2018

Judge Kavanaugh and Freedom of Expression

Timothy Zick
William & Mary Law School, tzick@wm.edu

SCOTUSblog
SUPREME COURT OF THE UNITED STATES BLOG

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Timothy Zick *Guest*
Posted Tue, August 7th, 2018 3:49 pm

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Timothy Zick is the Mills E. Godwin, Jr., Professor of Law at William & Mary Law School.

As Jonathan Adler recently observed, Justice Anthony Kennedy's "expansive conception of the First Amendment's protection of freedom of speech is among his most important judicial legacies, marking his jurisprudence from his first days on the Court to his last." Although it is not clear whether Judge Brett Kavanaugh would compile a similar record on the Supreme Court, we can make a few tentative predictions based on his record in the U.S. Court of Appeals for the District of Columbia Circuit. (Of course, all of the usual caveats associated with predicting the behavior of lower court judges once elevated to the Supreme Court apply.) This post reviews cases in which Kavanaugh either joined or authored opinions concerning freedom of speech and, to a lesser extent, other First Amendment rights (specifically, press and petition). It excludes decisions and opinions in the area of campaign finance, which were discussed in a prior post.

Kavanaugh's record in First Amendment cases demonstrates a precedent-based or "common law" methodology, one that also relies on the lessons of history regarding free speech, press and petition rights. In substance, his record suggests that Kavanaugh would not expand the speech rights of government employees and might interpret the government speech principle rather broadly. He has also concluded that noncitizens abroad do not enjoy First Amendment rights – an issue the Supreme Court has not directly decided. However, in many contexts, Kavanaugh would likely be a consistent supporter of First Amendment rights. He has emphasized the importance, to democratic self-governance and the search for truth, of robust free speech, press and petition rights. He has adopted an expansive interpretation of editorial and speaker autonomy rights, is generally skeptical of measures that compel speech and association, and views government power to regulate private speech as sharply circumscribed. Looking forward, Kavanaugh's appointment could have a significant impact in regulatory areas such as telecommunications and data privacy. Notably in this regard, his opinions suggest strong support for the speech rights of corporations, including digital-content providers.

1. Speech in public forums

Although his record in this area is modest, Kavanaugh has voted to invalidate restrictions on free speech rights in public forums. However, he has made clear that this support does not extend to actions that deface or destroy public property.

In *Boardley v. U.S. Department of Interior*, Kavanaugh joined an opinion invalidating National Park Service rules that required permits and limited speakers to certain free speech areas. A group seeking to distribute religious tracts near Mount Rushmore National Memorial challenged the rules. The D.C. Circuit declined to hold that all national parks governed by the NPS rules were traditional public forums, where free speech and other First Amendment rights are at their zenith. However, the court concluded that the free speech areas constituted designated public forums for First Amendment purposes. The court held that the regulations were content-neutral, but were not narrowly tailored to further the government's interests. In particular, the court took issue with application of the rules to individuals and small gatherings, who were particularly burdened by the permit and free speech zone requirements. It concluded that the regulations effectively forbade spontaneous speech in public parks, infringed on individuals' ability to engage in anonymous speech, and failed to leave open ample alternative forums for expression.

However, in a brief concurring opinion in *Mahoney v. Doe*, Kavanaugh agreed with the panel that the government could, under a content-neutral District of Columbia law prohibiting the defacement of public property, prohibit anti-abortion protesters from chalking the sidewalks outside the White House. He wrote separately because he did not "want the fog of First Amendment doctrine to make this case seem harder than it is." "No one," Kavanaugh wrote, "has a First Amendment right to deface government property."

2. Coverage exceptions – defamation and incitement

First Amendment doctrine recognizes certain narrow coverage exceptions, including for communications about public officials or figures that are made with knowledge of their falsity or reckless disregard for their truth (defamation) and speech that incites others to unlawful action (incitement). Kavanaugh has written two defamation opinions and one opinion addressing speech that incites unlawful action.

In *Kahl v. Bureau of National Affairs, Inc.*, Kavanaugh wrote the court's opinion dismissing a prisoner's defamation case against the Bureau of National Affairs, which was based on BNA's reporting on a legal filing in the prisoner's case. Applying the standards announced in *New York Times v. Sullivan*, Kavanaugh concluded that the prisoner, who had been convicted of murdering two U.S. marshals, was a "limited purpose public figure." Thus, he had to demonstrate that BNA had acted with "actual malice." Kavanaugh concluded that merely alleging falsity was not enough to satisfy this

burden. He recognized that "[c]ostly and time-consuming defamation litigation" can chill freedom of speech and press. And he wrote: "To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." In dismissing the complaint, Kavanaugh emphasized the First Amendment's broad protection for the "unfettered interchange" of thoughts and ideas on matters of public concern.

