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The Courts and the Administrative State*

Honorable Brett M. Kavanaugh†

Contents

Introduction

I am honored to be included among the jurists and scholars who have delivered this lecture. I cl

powers principle and resolving disputes between the legislative and executive branches; and (3) deciding cases during wartime.

I. Background of the D.C. Circuit Court

A. Location

One distinctive aspect of the D.C. Circuit is our location. We are about halfway between the White House and the Capitol, which is fitting for the work we do. Even better, our front door is on Constitution Avenue. What could be better than to say, "I work on Constitution Avenue."

And I love being in the courthouse with the district court judges and the other judges on the D.C. Circuit. Our building houses not only all the federal judges from both the court of appeals and the district court but also a judge's lunchroom where we all eat together and talk about the events of the day, sports, or what is going on at Capitol Hill. Judicial salary might come up once in a while. But developing relationships with other judges and learning about their backgrounds are some of the great aspects of being on this court, or on any court. Of course, we don't talk about pending cases. But after a reversal of the district court, the court of appeals judges tend to avoid the lunchroom for a few days. You can imagine how the conversation goes when you ask the district judge how his or her day is going, and the district judge is clearly thinking, "Did you have to say I abused my discretion? Did you have to say I didn't just 'err' but that I 'clearly erred'?" On those days, a peanut butter and jelly at the desk works just fine.

My personal background of growing up in Washington, D.C.—which is rare[2]—makes for especially interesting interactions. It is always amusing as a judge—even now I have been on the bench for seven years—how people treat you when you are a judge on the D.C. Circuit. I think it falls into two categories: those who knew you before you were a judge and those who have only known you after you became a judge. The second group is very respectful, very deferential, usually addressing me formally as "Your Honor." But the first group, my old friends, will say "judge," but it is usually "*judge*?" in a tone of amusement. Someone I have known for a long time—one of my old friends, with whom I had worked a long time ago—had to argue in our court recently. I told my clerks afterward, "You know, it is really hard to do an oral argument like this guy did and do it so well. It is hard to do an oral argument when you are looking up at the bench and saying to yourself, 'I can't believe this guy is a federal judge.'"

B. Appointment Process

1. Overview and Personal Experience

Another distinctive aspect of the D.C. Circuit is the fact that we are a national court in some respects. It is a function of the appointment process. Think about the appointment process for other courts of appeals; the President—the White House—has to work with the two senators for the state whose citizenry has traditionally filled a circuit judgeship. If either of the two home-state senators objects to a nominee, that's it. It is called the blue-slip process, an old tradition in the Senate, and the nominee will not go forward.

That doesn't happen on the D.C. Circuit. There are obviously no home-state senators involved in the process in the D.C. Circuit. That frees up the President to choose judges from all over the country, a national pool with different kinds of experiences. We have on our court now a former Senate legal counsel; a former justice of the California Supreme Court; a former judge on D.C.'s highest court; former district court judges from North Carolina and South Carolina; former law professors from Michigan, Colorado, Harvard; several former high-level Justice Department officials; and a former Deputy Solicitor General. A range of geographic backgrounds, intellectual backgrounds, and professional experiences are represented, and I think this is distinctive of the D.C. Circuit.

For my part, I came from the White House most immediately before my appointment and before that, private practice in Washington. I worked at the White House for five and a half years before becoming a judge. Now, it is fair to say that certain senators were not entirely sold that working at the White House is the best launching pad for a position in the Article III branch. One senator at my hearing didn't like the idea that I had been working in the White House and would be coming to work in the judiciary, and he said in the hearing "[this] is not just a drop of salt in the partisan wounds, it is the whole shaker." But this is where you need your mother at the confirmation hearing, because my mom afterward said to me "I think he really respects you," as only a mom can.

But White House service, it turns out, is very useful for a job on the D.C. Circuit. It gives you great respect, first of all, for the presidency, the demands of the executive branch, and the burdens of the presidency. But at the same time, it gives you perspectives that might be unexpected to some. Such experience helps refine your ability to determine whether the executive branch might be exaggerating or overstating how things actually work and the problems that would supposedly arise under certain legal interpretations. White House experience also helps—and history shows that executive branch experience helps—when judges need to show some fortitude and backbone in those cases where the independent judiciary has to stand

up to the mystique of the presidency and the executive branch. Fortitude and backbone are important characteristics, I think, for our court and courts generally in our separation of powers structure. Of course, we all think of Justice Robert Jackson in the Youngstown case, a role model for all executive branch lawyers turned judges.

