



September 4, 2018

The Honorable Chuck Grassley  
Chairman, Senate Committee on the Judiciary

The Honorable Dianne Feinstein  
Ranking Member, Senate Committee on the Judiciary

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***RE: Nomination of Brett Kavanaugh to the Supreme Court***

Dear Chairman Grassley and Ranking Member Feinstein,

We, the president and public policy director of the Committee for Justice (CFJ), write to you regarding the nomination of Brett Kavanaugh to be an Associate Justice of the United States Supreme Court. Founded in 2002, CFJ is a nonprofit legal and policy organization that promotes the rule of law and constitutionally limited government, including engaging in the national debate about a variety of technology issues.

In order to provide the greatest added value to this committee's consideration of the Kavanaugh nomination, this letter will focus on an issue which has not gotten a lot of attention—specifically, what Judge Kavanaugh's confirmation to the Supreme Court would mean for America's tech industry. To answer that question, we look to the areas of federal law that will be most impactful on the future of that industry, including the First Amendment, antitrust law, and administrative law.

With regard to the last of these areas, we discuss the difficulty of reconciling critics' claim that Judge Kavanaugh has not been deferential enough to the authority of executive agencies with their claim that he will be too deferential to executive power if confirmed to the Supreme Court.

**Administrative Law**

America's tech industry is subject to a number of regulatory agencies—including, in part, the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), and the Federal Aviation Administration (FAA)—and there are calls for additional regulations every day. Consequently, the willingness of the courts to carefully scrutinize agency rulemaking is vitally important to the continued vibrancy of the industry.

Of the 307 opinions Judge Kavanaugh has written while serving on the U.S. Court of Appeals for the D.C. Circuit, more than one hundred review agency decisions. It bodes well for our nation's tech industry that, as clearly demonstrated by Kavanaugh's well-established record in these cases, he is willing to enforce the constitutional limits on the authority of regulatory agencies. In one of the more notable such case, Kavanaugh wrote in a dissent that the FCC's "net neutrality rule might be wise policy ... [but] congressional inaction does not license the Executive Branch to take matters into its own hands," adding that the FCC's action "will affect every Internet service provider, every Internet content provider, and every Internet consumer."<sup>1</sup>

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<sup>1</sup> *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

As we recently described, Judge Kavanaugh views the nearly blind deference to executive agencies that some argue for as an abdication of the judicial branch's duty and a violation of the constitutional separation of powers.<sup>2</sup> He has applied this more skeptical approach to regulators under both Republican and Democratic administrations, seeking not to promote any particular ideology but to protect Americans from unaccountable bureaucrats.

Particularly important is Judge Kavanaugh's strong voice in emphasizing that *Chevron* deference—named for the 1984 Supreme Court decision in *Chevron v. Natural Resources Defense Council*<sup>3</sup>—has its limits. The *Chevron* doctrine, which holds that courts should defer to an executive agency's interpretation of a statute when its language does not clearly answer the question at issue, has allowed agencies to turn statutory ambiguity into justification for expanding the scope of their authority. As Judge Kavanaugh wrote, *Chevron* deference "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations."<sup>4</sup>

Judge Kavanaugh is a fitting replacement for Justice Anthony Kennedy, who wrote shortly before his retirement of his "concern with the way in which the Court's opinion in [*Chevron*] has come to be understood and applied."<sup>5</sup> "The type of reflexive deference exhibited in some of these cases is troubling," said Kennedy. "The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles."

Judicial skepticism about the broad application of agency deference is important for any industry that is vulnerable to overreaching regulations, but this is particularly true for the tech industry. The slow-moving, one-size-fits-all nature of government regulation can be an enormous obstacle to the technological and entrepreneurial innovation that has made America's tech industry an engine of economic growth and consumer choice, even during difficult economic times.

Furthermore, regulatory compliance costs pose an existential threat to the small startup companies that make up much of the American tech industry and drive economic growth. Those costs stifle competition and doom many of the startups that might otherwise grow to compete with the giant tech companies that are the main target of regulators. Judge Kavanaugh's judicial record demonstrates that, if confirmed, he will help to ameliorate this problem by holding federal agencies to their responsibility of conducting cost-benefit analyses before imposing costly regulations.<sup>6</sup>

## **Presidential Power**

Some critics of Judge Kavanaugh's nomination have characterized his enforcement of the constitutional limits on federal regulators' authority as not deferential enough to executive agencies. It is puzzling that many of these same critics also worry that Kavanaugh will be too deferential to presidential power. In fact, Democrats on the Senate Judiciary Committee are making this concern a main theme of their opposition to the nominee.

