President Trump Nominates Judge Brett Kavanaugh To Supreme Court

July 10, 2018

To Our Clients and Friends:

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit to fill seat on the Supreme Court of the United States being vacated by Justice Anthony Kennedy.

To assess Judge Kavanaugh's potential impact on the Supreme Court, should the Senate confirm his nomination, we have started reviewing his written opinions and other legal writings. This Memorandum briefly summarizes Judge Kavanaugh's noteworthy opinions in several key areas of law, including (1) administrative law, (2) antitrust, (3) arbitration, (4) immigration, (5) labor and employment, (6) religious liberty, and (7) tax.

Based on Judge Kavanaugh's prior opinions, President Trump appears to have fulfilled his campaign promise to "appoint judges very much in the mold of Justice Scalia." Like Justice Scalia, Judge Kavanaugh often decides cases by focusing on the text of the relevant statute or constitutional provision, without resorting to legislative history. Judge Kavanaugh also frequently resolves constitutional cases by examining the document's original meaning in light of history and tradition.

Judge Kavanaugh, who is 53 years old, is admired on both sides of the political aisle. He is credited with a keen legal mind and praised for writing opinions that are clear and concise. Judge Kavanaugh

earned his law degree in 1990 from Yale Law School. Following law school, he clerked for Judge Walter King Stapleton on the Third Circuit and Judge Alex Kozinski on the Ninth Circuit. He then completed a one-year position with the United States Solicitor General's Office (later called a Bristow Fellowship) before clerking for Justice Kennedy. Judge Kavanaugh joined the Office of the Independent Counsel under Kenneth Starr and later went into private practice. In the George W. Bush administration, Judge Kavanaugh served as Assistant to the President and Staff Secretary to the President. President George W. Bush nominated him to the D.C. Circuit in 2006. The Senate confirmed his nomination to that seat by a vote of 57-36.

Gibson Dunn will continue to review his jurisprudence and monitor the confirmation proceedings, and provide periodic updates.

Administrative Law

In two significant decisions addressing the process for appointment of executive branch officials, and the President's power to remove them, Judge Kavanaugh authored opinions that construed the Constitution's separation of powers in the context of the modern administrative state.

PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Judge Kavanaugh dissented from the en banc opinion holding that the statute providing that the Consumer Financial Protection Bureau's director could be removed by the President only for cause was constitutional. According to Judge Kavanaugh, vesting authority in a single director removable only for cause violates historical precedent, threatens individual liberty, and diminishes the President's Article II authority over the Executive Branch.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010). Judge Kavanaugh dissented from a panel opinion holding that the Public Company Accounting Oversight Board did not violate the Appointments Clause or separation of powers principles. He reasoned that the PCAOB violated separation of powers because PCAOB members were only removable for cause by another independent agency, the Securities and Exchange Commission, and not by the President or his alter ego, such as the head of an executive agency. The Supreme Court later reversed the panel decision and largely endorsed Judge Kavanaugh's reasoning.

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An important question in administrative law is the continued vitality of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), under which courts examine agency interpretations of statutes in two steps, such that if the statute itself unambiguously forecloses the agency's interpretation, it is invalid, but if the statute is ambiguous, the agency's interpretation is upheld if merely reasonable. *Chevron* deference,

Judge Kavanaugh has explained, is the rule that "in cases of textual ambiguity, [courts] defer to an executive agency's reasonable interpretation of a statute." *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2135 (2016) (reviewing Second Circuit Judge Katzmann's book on statutory interpretation).

One potential limitation on the reach of *Chevron* deference is the "major rules" doctrine, and Judge Kavanaugh's dissent from denial of rehearing *en banc* as to the D.C. Circuit's upholding of the FCC's 2015 net neutrality rule indicates that he takes that limitation seriously. *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417-35 (D.C. Cir. 2017). The major rules doctrine requires Congress to speak clearly when it authorizes an agency rule that is of "vast 'economic and political significance,'" and Judge Kavanaugh has explained that it "helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority." And, in his view, "while the *Chevron* doctrine allows an agency to rely on statutory ambiguity to issue ordinary rules, the major rules doctrine prevents an agency from relying on statutory ambiguity to issue major rules," although he acknowledged that "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality." *Id.* at 419, 423.

