Brett Kavanaugh's opportunistic corner cutting

BY RENA STEINZOR, OPINION CONTRIBUTOR — 08/29/18 05:00 PM EDT
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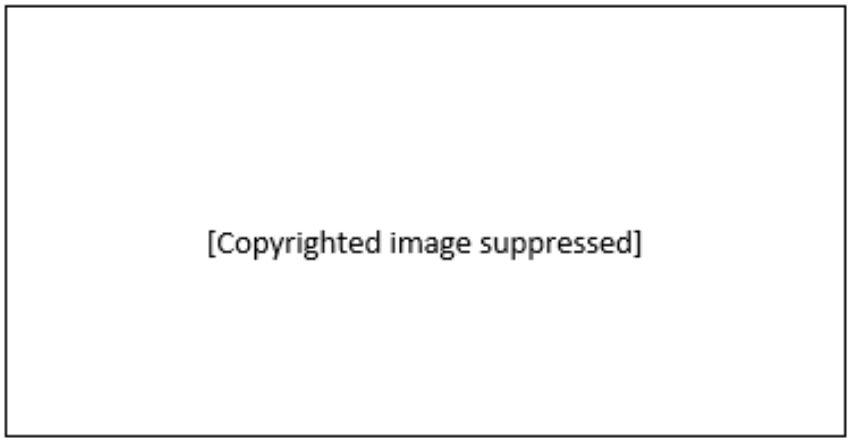

Tens of thousands of thoughtful — and not so thoughtful — words have been written about Supreme Court nominee Brett Kavanaugh's substantive positions on issues the court will face. At least one question has not been addressed, however: Is Judge Brett Kavanaugh so ideological about certain topics that he veers toward sloppiness?

As a law professor, I spend a lot of time around first-year law students, introducing them to the professional standards that define a good lawyer. My advice includes three things they must never do: ignore inconvenient language in a law to distort its meaning; rocket off on tangents that have little to do with the subject at hand; and cite one law to support a conclusion in another area to which it does not apply.

Kavanaugh has done all three things in D.C. Circuit Court of Appeals opinions of significance and his colleagues have rightly called him out for this professionally dubious behavior. The three examples have to do with administrative law, his specialty, and an area where he will try to lead the Supreme Court if confirmed.

1. In *Mexichem Fluor Inc. v. EPA*, the case centered on whether, on an ongoing basis, the agency could prohibit companies from complying with a requirement to replace chemicals in products that deplete the ozone layer with chemicals that do even greater harm by emitting the greenhouse gases that cause climate change. Kavanaugh's opinion tied EPA's hands — to get there, he cherry-picked one passage from the statute

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that cast his conclusion in the most positive light, while ignoring others of equal importance.

Judge Robert Wilkins' dissent considered all the relevant passages, which supported EPA's interpretation. Because the prevailing law holds that when a statute's meaning is ambiguous, courts should defer to an agency's permissible interpretation of a statute, Wilkins argued that EPA should win the case. Kavanaugh's cherry-picking distorted the law's meaning.

2. The Occupational Safety and Health Administration (OSHA) has jurisdiction over almost all workplaces in the United States, including venues where trained animals are displayed to the public.

On February 24, 2010, Dawn Brancheau was working with an orca at a SeaWorld venue in Florida. The whale, which had been involved in two other human fatalities, pulled her off a platform, snapped her spinal cord, and drowned her. The company was fined just $7,000 by OSHA inspectors but still took the case all the way up to the D.C. Circuit Court of Appeals, probably because it feared further liability.

An opinion authored by Judge Judith Rogers and joined by Judge Merrick Garland upheld the agency's decision because SeaWorld knew the risks and could have prevented the catastrophe. Enter Kavanaugh, who condemned the opinion as "paternalistic" and wandered off on an irrelevant tangent about whether it would open the door to "over-regulation" of the risk-taking heroes of NASCAR and professional football teams.

3. Another case involved permits granted by the Army Corps of Engineers that allowed Mingo Logan Coal Company to dump mountaintop removal mining waste into three streams in West Virginia.

EPA has veto authority over such permits, not just when the permit is issued but as information emerges about the environmental consequences of dumping or other polluting activities. The relevant language spelled out quite clearly what environmental conditions EPA was supposed to consider when making those decisions.

Judge Karen Henderson, an appointee of President George H.W. Bush, wrote for the majority that the law allowed EPA to rescind a permit for dumping in two of the streams because it concluded that the resulting environmental harm would be unacceptable. She also pointed out that not even the company had made any argument to EPA about costs, a mistake that barred the court from considering those concerns on appeal.

Kavanaugh, writing in dissent, argued instead that the revocation would cost the company too much money. What was his source for this factor, which is not mentioned in the provision the court was considering? It was a Supreme Court case dealing with the Clean Air Act — an entirely different statute with very detailed wording, a different framework, and its own interpretive cases.

Kavanaugh has a copious record consisting of one million pages now under review in the Senate. But his judicial opinions, whether for the majority or in dissent, should reflect his most careful and considered work. Instead, the analysis in all three cases reflect opportunistic corner-cutting that is more than a little surprising given the conventional wisdom about the quality of his credentials. Unfortunately, the explanation is

hiding in plain sight: His ideological opposition to protective regulations, at least those protecting worker safety and the environment, drove him to push beyond sound legal analysis in ways unworthy of a Supreme Court justice.

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