In *Abbas v. Foreign Policy Group, LLC*, Kavanaugh wrote an opinion holding that questions posed in an article about a foreign leader's son could not be treated as assertions of fact for purposes of proving defamation. Acknowledging that D.C. law was not clear on whether mere questions can constitute defamatory statements, Kavanaugh resolved the question by looking to the general rule from other jurisdictions. Kavanaugh reasoned:

> After all, just imagine the severe infringement on free speech that would ensue in the alternative universe envisioned by Abbas. Is the Mayor a thief? Is the quarterback a cheater? Did the Governor accept bribes? Did the CEO pay her taxes? Did the baseball star take steroids? Questions like that appear all the time in news reports and on blogs, in tweets and on cable shows. And all such questions could be actionable under Abbas's novel defamation theory.

He concluded that a contrary ruling would "ensnare a substantial amount of speech that is essential to the marketplace of ideas and would dramatically chill the freedom of speech."

Abbas also addressed the question whether the District of Columbia's Anti-Strategic Lawsuits Against Public Participation Act applied in federal court. Anti-SLAPP statutes like D.C.'s generally make it easier to dismiss defamation suits at an earlier stage, with the goal of decreasing the chilling effects associated with such litigation. Kavanaugh's opinion acknowledged the purpose and importance of anti-SLAPP laws to free speech and press rights. His conclusion that the anti-SLAPP law does not apply when a federal court is exercising diversity jurisdiction, which involves a rather tricky federal procedure question, is shared by courts in some other circuits.

Kavanaugh has also authored an opinion applying the First Amendment's "incitement" standard. In *Al Bahlul v. United States*, an en banc decision rejecting various constitutional challenges to trial by military commission, Kavanaugh wrote a concurring opinion in which he also addressed Al Bahlul's claim that he had been prosecuted for political speech. The speech in question consisted of the production and distribution of al Qaeda recruitment videos that encouraged viewers to join al Qaeda and kill Americans. Kavanaugh concluded that the free speech clause does not apply to noncitizens located abroad. Further, even if the free speech clause did apply in these circumstances, he concluded that Al Bahlul's speech was not covered by the First Amendment because it expressly incited, and was likely to result in, imminent unlawful activity.

3. Government's role as employer and speaker

Although the record is thin, Kavanaugh may support existing limits on public employee speech rights. In two cases, he has also taken a relatively broad view of the government's power when it acts as a speaker rather than as a regulator of speech.

In *LeFande v. D.C.*, Kavanaugh joined an opinion holding that a police reserve officer's emails to his superiors, in which he cc'd his co-workers, were not protected under the balancing test adopted by the Supreme Court in *Pickering v. Board of Education*. The district court had held that the emails were government speech and thus not entitled to any First Amendment protection. However, the panel concluded that even if the emails constituted speech by an employee on a matter of public concern, the employer's interest in promoting office harmony outweighed any interest the employee had in sending them.

In *Moore v. Hartman*, Kavanaugh disagreed with a panel opinion finding, in a First Amendment retaliation suit, that D.C. law had "clearly established" that an arrest in retaliation for speech is insulated from suit when there is probable cause for the arrest. In a dissenting opinion, Kavanaugh concluded that the law concerning probable cause was not "clearly established" and that defendants were thus entitled to qualified immunity on the First Amendment claim. (The Supreme Court recently ruled that probable cause sometimes, although not always, bars a First Amendment retaliation claim.)

Kavanaugh was also involved in two cases addressing the government speech doctrine. In both cases, he rejected the First Amendment claim.

In *DKT International, Inc. v. U.S. Agency for International Development*, Kavanaugh joined an opinion holding, in the context of federal grants for HIV/AIDS relief efforts, that the federal government could refuse to fund nongovernmental organizations if they did not certify that they had a policy opposing prostitution and sex trafficking. Under existing U.S. policy, eradicating prostitution and sex trafficking was considered an integral part of the worldwide fight against HIV/AIDS. The D.C. Circuit, applying the principle that when the government communicates it may discriminate based on viewpoint, upheld the funding restriction. (In response to another challenge, the Supreme Court later invalidated the funding restriction, on the ground that it unconstitutionally compelled speech outside the scope of the government funding program.)