That said, Judge Kavanaugh's day job for 12 years has required application of *Chevron* as it currently exists, and in doing so, he has often written for the D.C. Circuit in reining in exercises of authority by agencies—perhaps most prominently, the EPA. For example, in *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D. C. Cir. 2017), writing for the divided panel, he concluded that a Clean Air Act provision which requires manufacturers to replace ozone-depleting substances with safe substitutes does not grant EPA authority to require replacement of hydroflourocarbons, a set of compounds which are not ozone-depleting substances. Focusing on the plain statutory text at the first of the two steps under *Chevron*, he concluded that "EPA's current reading stretches the word 'replace' beyond its ordinary meaning." He nevertheless pointed to other sources of statutory authority for regulating HFCs.

In two prominent cases, the Supreme Court relied on and agreed with Judge Kavanaugh's opinions, which had differed from his colleagues' upholding of EPA actions:

Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *reh'g en banc denied*, No. 09–1322, 2012 WL 6621785 (Dec. 20, 2012), *rev'd in part by Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). The D.C. Circuit upheld challenged EPA greenhouse-gas actions, and Judge Kavanaugh urged rehearing *en banc*, disagreeing with EPA's construction of the term "air pollutant." The Supreme Court, in a 5-4 opinion by Justice Scalia, rejected EPA's construction, quoting an admonition from Judge Kavanaugh's opinion: "Agencies are not free to 'adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'"

White Stallion Energy Center, LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd by Michigan v. EPA*, 135 S. Ct. 2699 (2015). After Judge Kavanaugh dissented in part from the D.C. Circuit panel's upholding of an EPA power-plant emission rule, the Supreme Court reversed in a 5-4 opinion by Justice Scalia. The Court quoted Judge Kavanaugh's opinion for the principle that, where Congress instructed EPA to add power plants to the program only if EPA found regulation "appropriate and necessary," the term "appropriate" was "broad and all-encompassing" enough to include consideration of cost. "Read naturally in the present context," the Court explained, "the phrase 'appropriate and necessary' requires at least some attention to cost."

In another case, however, the Supreme Court overturned Judge Kavanaugh's conclusion and instead deferred to the EPA's views under *Chevron*:

EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *rev'd and remanded by EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), *on remand*, 795 F.3d 118 (D.C. Cir. 2015). Judge Kavanaugh's opinion for a divided panel entirely set aside the Transport Rule, also known as the Cross–State Air Pollution Rule, under the Clean Air Act, but the Supreme Court, in a 6-2 opinion by Justice Ginsburg (Justice Alito was recused), disagreed. The Supreme Court concluded that the Rule was not invalid "on its face," but allowed certain "particularized, as-applied challenge[s]" to proceed. On remand, Judge Kavanaugh's opinion for a unanimous opinion remanded actions as to some states to the EPA for reconsideration (without vacating them).

To be sure, Judge Kavanaugh has written unanimous and divided panel opinions upholding EPA rules against private challengers. *See, e.g.*, *Am. Trucking Ass's, Inc. v. EPA*, 600 F.3d 624 (D.C. Cir. 2010) (upholding, over a dissent, EPA approval of California's rule regulating emissions from transportation refrigeration units in trucks); *Energy Future Coalition v. EPA*, 793 F.3d 141 (D.C. Cir. 2015) (upholding unanimously EPA regulation requiring test biofuels be commercially available against biofuel producer challenge).

And Judge Kavanaugh's rejection of EPA's efforts to interpret the statutes it administers have not only favored regulated entities: In *NRDC v. EPA*, 749 F.3d 1055 (D. C. Cir. 2014), writing for a unanimous panel, he held that EPA exceeded its authority when it created an affirmative defense for private civil suits in which plaintiffs seek penalties for violations of emission standards by sources of pollution.