2. Challenges and Proposed Reform

Our court has a distinctive composition because of the way the selection process works and a distinctive nominations process because we do not have home state senators involved in the process. But we still have a confirmation process for our court, and, although no home-state senators are involved, nominations to the D.C. Circuit have been contentious for the last twenty years or so. There are several extraordinary people who were nominated to the D.C. Circuit but never confirmed. Even for those who have been confirmed, the process has been beset by years of delays.

I saw this firsthand when I worked in the Bush White House. Nominees were held up for years without hearings or votes, and the same thing happened during the Clinton Administration and, to some extent, during the Obama Administration. The best examples to show this are the D.C. Circuit nominations of now–Chief Justice John Roberts and now-Justice Elena Kagan. Chief Justice Roberts was first nominated to the D.C. Circuit in 1992, renominated in 2001, and did not get through for another two years until he was finally confirmed in 2003. Justice Kagan was nominated to the D.C. Circuit in 1999. But she never got through. It turns out for both of them it was much easier to get confirmed to the Supreme Court than to the D.C. Circuit, which shows that something is wrong, I think, with the confirmation process.

I think something is wrong in not just the confirmation process for our court but for lower courts more generally. A nominee's confirmation may not happen for up to three years. This leaves seats vacant too long, overburdens judges on certain courts, and is unfair to the individual nominees. Moreover, the delays have systemic effects and deter talented people from wanting to become judges. We want to design a system, I think, that encourages good people to want to be judges. During the Clinton and George W. Bush Administrations, then–Chief Justice William Rehnquist discussed the delays[3] and their effect of discouraging private practice attorneys in particular from wanting to be federal judges.

There is a better way to do this, I think. As Presidents Clinton and Bush have suggested, the executive branch and the Senate should work

[3] *See, e.g.* William H. Rehnquist The 1997 Year-End Report of the Federal Judiciary *reprinted in* 1 State of the Fed. Judiciary: Annual Reports of the Chief Justice of the Supreme Court of the U.S. Annual Reports

But what I have seen in my seven years and what my experience before that told me—but really what I have seen since I have been a judge—is that these cases oftentimes come down to what Justice Felix Frankfurter used to describe as the three rules of resolving these kinds of cases: "(1) Read the statute; (2) read the statute; (3) read the statute!"[4] So the most important factor in resolving these administrative cases often turns out to be the precise wording of the statutory text. If you sat in our courtroom for a week or two and listened to case after case—I don't advise this for anyone who wants to stay sane—what you would hear is judges from across the so-called ideological spectrum, different judicial philosophies, from all different backgrounds, Democratic appointees, Republican appointees, you would hear them inquiring, "What does the statute say? What is the precise wording of the statutory provision at issue?" And this is a real contrast to how statutory interpretation and administrative law were done thirty, twenty-five years ago when there were a lot more references to the purpose that Congress might have had in mind, to statements of individual members of Congress and Senators, to committee reports, and to floor debates.

And the change is due in large part generally to the influence coming from the Supreme Court and, most particularly, to Justice Antonin Scalia's influence on statutory interpretation, but it is broader than that, I think. It is because both formalists—Justice Scalia a formalist—and also functionalists, people who think about the congressional process and how it results in legislation, have come to realize the centrality of the statutory text to statutory interpretation.

And so formalists, the Justice Scalia model, focus on the text because that is what was passed by both houses of Congress and signed by the President. Under that view, the Constitution requires us to look at the text when resolving cases, not what might have been in the committee report. But functionalists, I think, have come also to realize—I credit a lot of people wi

do not adhere to that compromise, if we do not adhere to the text of the provisions, we are really taking sides and upsetting the compromise that was reached in the legislative process. So functionalists have come to agree with the importance of the text. I want to emphasize that the text is not the end-all of statutory interpretation. But the statutory text is very important in determining how to resolve questions whether the agency has violated statutory constraints on it.