In *Bryant v. Gates*, the D.C. Circuit rejected a challenge to Department of Defense regulations that restricted advertisements in newspapers published under contract with the department and distributed on military bases. The majority resolved the case under public forum doctrine, holding that the newspapers' advertisement space was a "non-public forum" and that the rules were reasonable and viewpoint-neutral. In a concurring opinion, Kavanaugh wrote that there was "a far easier way to analyze this kind of case under the Supreme Court's precedents." He concluded that the content in military-run newspapers and advertisement spaces was the government's own speech. As he explained: "The military may, for example, permit advertisements that say 'Support the Troops' but decline advertisements that say 'Oppose the Troops.' If forum analysis applied, however, the military could not maintain that kind of sensible editorial policy."

4. Petition rights

The First Amendment's petition clause, which protects the right "to petition the Government for a redress of grievances," does not receive much judicial attention. Kavanaugh has written two opinions addressing petition rights, recognizing such rights in one case and declining to do so in the other.

Kavanaugh wrote the opinion in *Venetian Casino Resort, L.L.C. v. National Labor Relations Board*, which held that the Venetian did not violate the National Labor Relations Act when it called on police officers to arrest employees demonstrating on a walkway in front of its property and to block

them from the walkway. The opinion applied the *Noerr–Pennington* doctrine, under which direct petitions to government are shielded from liability under the NLRA on the ground that they are protected by the First Amendment. Kavanaugh wrote that "the act of summoning the police to enforce state trespass law is a direct petition to government subject to protection under the *Noerr-Pennington* doctrine." However, the doctrine does not apply if the petition is a "sham." Kavanaugh remanded the case to the NLRB to determine whether the Venetian's petition was genuine.

In *We The People Foundation, Inc. v. United States,* Kavanaugh wrote an opinion rejecting a petition clause claim. Various individuals who had petitioned Congress and the executive branch with respect to a variety of issues (war, privacy and taxes) alleged that the petition clause entitled them to a response from the federal government. Relying on Supreme Court precedents rejecting similar claims filed against state officials, the D.C. Circuit held that the petition clause does not entitle petitioners to any response from federal officials.

5. Commercial speech and compelled speech

Kavanaugh has written one significant opinion in a case involving commercial speech. The opinion is noteworthy for two reasons. First, it addressed the scope of protection for commercial speech. Second, it involved a mandatory disclosure, thus implicating rights against compelled speech.

In *American Meat Institute v. U.S. Department of Agriculture*, a divided panel of the en banc D.C. Circuit upheld a federal regulation that required the meat industry to include "country of origin" information on meat packaging. In *Zauderer v. Office of Disciplinarian Counsel of the Ohio Supreme Court*, the Supreme Court held that "the States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." In *American Meat Institute*, a group of livestock producers, feedlot operators and meat packers challenged the "country of origin" regulation on First Amendment grounds, arguing that it failed under *Zauderer* because it amounted to compelled speech that did not advance a permissible regulatory goal. The majority concluded that the mandatory disclosure was justified because the information was valuable to consumers in terms of making informed purchases and relevant to health concerns relating to possible food-borne illnesses.

In a concurring opinion, Kavanaugh concluded that the First Amendment did not bar the "longstanding and commonplace country-of-origin labeling requirements." He found that the government could not "advance a traditional anti-deception, health, or safety interest in this case." Rather, it asserted a general interest in "providing consumers with information." Rejecting that argument, Kavanaugh concurred in the judgment on the ground that country-of-origin labeling was justified "by the Government's historically rooted interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers." Thus, he upheld the regulation, but on a different and somewhat narrower ground than the majority.

Some have suggested that Kavanaugh's concurrence indicates a lack of support for commercial speech rights. However, in addition to emphasizing that "the First Amendment protects commercial speech," Kavanaugh interpreted *Zauderer* as denying government "a free pass to spread their preferred messages on the backs of others" owing solely to its interest in providing consumers with information. He concluded that "history and tradition provide no support for that kind of free-wheeling government power to mandate compelled commercial disclosures." Kavanaugh also explained that *Zauderer* is "simply an application of *Central Hudson Gas & Electric v. Public Svc. Comm.* [which provides the general standard for commercial speech regulations], not a different test altogether." Kavanaugh described the *Zauderer* standard as "far more stringent than mere rational basis review." Indeed, he wrote, "*Zauderer* tightly limits mandatory disclosures to a very narrow class that meets the various *Zauderer* requirements."