Antitrust

FTC v. Whole Foods Market, Inc., 548 F.3d 1028 (D.C. Cir. 2008). The FTC moved to preliminarily enjoin Whole Foods's merger with Wild Oats. The district court denied the injunction, and the panel majority reversed. Judge Kavanaugh dissented, writing that he would have affirmed the denial of the injunction, and that the FTC's position opposing the merger "calls to mind the bad old days when

mergers were viewed with suspicion regardless of the economic benefits." He accused the majority of reviving the Supreme Court's "moribund *Brown Shoe* practical indicia test" and of applying "an overly lax preliminary injunction standard for merger cases."

Arbitration

Verizon New England v. NLRB, 826 F.3d 480 (D.C. Cir. 2016). In the collective bargaining agreement between Verizon New England and its employees' union, the employees waived their right to picket. Later, during a labor dispute, employees displayed pro-union signs on Verizon's property. Verizon demanded that the employees take down the signs, and the union challenged Verizon's action before an arbitration panel, which interpreted the collective bargaining agreement's waiver of the right to picket as including waiver of the right to display of pro-union signs. The union sought relief from the NLRB, which is allowed to review arbitral decisions but must apply a highly deferential standard to the arbitrator. The agency overturned the arbitration decision, and Verizon appealed to the D.C. Circuit. Judge Kavanaugh, writing for the Court, held that the NLRB had not deferred sufficiently to the arbitration decision. His opinion stressed the importance of deference to arbitrators, noting that the NLRB was required to defer unless "the arbitration decision was 'clearly repugnant' to the National Labor Relations Act." Here, Judge Kavanaugh wrote, it did not matter whether the agency read the collectively bargaining agreement *differently* than the arbitrator; instead, what mattered was that the arbitrator's reading was not "egregiously wrong" because the term "picketing" may, under certain circumstances, include the mere display of signs.

Immigration

Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc). In this litigation over whether a teenager who was in the United States unlawfully could be released from government custody to obtain an abortion, the en banc D.C. Circuit vacated the panel opinion granting the government additional time to find an immigration sponsor and thus delaying the abortion. In dissent from the en banc order, Judge Kavanaugh wrote that the majority wrongly concluded "that the Government must allow unlawful immigrant minors to have an immediate abortion on demand." He stated that the en banc order ignored the government's "permissible interest in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion."

Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127 (D.C. Cir. 2014). The panel majority held that the agency failed to sufficiently explain its newly adopted conclusion that cultural knowledge was categorically irrelevant to the "specialized knowledge" required to obtain an L-1B work visa. Judge Kavanaugh dissented, agreeing with the agency that a chef's cultural background does not constitute "specialized knowledge," and that American chefs could learn the relevant Brazilian cooking techniques within a reasonable time. He concluded: "In our constitutional system, Congress and the

President determine the circumstances under which foreign citizens may enter the country. The judicial task is far narrower: to apply the immigration statutes as written."

Labor and Employment

Venetian Casino Resort LLC v. NLRB, 793 F.3d 85 (D.C. Cir. 2015). The Venetian, a luxury hotel and casino complex operating from the Las Vegas Strip, asked police to issue criminal citations to union-demonstrators who were blocking an entrance to the casino. The demonstrators filed a petition with the NLRB, claiming that the Venetian committed an unfair trade practice by interfering with the demonstration. Writing for a unanimous panel, Judge Kavanaugh determined that the *Noerr-Pennington* doctrine—which provides that "employer conduct that would otherwise be illegal may be 'protected by the First Amendment when it is part of a direct petition to government'"—shielded the Venetian from liability. The court explained that "the act of summoning the police to enforce state trespass law is a direct petition to government," and therefore constitutionally protected conduct.

Ayissi-Etoh v. Fannie Mae, 712 F.3d 572 (D.C. 2013). Judge Kavanaugh, writing in concurrence, emphasized that a single workplace use of an offensive racial epithet could be severe enough to establish a hostile work environment for purposes of federal anti-discrimination laws. He noted that although "[i]t may be difficult to fully catalogue the various verbal insults and epithets that by themselves could create a hostile environment," no other "act can more quickly alter the conditions of employment and create an abusive working environment that the use" of the n-word "by a supervisor in the presence of his subordinates."

