Courthouse News Service

Nomination Spotlight: Judge Brett Kavanaugh

Tim Ryan

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WASHINGTON (CN) – Hungry for insight into the mind of Supreme Court nominee Brett Kavanaugh, legal scholars and interest groups have devoted weeks to dissecting the judge's writings from a tenure with the D.C. Circuit that spans over a decade.

Executive Power, Separation of Powers and Administrative Law

Ilya Shapiro, a senior fellow in constitutional studies at the libertarian-leaning Cato Institute, said what differentiates Kavanaugh from the high court's other four conservative justices is his focus on administrative law. Because of the time he spent on the D.C. Circuit, as well as its location and jurisdiction over appeals of federal agency actions, Kavanaugh has developed a more detailed record on the subject than even fellow D.C. Circuit alumnus Chief Justice John Roberts.

"There really hasn't been someone among the conservatives that has been making a name for himself in that area," Shapiro said in an interview, contrasting the nominee against the outgoing Justice Anthony Kennedy.

"So it's not necessarily that Kavanaugh is unique among conservative or center-right legal theorists," Shapiro added, "but on the court he would be a strong originalist, textualist voice in that area where none of the others have really made a name for themselves."

Perhaps it is no coincidence, then, that Kavanaugh's most scrutinized opinions are in cases touching on this area of law.

First among these is the 2017 statement Kavanaugh gave when the D.C. Circuit opted not to hold an en banc rehearing of a challenge to the Federal Communications Commission's 2015 net neutrality rule, which altered how the government regulated the internet.

Kavanaugh was one of two judges on the court who wrote separate dissenting statements, with Kavanaugh insisting that the rule was too major for the FCC to enact without "clear congressional authorization."

"The FCC adopted the net neutrality rule because the agency believed the rule to be wise policy and because Congress would not pass it," Kavanaugh wrote. "The net neutrality rule might be wise policy. But even assuming that the net neutrality rule is wise policy, congressional inaction does not license the executive branch to take matters into its own hands. Far from it."

Shapiro also said Kavanaugh has expressed interest in changing the standards under which courts give deference to administrative agencies. Known as *Chevron* deference, courts are to defer to

agencies when they make a rule under an ambiguous statute, so long as the rule is not arbitrary or capricious.

President Donald Trump's first Supreme Court nominee, Justice Neil Gorsuch, similarly questioned *Chevron*, but Shapiro said Kavanaugh's focus is slightly different. Whereas Gorsuch advocated for raising the bar for when courts find an agency's rule reasonable, Kavanaugh seems more in favor of courts being less quick to defer to agencies in the first place.

"*Chevron* only applies when the statute that the agency is interpreting is ambiguous," Shapiro said. "Well, Kavanaugh says, in too many of these cases, the statutes aren't really ambiguous. You might have to do some work to figure out what it means, but just because it's hard to figure out doesn't mean that it's ambiguous."

A 2016 majority opinion that found the structure of the Consumer Financial Protection Bureau unconstitutional also offers insight into Kavanaugh's views on executive power. In that case, mortgage lender PHH Corp. challenged the organization of the CFPB, which has a single director who serves five-year terms and whom the president can only remove for cause.

Congress created the bureau in the wake of the financial crisis and gave the organization broad power to regulate banks and other financial institutions.

According to Kavanaugh's opinion, the CFPB as originally designed was to be an independent agency led by a group of commissioners the president could only remove for cause. This is a relatively common arrangement in the federal government, with familiar agencies like the Federal Communications Commission, the Securities and Exchange Commission and the Federal Trade Commission all having a similar structure.

But after the House of Representatives passed the Dodd-Frank Act, the financial-reform package that, among other things, created the CFPB, the bureau's structure changed. Instead of a group of commissioners, a single director would lead the agency. The president could only remove this director for cause.

In a 101-page majority opinion released in October 2016, Kavanaugh wrote this arrangement gave the director of the CFPB "more unilateral authority" than anybody in the federal government except the president.

