writing that “The Constitution expressly established special rules for Indian tribes because the Founders considered Indian tribes to be separate sovereigns. . . . To convert this express recognition of Indian tribal sovereignty into a sweeping license for favorable race-based treatment for the descendants of Indigenous people is to allow political correctness to trump the Constitution.”

E. Clerk to Justice Anthony Kennedy (1993-94)

Kavanaugh likely had some exposure to Indian law cases that came before the U.S. Supreme Court during his time as a clerk for Justice Kennedy. During that term, the Court decided three Indian law cases: *Negonsott v Samuels*, 507 U.S. 99 (1993) (holding that the Kansas Act conferred criminal jurisdiction to the State of Kansas over major crimes committed by Indians in Indian Country); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding the Flood Control Act abrogated Tribe’s ability to regulate hunting/fishing over non-members along banks of reservoir within the reservation); and *Hagen v. Utah*, 510 U.S. 399 (1994) (holding the Uintah reservation was diminished by Congress when opened to non-Indian settlement). Justice Kennedy did not author any of these opinions. In addition, we cannot know the extent of Kavanaugh’s involvement (if any) in these cases, although it would have been consistent with his role as a law clerk to perform research, write memoranda, and discuss the cases with the Justice, if so assigned.

F. Solicitor General’s Office (1992-93)

Kavanaugh did not argue any Indian law cases during his time at the Solicitor General’s Office, nor were any briefs identified in our research where Kavanaugh appeared as counsel for the United States in an Indian law case.

G. Clerk to Alex Kozinski (9th Circuit) (1991-92)

During Kavanaugh’s time as a law clerk for Judge Kozinski, the judge participated in a few Indian law cases and wrote one opinion. As discussed with regard to Kavanaugh’s clerkship with Justice Kennedy above, we cannot know the extent of Kavanaugh’s involvement (if any) with these cases, but judicial law clerks frequently preform research, write memoranda, discuss the cases with their judge, and assist

in drafting opinions. The only Indian-related opinion Judge Kozinski authored during Kavanaugh's year as a clerk was *United States v. Alexander*, 938 F. 2d 942 (9th Cir. 1991), which held that Haida members' sales of fish in violation of Alaska law were protected under Alaska National Interest Lands Conservation Act.

In addition, that year Judge Kozinski joined a majority opinion holding that Tribal court exhaustion need not apply in contract dispute. *Stock West Corp. v. Taylor*, 942 F. 2d 655 (9th Cir. 1991). Also, judge Kozinski was on three memorandum opinions, which do not identify which of the three judges on the opinion may have authored it: *Dianmontiney v. Daniel*, 935 F. 2d 273 (9th Cir. 1991) (affirming district court dismissal of Native American inmate's claim of constitutional violations by being placed in cell with white inmates); *United States v. Blue Horse*, 967 F. 2d 592 (9th Cir. 1992) (affirming the district court's sentence enhancement of a tribal member in police chase); and *Sauceda v. United States*, 974 F. 2d 1343 (9th Cir. 1992) (affirming district court ruling that a BIA officer was not liable under the FTCA for failing to arrest drunk driver).

H. Clerk to Walter Stapleton (3rd Circuit) (1990-91)

No Indian law cases were identified that came before Judge Stapleton during this time.

IV. Should Indian Country Support or Oppose Judge Kavanaugh's Confirmation?

If confirmed, Judge Kavanaugh would replace Justice Anthony Kennedy, who is often referred to as a "swing vote" on the Court, occupying a middle ground between liberal and conservative positions and casting a deciding vote in many landmark cases in recent decades. However, regarding Indian law cases, Justice Kennedy voted against tribal interests 74% of the time while on the Court. While many may view Judge Kavanaugh's confirmation as likely shifting the Court's balance in a more conservative direction, his limited Indian law record as a judge on the D.C. Circuit offers little insight on how he views a host of Indian law topics that may come before the U.S. Supreme Court. In short, it is difficult to determine how Judge Kavanaugh might think about foundational Indian law principles and whether he views Indian law and tribal issues differently than Justice Kennedy so as to shift the balance of the Court with regard to Indian law.

In addition, his public statements regarding *Rice v. Cayetano* raise questions. His description of OHA as a "racial spoils system" is disturbing. And while he acknowledges an express Constitutional basis for "special rules for Indian tribes," it is not clear what limitations he sees on that Constitutional authority and what he may consider to be impermissible "favorable race-based treatment for the descendants of Indigenous people." Moreover, it is notable that both in the briefing and articles related to *Cayetano*, Kavanaugh advanced and espoused a "color-blind" approach to Constitutional law, even quoting the late-Justice Scalia in one op-ed: "Under our Constitution there can be no such thing as a creditor or debtor race . . . In the eyes of the government we are one race here. It is American." David Getches, in his seminal article on Indian law in the modern U.S. Supreme Court, warned of the impact of this sort of

“color-blind” approach in the area of Indian law, writing, “This theory of equality is especially destructive when misapplied to laws relating to Indians.”³

For Indian country, Judge Kavanaugh’s background, legal experience and judicial record offer little substance to solicit support for his confirmation, and also contain some troubling aspects. NARF, in conjunction with the National Congress of American Indians, will monitor the upcoming confirmation hearings closely and evaluate Judge Kavanaugh’s responses to questions posed by the Senate Judiciary Committee. His record offers few clues as to whether his approach to Indian law will be more favorable or less favorable to Indian interests as compared to the Justice he would replace, and it is therefore very difficult to forecast what his confirmation may portend for Indian law cases before the U.S. Supreme Court.

³ David Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color Blind Justice, and Mainstream Values*, 86 Minn. L. Rev. 267, 319 (2001).