Religious Liberty

Priests for Life v. U.S. Dep't of Health & Human Services, 808 F.3d 1 (D.C. Cir. 2015). This constitutional challenge to the scheme for opting out of contraceptive coverage under the Affordable Care Act ("ACA") was brought by several pro-life, religiously-affiliated employers. They contended that the statutory and regulatory scheme (which allowed religious nonprofits to opt out from including contraceptive coverage in their health insurance plans only by completing forms that prompted others to cover contraceptives to employees) violated the Religious Freedom Restoration Act ("RFRA"), among other laws. RFRA prohibits the federal government from substantially burdening any person's exercise of religion, unless there is both a compelling government interest and no less restrictive mean of achieve that interest. A three-judge panel of the D.C. Circuit (which did not include Judge Kavanaugh) held that the contraception scheme did not violate RFRA because it did not impose a substantial burden on religious exercise. The *en banc* D.C. Circuit denied review over a dissent by Judge Kavanaugh. In his dissent, Judge Kavanaugh argued that: (1) the contraception scheme substantially burdened the plaintiffs' exercise of religion because "submitting the form actually contravenes plaintiffs' sincere religious beliefs" and refusing to submit the form would trigger a monetary penalty; (2) the federal government "has a compelling interest in facilitating access to

contraception for the employees of these religious organizations"; and (3) the government could have facilitated access to contraception without requiring religious organizations to submit any forms. Judge Kavanaugh concluded that the contraceptive scheme violated RFRA, but along the way he identified the "less restrictive" way the government could have lawfully ensured contraceptive coverage.

In addition, Judge Kavanaugh has been involved with several other challenges to the Affordable Care Act:

Sissel v. U.S. Dep't of Health & Human Services, 799 F.3d 1035 (D.C. Cir. 2015). Judge Kavanaugh dissented from the denial of a petition for rehearing *en banc*, and would have granted the petition to fix the rationale of the panel opinion while reaching the same outcome. In *Sissel*, the plaintiffs argued that the Affordable Care Act was unconstitutional because it is a revenue-raising bill that, per the Origination Clause, must originate in the House of Representatives rather than the Senate. The panel opinion, relying on Supreme Court precedent, determined that the Origination Clause was not implicated because the revenue-raising function of the ACA was not the primary purpose of the Act. Judge Kavanaugh would have granted the petition to hold that the ACA was a revenue-raising bill because it raised an "enormous" amount of revenue that is not earmarked for a program created by the Act. However, he would have found that the Act originated in the House of Representatives and therefore satisfied the Origination Clause.

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012). Judge Kavanaugh dissented from a panel decision upholding the Affordable Care Act's individual mandate, and would have found that the Anti-Injunction Act deprived the panel of jurisdiction to decide the issue. He regarded the individual mandate, which is enforced and collected by the Internal Revenue Service, as a tax, and therefore the Anti-Injunction Act, "which carefully limits jurisdiction of federal courts over tax-related matters," prevents a federal court from passing on its constitutionality until a challenger pays the tax or faces an enforcement action by the IRS. Judge Kavanaugh's dissent previewed Chief Justice Robert's later opinion upholding the individual mandate as a permissible tax.

Tax

Cannon v. District of Columbia, 783 F.3d 327 (D.C. Cir. 2015). The District of Columbia requires retired police officers who work in the D.C. Protective Services Division to offset their salary by the amount of their police pension. Judge Kavanaugh, writing for a unanimous panel, determined that the offset did not constitute a tax. "It does not raise revenue. Rather, it operates on the opposite side of D.C.'s financial ledger. It reduces D.C.'s total expenditures on salaries." Judge Kavanaugh characterized the salary reduction statute as "nothing more than a way for D.C. to prevent so-called double-dipping and thereby reduce its expenditures on employee salaries."

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