Kavanaugh found this investiture of power in a single, unelected official ran directly counter to the framers' decision to place the full executive power in the hands of the president, who faces a nationwide election every four years.

While other officials in the executive branch are either constrained by the threat of the president firing them or, in the case of other independent agencies, by other commissioners with competing views and ambitions, the director of the CFPB can operate with relatively few limitations, Kavanaugh wrote.

"The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked director not only departs from settled historical practice, but also poses a far greater risk of

arbitrary decision making and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency," Kavanaugh wrote.

Kavanaugh's opinion came nearly a decade after he filed a dissent in a similar case called *Free Enterprise Fund v. Public Company Accounting Oversight Board*. That dispute centered on the Public Company Accounting Oversight Board, which was lead by five SEC-appointed members who could only be dismissed for cause.

Foreshadowing his majority opinion in the CFPB case, Kavanaugh wrote the structure of the PCAOB "effectively eliminates "the president's ability to control the regulatory focus of the board.

"The president's power to remove is critical to the president's power to control the executive branch and perform his Article II responsibilities," Kavanaugh wrote. "Yet under this statute, the president is two levels of for-cause removal away from board members, a previously unheard-of restriction on and attenuation of the president's authority over executive officers."

A majority of the D.C. Circuit upheld the board's makeup, but the Supreme Court eventually determined that its structure violated the Constitution and required that the members be subject to at-will firing.

In a report released on Thursday, the NAACP Legal Defense Fund argued that the *PHH* and *Free Enterprise Fund* cases together show Kavanaugh has an inclination toward a strong president able to shape the executive branch to his or her will.

Referred to as "unitary executive theory," the group raised concerns that Kavanaugh's view of executive power would impact how he rules in cases touching on presidential powers.

"A justice's views – explicit or implicit – on what values matter most can be outcome determinative," the report states. "Judge Kavanaugh himself recognizes as much. All Americans should be concerned with the possibility of seating a new justice who prioritizes presidential power in a world where the president is determined to push that power as far as it can go."

Second Amendment and Judicial Philosophy

Sure to earn much scrutiny at Kavanaugh's confirmation hearing next week is his 2011 dissent in a challenge of Washington, D.C.'s gun-registration law.

Though the Supreme Court had struck down the city's outright ban on handguns three years earlier in the landmark case *Heller v. District of Columbia*, the later case, aptly called *Heller II*, focused on D.C.'s ban on semiautomatic rifles as well as its registration requirement for all guns.

When his colleagues voted to uphold the revised law, Kavanaugh wrote in dissent that they erred in employing a balancing test, where the interests of the government were weighed against the interests of gun owners, rather than looking at the "text, history and tradition" of the Second Amendment and gun regulations.

Kavanaugh contended that the distinction drawn by the majority between semiautomatic handguns, which the Supreme Court held the city could not ban, and semiautomatic rifles was not a meaningful one.

Randy Barnett is the Carmack Waterhouse professor of legal theory at Georgetown University, and is also director of the school's Center for the Constitution. Here Barnett is seen introducing Supreme Court Justice Antonin Scalia for a public appearance at Georgetown's Law Center.

More than a hint at how Kavanaugh might rule in a gun-regulation case at the Supreme Court, Georgetown University law professor Randy Barnett said the Kavanaugh dissent in *Heller II* opinion offers a clear example of the judge's originalist judicial approach.

"I had a question about this because it was my perception that Judge Kavanaugh hadn't used the term originalist to describe himself on a number of occasions when he might have, but I've now, since he's been nominated, been able to satisfy myself that he really is and was an originalist, he just avoided using the label for some reason," Barnett said. "And that might be because of its negative connotations in certain circles, but the substance of his views are originalist – textualist and originalist."

In the dissent, Kavanaugh cites the original Heller opinion handed down by the Supreme Court, saying "the proper interpretive approach" for courts considering new technologies "is to reason by analogy from history and tradition."

