

AGENCY AUTHORITY

REVIEW OF DISABILITY-RELATED CASES INVOLVING JUDGE BRETT KAVANAUGH

The Bazelon Center for Mental Health Law strongly opposes the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. The appointment of Judge Kavanaugh would threaten hard-won rights and protections for people with disabilities. Judge Kavanaugh’s record demonstrates his great skepticism of the Affordable Care Act, his hostility to civil rights—including the rights of people with disabilities—and his narrow view of the authority of executive branch agencies to interpret and enforce the law. His confirmation could add a fifth vote for such regressive views. A summary of his record is provided below.

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Administrative agencies, such as the Departments of Justice, Education, and Health and Human Services, play a large role in enforcing civil rights protections and managing federal healthcare and benefits programs that are crucial to many people with disabilities. Judge Kavanaugh’s writings and opinions demonstrate that he shares Justice Gorsuch’s antipathy for agencies’ role in interpreting and implementing laws, including limiting their ability to make decisions regarding the laws they are expressly charged with implementing. For example, he has called for judges to limit the application of *Chevron* deference¹—the long-accepted canon under which courts defer to an agency’s reasonable interpretation of the statutes they are responsible for implementing—calling it “an atextual invention by courts” and “a judicially orchestrated shift of power from Congress to the Executive Branch.”² Judge Kavanaugh has also suggested that some agencies should be reduced or eliminated, citing “extraordinary duplication, overlap, and confusion among the missions of different agencies”³ and writing that the existence of independent agencies is not “wise” and “has clear costs in terms of democratic accountability.”⁴

¹ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 128 Harvard L.J. 2118, 2154 (2016), <http://cdn.harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf>.

² *Id.* at 2150.

³ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L.R. 1454, 1469-70 (2009), http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.

⁴ *Id.* at 1472.

Judge Kavanaugh has also imposed these beliefs in the cases before him as a judge. For example, in *EME Homer City Generation, L.P. v. E.P.A.*,⁵ Judge Kavanaugh attempted to strike down an Environmental Protection Agency (EPA) rule intended to address air pollutants that cross state lines. Judge Kavanaugh vacated the rule in its entirety, writing that the EPA had exceeded its statutory authority. The Supreme Court voted 6-2 to overturn Judge Kavanaugh’s decision, holding that the plain text of the Clean Air Act supported the EPA’s rule.⁶ The Court observed that Judge Kavanaugh’s decision wrote “an unwritten exception” into the text and violated the precept that the task of a reviewing court “is to apply the text [of the statute], not to improve upon it.”⁷

In another troubling case, *PHH Corporation v. Consumer Finance Protection Bureau*,⁸ Judge Kavanaugh found that the Consumer Financial Protection Bureau (CFPB) was unconstitutionally structured and struck down the relevant provision of the Dodd-Frank Act. Judge Kavanaugh evinced outright hostility to independent agencies—a group that includes not only the CFPB but also other agencies such as the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Social Security Administration—writing that they “pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”⁹ The full Circuit Court reheard the case en banc and upheld the constitutionality of the agency, overturning Judge Kavanaugh’s decision.¹⁰

⁵ 696 F.3d 7 (D.C. Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1584 (2014).

⁶ *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

⁷ *Id.* at 1600.

⁸ 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

⁹ *Id.* at 5-6.

¹⁰ 881 F.3d 75.