conclusion he did? Well, he went on to say that the statute could be construed not to impose a mandate but, rather, just a traditional tax incentive of the kind we have with regulatory taxes, cigarette taxes, the mortgage interest deduction, and other things like that in the Tax Code, and then he relied on the constitutional avoidance canon to interpret the individual mandate to not really be a mandate. So he said by interpreting it that way it will be constitutional. We will avoid the unconstitutionality that would otherwise exist with the statute as drafted.[7] The dissenters disagreed. They argued that the constitutional avoidance canon was not so flexible so as to allow a judge to stretch the statute so far from its ordinary terms.[8]

So in that case, we have agreement on basic constitutional principles between Chief Justice Roberts and the dissenters, really agreement on how to interpret the text as written. Where the disagreement came—and it is amazing that in a case of that magnitude and that importance and that significance—it came down to, "How do you apply the constitutional avoidance canon?"

Consider also another canon, the surplusage canon. I won't quiz you on that. The principle is that words in a statute should not be interpreted to be redundant of other words in the statute. But it turns out that members of Congress often want to be redundant. They want to be redundant. Why do they want to be redundant? Well, in the words of Shakespeare, they want to "make doubly sure."[9] They want to make doubly sure about things. And so oftentimes, just to make sure there is no doubt, Congress is intentionally redundant. A lot of legal drafting is redundant to make sure someone cannot wiggle out with arguing, "Well, if they meant that, they would have used clearer

So in matters of statutory interpretation, text is key. I think in the legal system—the judicial system—although there are lots of disagreements at the margins, there is a pretty broad consensus that the actual words of the statute are critical. But as judges, as lawyers, and as academics, one thing I have seen on the D.C. Circuit is we need to do a better job of reaching consensus on the canons we apply to interpret the text. Justice Scalia—not surprisingly, given his focus on this topic—and Bryan Garner got us started with a wonderful book that came out last year called *Reading Law: the Interpretation of Legal Texts*.[10] Really, every lawyer should have that book because interpreting text is so central to what we all do as lawyers. Likewise, Professors Manning, William Eskridge Jr., and Abbe Gluck have all done wonderful work on statutory interpretation.

But there is still too much uncertainty about the canons and too much uncertainty about how they apply in particular cases. So my thought for all of us—and especially the academics and the judges—is to work to ensure that the tools of interpretation are stable and consistent and that the rules of the road are agreed upon in advance. That is what we mean by rule of law. Ideally, the rules of the road would be agreed upon in advance so that they are not battled out and manipulated in the crucible of a controversial case. We made great progress in statutory interpretation,

many others: the constitutionality of the Public Company Accounting Oversight Board; the cases in the 1990s challenging the Line Item Veto Act; the legislative veto challenge; and going back to the famous Youngstown Steel seizure cases. Cases of this kind come to the D.C. Circuit often.

And how do we resolve these cases, the separation of powers cases? Well, it turns out that we often rely on the text again—the text of the Constitution in these kinds of cases. It turns out, if you look at the D.C. Circuit's docket and the Supreme Court's case law in this area, that text matters not only in statutory interpretation today, but it is also of significant value in constitutional interpretation. This is particularly true in separation of powers cases. So the observation that text matters is both normative and positive. Yes, this observation must be normative. The text of the Constitution is the supreme law of the land as Article VI says it is. It is not a set of aspirational ideas. The Constitution is law. One of Chief Justice Roberts's primary points at his confirmation hearing was that the Constitution is law.[13] It is a legal document, and this written law binds us as a nation. It binds us as judges, as legislators, as executive branch officials, and as citizens.

To be sure, we are all aware that there is a debate as to the correct method for interpreting the Constitution between—to oversimplify significantly—*living constitutionalists*

So we have a debate between living constitutionalists and enduring constitutionalists. But no matter how one resolves that debate in cases involving, say, the Equal Protection Clause, the Due Process Clause, or the First Amendment—those somewhat open-ended provisions of the

the President is presented with a bill that has lots of things, the President could, in essence, line out parts of the bill the President disliked. Again, in the Constitution, we have a specific procedure for how legislation gets enacted. So was this consistent with the Constitution? And the idea here, similarly, was this is a sensible accommodation to the practical realities of governing in the modern age and, in particular—and this will sound familiar, today—to the budgetary problems of the United States. Congress was putting in too many spending projects that were too parochial, essentially log rolling; and there were projects that would help this member and that member, and they would increase the federal deficit too greatly.