"The constitutional principles do not change (absent amendment), but the relevant principles must be faithfully applied not only to circumstances as they existed in 1787, 1791 and 1868, for example, but also to modern situations that were unknown to the Constitution's framers," Kavanaugh wrote. "To be sure, applying constitutional principles to modern conditions can be difficult and leave close questions at the margins. But that is hardly unique to the Second Amendment. It is an essential component of judicial decision-making of our enduring Constitution."

Criminal Law

Before President Donald Trump announced Kavanaugh's nomination on July 9, Shapiro expressed some reservations about the judge's track record on criminal-law matters. After reviewing more of his opinions, however, Shapiro now says one can distinguish between Kavanaugh's views on issues of national security and those involving domestic criminal rights and procedure.

To illustrate this, Shapiro pointed to Kavanaugh's statement after the D.C. Circuit decided not to rehear en banc *Klayman v. Obama*, a challenge to the NSA's collection of internet and telephone metadata. Explaining why he sided against a rehearing, Kavanaugh wrote that the plaintiffs challenging the program had not shown a likelihood of success.

President Donald Trump's Supreme Court nominee, Judge Brett Kavanaugh, officiates the Aug. 7, 2018, swearing-in of Judge Britt Grant to take a seat on the U.S. Court of Appeals for the 11th Circuit in Atlanta at the U.S. District Courthouse in Washington. Kavanaugh has frequently

supported giving the government wide latitude in the name of national security, including the secret collection of personal data from Americans. (AP Photo/J. Scott Applewhite, File)

Citing lawful government activities, like checkpoints for drunken drivers and airport-security screenings, Kavanaugh wrote the government has authority to conduct broad searches when it shows a "special need" to do so.

"Even if the bulk collection of telephony metadata constitutes a search, the Fourth Amendment does not bar all searches and seizures," Kavanaugh wrote. "It bars only *unreasonable* searches and seizures. And the government's metadata collection program readily qualifies as reasonable under the Supreme Court's case law." (Emphasis in original.)

Shapiro contrasted this with Kavanaugh's dissent in *United States v. Burwell*, a criminal case involving a bank robber who was given an enhanced sentence because he committed a crime spree using a gun that could switch between automatic and semiautomatic.

The majority held the government did not need to prove the robber knew the gun he used was capable of firing automatically, but Kavanaugh disagreed, calling the principle of mens rea a "bedrock historical foundation" of the American and English legal system.

He noted defendants who use a semiautomatic weapon face a 10-year mandatory minimum, while those who use an automatic weapon face a mandatory 30 years in prison. This difference should mean the government must be held to higher standard, Kavanaugh wrote.

"The majority opinion holds that a person who committed a robbery while carrying an automatic gun – but who genuinely thought the gun was semi-automatic – is still subject to the 30-year mandatory minimum sentence," Kavanaugh wrote. "The majority thus gives an extra 20 years of *mandatory* imprisonment to a criminal defendant *based on a fact the defendant did not know*." (Emphasis in original.)

Shapiro said the contrasting decisions in these cases give him the sense that Kavanaugh, while deferential to the government in national-security cases, holds it to a high standard in "run-of-the-mill" domestic criminal matters.

The Legal Defense Fund report made a different observation, however, based on the case *National Federation of Federal Employees – IAM v. Vilsack*, in which Kavanaugh dissented from the majority's striking down of a program that required random drug testing for federal employees who worked in special schools for at-risk youth.

Kavanaugh wrote the program was "narrowly targeted" and "common sense" because the employees were regularly interacting with many students who had a history of drug use, giving the government substantial reason to enact the program without violating the Fourth Amendment.

The Legal Defense Fund report says the case, combined with the Klayman statement and another criminal case involving a street search, shows Kavanaugh is willing "to downplay the intrusiveness of a search, especially in the context of drug-testing policies, law enforcement street encounters and mass surveillance."