Regarding mandatory disclosures and compelled speech more generally, Kavanaugh's concurrence agreed "that the First Amendment imposes stringent limits on the Government's authority to either restrict or compel speech by private citizens and organizations." Moreover, in his telecommunications opinions, which are discussed immediately below, Kavanaugh made clear that he supports broad First Amendment rights against compelled speech and association. Thus, the single instance in which he upheld a mandatory commercial disclosure likely tells us little about how he would decide a case involving, for example, compulsory baking of wedding cakes for same-sex couples. Kavanaugh's general approach to compulsory disclosure laws suggests that he would view such measures skeptically.

6. Telecommunications and technology

Kavanaugh has written several opinions concerning the First Amendment rights of internet intermediaries, cable providers and other telecommunications networks. His opinions articulate a broad view of First Amendment editorial and speaker-autonomy rights, including for digital-content providers.

The opinion that has received the most attention is Kavanaugh's dissent from the denial of en banc review in *United States Telecom Association v. Federal Communications Commission*. A panel of the D.C. Circuit upheld the FCC's Open Internet Order, which imposed what is commonly referred to as "net neutrality." In general terms, net neutrality required that internet service providers treat all internet traffic equally or neutrally. Thus, ISPs like AT&T, Comcast and Verizon were barred from charging more for various activities, such as video streaming, which takes up more bandwidth. Proponents of net neutrality contended that in its absence, the free flow of information on the internet would be adversely affected by a tiered communication system controlled by powerful ISPs. (The FCC reversed its order in December 2017; in January 2018, 21 states filed suit against the FCC challenging the reversal.)

In his dissent from denial of en banc review of the panel opinion, Kavanaugh wrote that the FCC order was not authorized by Congress and undermined the separation of powers. He also argued that even if Congress had authorized net neutrality, "the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market." Addressing the application of the First Amendment to ISPs, Kavanaugh wrote: "The First Amendment protects an independent media and an independent communications marketplace against takeover efforts by the Legislative and Executive Branches. The First Amendment operates as a vital guarantee of democratic self-government." He also invoked the Founding era, during which "the First Amendment protected (among other things) the editorial discretion of the many publishers, newspapers, and pamphleteers who produced and supplied written communications to the citizens of the United States." Kavanaugh concluded that "those foundational First Amendment principles apply to editors and speakers in the modern communications marketplace in much the same way that the principles apply to the newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands traditionally protected by the First Amendment." If the rule were otherwise, he wrote, the government could "regulate the editorial decisions of Facebook and Google, of MSNBC and Fox, of NYTimes.com and WSJ.com,

In other cases, Kavanaugh has expressed similar views about the First Amendment editorial rights of content providers and telecommunications networks. Thus, in *Comcast Cable Communications, LLC v. FCC*, he wrote a concurring opinion stating that absent a sufficient showing of market power, the FCC's interpretation of a regulation that required Comcast and other programming distributors to carry certain content violated the First Amendment. Similarly, in *Cablevision Systems Corp. v. FCC*, Kavanaugh filed a dissent from the court's decision upholding an FCC regulation prohibiting exclusive contracts between cable companies and affiliated networks. In both cases, he emphasized that the FCC could not interfere with the content provider's editorial discretion by compelling it to carry, or prohibiting it from carrying, certain content. The opinions are based on what Kavanaugh referred to as a "straightforward and expansive" First Amendment that applies with full force to "modern means of communication" just as it did to early publishers and pamphleteers.

Some commentators have suggested that these opinions indicate that Kavanaugh may interpret data privacy and other laws in ways that could "alter the digital landscape." The record, including his opinions in the campaign finance and telecommunications areas, strongly suggests that Kavanaugh will broadly protect the rights of corporate speakers and apply the free speech clause in a variety of regulatory areas, perhaps including data privacy.

Posted in Nomination of Brett Kavanaugh to the Supreme Court, Judge Kavanaugh's jurisprudence, Featured

Recommended Citation: Timothy Zick, *Judge Kavanaugh and freedom of expression*, SCOTUSblog (Aug. 7, 2018, 3:49 PM), http://www.scotusblog.com/2018/08/judge-kavanaugh-and-freedom-of-expression/