



Judge Kavanaugh's Judicial Record on the Right to Abortion

Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc)

Garza v. Hargan is the only case in which Judge Kavanaugh has addressed the right to abortion.

- It shows that he does not believe that the Constitution's protection for abortion is meaningful, even under the currently binding precedent of *Roe v. Wade* and *Planned Parenthood v. Casey*.
- Unlike the majority, Judge Kavanaugh did not denounce the argument that detained unaccompanied minors have no constitutional right to abortion.

Case Facts

Garza involved an unaccompanied immigrant minor—Jane Doe (J.D.), represented by the ACLU—who was detained when entering the United States and placed in a federally funded shelter in Texas, where she discovered she was pregnant. J.D. requested an abortion and, as required by Texas state law when a minor seeks abortion without parental consent, went through the state bypass process in state court with the help of an attorney and appointed guardian. As a result of that process, a judge determined she could consent to the abortion herself.

The federal government nonetheless refused to allow J.D. to travel to the clinic. J.D. filed a lawsuit in federal court, claiming the shelter violated her constitutional rights. The U.S. District Court for D.C. granted a temporary restraining order, prohibiting the government from continuing to block her abortion. But before J.D. could obtain the abortion, the government appealed the order to a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit that included Judge Kavanaugh. **Judge Kavanaugh voted to block J.D.'s abortion for at least 11 more days, issuing an order asserting that the federal government would not impose an undue burden on Jane Doe's right to abortion if it could find a sponsor who would remove her from custody "expeditiously."**

The order ignored Jane Doe's evidence, presented in her briefs and at oral argument, that she had already been blocked from obtaining an abortion for almost four weeks; that finding a sponsor was often a lengthy process, involving close vetting, and two possibilities for Jane Doe had fallen through; that Jane Doe had already gone through the Texas state bypass process and been deemed able to consent to the abortion for herself; and that the government would play no role in facilitating the abortion, but would simply need to not block Jane Doe from using private funds and logistical support.

J.D. petitioned to the full Court of Appeals, which reversed the panel and ordered that she be permitted to obtain the abortion without additional delay. The en banc court adopted the reasoning of the lone dissenter on the panel, Judge Patricia Millet, who wrote: "[f]orcing [J.D.] to continue an unwanted pregnancy just in the hopes of finding a sponsor that has not been found in the past six weeks sacrifices J.D.'s constitutional

liberty, autonomy, and personal dignity for no justifiable governmental reason. The flat barrier that the government has interposed to her knowing and informed decision to end the pregnancy defies controlling Supreme Court precedent.” There was simply no question, she wrote, that “[s]etting up substantial barriers to the woman’s choice violates the Constitution. That is settled, binding Supreme Court precedent.” The “government’s insistence that it must not even stand back and permit abortion to go forward for someone in some form of custody is freakishly erratic.”

Judge Kavanaugh wrote a dissenting opinion, maintaining that the government could continue to block J.D.’s access while it tried to locate a sponsor who would remove her from custody.

Judge Kavanaugh’s Dissent – Blocking Jane Doe’s Abortion Did Not Impose an Undue Burden

Judge Kavanaugh rejected the majority’s conclusion that the government had imposed an unconstitutional undue burden, calling it “ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision.” But as the majority noted, the Constitution does not permit additional government-imposed delay simply because state officials do not believe someone should have an abortion—after she has completed all the legal requirements and would be able to access care immediately absent government obstruction.

Judge Kavanaugh wrote that “the Supreme Court’s many precedents hold that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion,” as long as it did not impose an undue burden on abortion access—and he concluded that the additional delay was not an undue burden. His one-sided view of precedent steamrolls a core Supreme Court holding from *Planned Parenthood of Southeastern Pennsylvania v. Casey*: while government can enact regulations that inform or try to persuade women, it cannot “hinder” the “free choice” to have an abortion before viability, which is precisely what the government’s actions did here.

Judge Kavanaugh further asserted that if the government could not find a sponsor in the allotted time, it could come back and make additional arguments, and whether or not J.D. could access abortion would “depend on what arguments the Government can make at that point.” In practice, Judge Kavanaugh was inviting additional, potentially indefinite delay, even while J.D.’s pregnancy progressed toward the state’s legal limit for abortion. His holding would have rendered constitutional protections for abortion meaningless.

Judge Kavanaugh on Precedent

While acknowledging that Supreme Court precedent does not allow the government to place an undue burden on abortion access, Judge Kavanaugh did not affirmatively state that the Constitution protects the right to abortion. He simply noted that “all parties to this case recognize that *Roe v. Wade* and *Planned Parenthood v. Casey* are precedents we must follow.”

Stating that precedent is binding once announced by the Supreme Court, he wrote that “our job as lower court judges is to apply the precedents and principles articulated in Supreme Court decisions to the new situations.”

He wrote in conclusion: “many Americans—including many Justices and judges—disagree with one or another aspect of the Supreme Court’s jurisprudence. From one perspective, some disagree with cases that

allow the Government to refuse to fund abortions and that allow the Government to impose regulations such as parental consent, informed consent, and waiting periods From the other perspective, some disagree with cases holding that the U.S. Constitution provides a right to an abortion.” He reiterated that lower courts must “follow the law as it is, not as we might wish it to be.” In other words, Judge Kavanaugh stated that, as a lower court judge, his place is to follow precedent—and that it is the exclusive role of the Supreme Court to set precedent on the extent which abortion is protected, if at all.

[Judge Kavanaugh on Whether Undocumented Detained Minors Have a Right to Abortion](#)

Judge Karen LeCraft Henderson authored a separate dissent stating that undocumented detained immigrants did not have a constitutional right to abortion and faulting the government for failing to press forward that argument. While she joined Judge Kavanaugh’s dissent, she would have allowed the government to deny Jane Doe’s abortion permanently. Judge Kavanaugh did not sign her opinion. However, neither did Judge Kavanaugh disavow that position (which the majority did in pointed terms, writing “[t]he implications of amici’s argument that J.D. is not a “person” in the eyes of our Constitution is also deeply troubling.”). Instead, Judge Kavanaugh’s dissent said several times that the government “assumed” that Jane Doe possessed the constitutional right, so the only inquiry was whether blocking her access was an undue burden—and it was not.