So this Line Item Veto would allow the President, the national figure, to line out those pork-barrel kinds of projects. But the Supreme Court again said no, this time in an opinion by Justice John Paul Stevens, joined by Chief Justice Rehnquist and Justice Clarence Thomas, among others. So, again, an ideological cross-section of the Supreme Court struck down the attempt by the legislative and executive branches to evade the bicameralism and presentment requirements. The Court stated Congress cannot alter the procedure set out in Article I, Section 7 without amending the Constitution.[28] Text matters.

I could go on. There are other—many other—separation of powers cases just like this: *Buckley v. Valeo*,[29] on the composition of the Federal Election Commission and how it was going to regulate campaign finance activities; *Bowsher v. Synar*;[30] the *Free Enterprise* case.[31] They all highlight the primacy of the constitutional text, and they reaffirm that the constitutional text is critical in separation of powers cases.

A lot of separation of powers cases never even make it to the Supreme Court or any court, right? A lot of separation of powers disputes are resolved in the executive and legislative branches themselves, and, when you are in the executive branch or when you are in the legislative branch, it turns out that you pay great attention to the precise words of the constitutional text.

Rather than giving you legal stories about that, I will give you one anecdote that I thought underscored it for me. When I was going through my Senate confirmation process, I would meet with individual

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Id.

national security cases. And then our court, the D.C. Circuit, has

Shortly thereafter, Justice Hugo Black—I guess things worked a little differently back then—invited President Truman and all the other justices to his house for dinner. This seems awkward to us today, and it must have been awkward even then, but eventually President Truman broke the tension by saying, "Hugo, I don't care much for your law, but this Bourbon is good." So his comment, real or apocryphal, shows the respect that the three branches of government can have for each other and especially for the judiciary's ultimate responsibility to interpret and enforce the Constitution. At a time when civility in Washington and functioning government in Washington appear to be not exactly going well, I think we can all take inspiration from our democracy's history of dealing with challenging and controversial cases.

Thank you again for the invitation to Case Western Reserve School of Law. Thank you for the opportunity to speak as part of this wonderful lecture series, which I am happy to be part of. I am happy to answer questions that people have. Thank you.

Answers to Audience Questions[37]

On Rules of Interpretation and Canons of Construction

Q: You talked about some of the pr

that the courts had a role in resolving it. It went up there to determine whether this is a political question that the courts should stay out of, consistent with what I was talking about earlier. The Supreme Court, per Chief Justice Roberts, said no, we can resolve this case. But they didn't resolve it.[40] They just said that federal courts can resolve it and then remanded it back to the lower courts to do so.[41] And so on remand our court, the D.C. Circuit—I was not on the case—has ruled, in fact, that the President does have the exclusive recognition power in this case, and, therefore, the statute does violate the Constitution.[42]

That is an example where there was a court case where someone was able to argue that the President has to follow the statute and is acting unlawfully by not doing so. There are other examples like that. Now, there are some where there is no one who has standing, and it can never get to court. That presents its own set of challenges. In those cases where no one can get to court, really it is Congress who has to take action, and one of Congress' two big tools of action, we all know, is shutting down the confirmation process or using that as a tool of retaliation against the President. And the other is, as we have seen today, that Congress can refuse to appropriate money to allow the government to operate or to shut down particular aspects of the executive branch.

On Interpreting the Words of the Constitution

Q: You mentioned a term also about being bound by the Constitution of 200 years. So how do we apply this if we are not going to be bound by the Constitution of what was written in 200 years ago as a loose constructionist or strict constructionist?

A: Well, I think my basic point was that in separation of powers cases all of the justices tend to agree that the words of the document are law, and thev229 -22:-1.9(ideuel222o.5(s)-2d) 15.7714 0 TD .0000[(ere TJ 16)4.5(

ended that they have been interpreted so as to reflect contemporary standards of decency and the like—the Eighth Amendment, the Due Process Clause, and what have you.

On the Hastings *Impeachment Case*

Q: Can you talk about the *Hastings* impeachment case?[43]

A: So in the judicial impeachment cases, the Supreme Court ruled—interpreting the text of the Constitution—that impeachment trials are exclusively committed to the Senate because the Senate, under the Constitution, has the sole power to try impeachments.