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Trump makes a shrewd political move with Supreme Court pick

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By picking Brett Kavanaugh as his Supreme Court nominee, President Trump showed that credentials and connections still matter — when backed up by results. One of the most scholarly members of the judiciary, Kavanaugh’s more than 300 opinions are read widely and influence courts across the country — including the one that he now hopes to join. There are few if any more respected lower-court judges.

More important than his erudition is Kavanaugh’s intense commitment to constitutional structure. As Anthony Kennedy, the justice he clerked for and now seeks to succeed, often emphasized, this is vital not simply to the functioning of our government, but to securing our freedom.

In his dozen years on the US Court of Appeals for the DC Circuit, his docket was heavy with cases involving administrative agencies and their place in our institutional design. His opinion in *PHH Corp. v. Consumer Financial Protection Bureau* (2016), for example, struck down the removal protections granted to that embattled agency’s director, holding that even if it were permissible to protect members of a multi-person commission from removal, protecting the sole director in this manner was a constitutional bridge too far.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2008), he also would have found certain removal protections unconstitutional — and his dissent was vindicated by the Supreme Court. Also notable are his opinions in a string of Clean Air Act cases that ultimately made it to the Supreme Court, pushing back on executive agencies that take too much power for themselves.

While he has not attacked the Chevron doctrine — the idea that judges should defer to agency interpretations that aren’t “arbitrary and capricious” — as directly as some others, he will likely make common cause with Justices Neil Gorsuch and Clarence Thomas (and others) in curbing bureaucratic excess.

Last year, for example, he wrote an opinion in *United States Telecom Association v. FCC* that outlined a “major rules” doctrine, in which novel agency rulemakings with profound economic consequences are presumed invalid. That case dealt with net neutrality, but it resonates widely in a time when super-statutes like ObamaCare and Dodd-Frank reorganize our lives.

In a speech at Notre Dame he advocated that judges look for the best reading of a text, rather than hunt for ambiguities. That's one of the best indications yet that a Justice Kavanaugh would leave "fixing" statutes to legislators rather than having judges do so, or even worse, regulators.

The one concern that some have about Kavanaugh is that he might be too much like Chief Justice John Roberts, working the strategic angle and playing the long game rather than simply calling the "balls and strikes" that both men are fond of using to describe the judicial role. That's what may have happened in *Seven-Sky v. Holder* (2011), the ObamaCare case where, instead of saying the individual mandate was constitutional or not, Kavanaugh would have dismissed the suit for a lack of jurisdiction under a technical tax statute.

Still, unlike Roberts, Kavanaugh has had a long involvement with the Federalist Society — which signals a commitment to ideas rather than mere careerism or partisan loyalty — and has been endorsed by plenty of conservatives who don't shy away from calling out judicial "squishes." That's in part because Kavanaugh is also a shrewd inside-the-Beltway operator, having worked under Ken Starr on the Clinton investigation and in senior roles under George W. Bush.

And that's where the left's attacks against him will come. Once the first wave of generic and groundless "Trump's nominee will take away my rights" demagoguery subsides, Kavanaugh will be smeared by association with the last Republican president. But that's not something that will keep Susan Collins — the keeper of the GOP's 50th Senate vote — from supporting him. Which is why he'll be confirmed on Majority Leader Mitch McConnell's timetable and be on the court when it sits again in October.

In short, the Kavanaugh selection seems likely to secure the bulwarks restraining the expansion of government against the onslaught of the swamp. In this regard, Trump has made a selection that should be praised — bigly.

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