These twin concerns of critics would be reconcilable if regulatory agencies and the White House were different branches of our federal government. However, those agencies and the presidency are both part of the executive branch. Judge Kavanaugh's critics should keep in mind that, because Article Two of the

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<sup>2</sup> Ashley Baker, *Kavanaugh's administrative law opinions should be given due deference*, The Hill, August 27, 2018, <http://thehill.com/opinion/judiciary/403694-kavanaughs-administrative-law-opinions-should-be-given-due-deference>.

<sup>3</sup> 104 S. Ct. 2778.

<sup>4</sup> Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016).

<sup>5</sup> *Pereira v. Sessions*, 138 S.Ct. 2105 (2015) (Kennedy, J., concurring).

<sup>6</sup> See, e.g., *White Stallion Energy Center v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).

Constitution vests all "the executive power" of the United States in the President, any judicial decision that strengthens the authority of federal agencies necessarily also strengthens the President's power.

## **Free Speech**

At the center of the technological transformation of America and the world is the Internet, which has brought Americans together to discuss and debate issues in a way no town square ever could. Overreaching, costly, or poorly thought out regulation of the Internet can wind up silencing ordinary Americans who want to participate in the political process online and can't afford expensive alternatives such as television advertising.<sup>7</sup> Whether we are talking about social media, online newspapers and blogs, email, or the online ads that keep all these services free, the continued vibrancy of the Internet depends on the protection of free speech—for both individual Americans and the websites they use—every bit as much as more traditional media and means of communication do.

Early in the Internet revolution, courts recognized the vital importance of free expression online, most notably in a landmark 1997 Supreme Court decision striking down provisions of the Communications Decency Act that effectively banned "indecent" and "patently offensive" communications online,<sup>8</sup> as well as in lower court decisions that broadly interpreted online platforms' statutory immunity from liability for third party speech. Without such protection by the courts, the Internet would likely be but a mere shadow of what it has become.

Fortunately, Judge Kavanaugh's judicial record makes it clear that he believes in the robust protection of free speech. In two D.C. Circuit cases decided on other grounds, Judge Kavanaugh wrote separately to discuss the First Amendment problems raised by the FCC actions challenged by the plaintiffs. In *Cablevision Systems Corp. v. FCC*,<sup>9</sup> Kavanaugh wrote in dissent:

*"The First Amendment endures, and it applies to modern means of communication as it did to the publishers, pamphleteers, and newspapers of the founding era. ... [V]ideo programming distributors (such as Comcast, DIRECTV, DISH, Time Warner, Cablevision, Verizon, and AT & T) and video programming networks ... are editors and speakers protected by the First Amendment's guarantees of freedom of speech and of the press."*

Notably, Judge Kavanaugh's strong First Amendment record includes enforcing the constitutional limits on defamation claims. Kavanaugh has written opinions upholding freedom of the press against claims of defamation for insinuating questions posed in an article (*Abbas v. Foreign Policy Group*<sup>10</sup>) and inaccurate reporting on a criminal conviction (*Kahl v. Bureau of Nat'l Affairs*<sup>11</sup>). Without judges willing to enforce the First Amendment in such cases, the free-wheeling nature of social media and other online expression would likely be impossible.

## **Antitrust Law**

During the past twenty years, giant tech companies have been a major focus of the public and legal debate about antitrust law. Recently, growing concerns about data privacy, content filtering, ranking of

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<sup>7</sup> See, e.g., Christina Pesavento and Ashley Baker, *No Safe Harbor: Congress Threatens Free Speech Online*, JURIST, October 28, 2017, <https://www.jurist.org/commentary/2017/10/pesavento-baker-safe-harbor>.

<sup>8</sup> *Reno v. A.C.L.U.*, 117 S. Ct. 2329 (1997).

<sup>9</sup> 597 F.3d 1306 (D.C. Cir. 2010). The other case is *Comcast Cable Communications v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).

<sup>10</sup> 783 F.3d 1328 (D.C. Cir. 2015).

<sup>11</sup> 856 F.3d 106 (D.C. Cir. 2017).

search results, and the like have led to increasing calls to break up the tech giants. While these issues need to be addressed, there is a risk that overreaction to them among lawmakers and the public could lead to poorly thought out or overreaching application of antitrust laws to these companies, which would endanger America's technological preeminence and the jobs that depend on it.

Therefore, our nation needs judges who will apply antitrust laws in a manner which is both balanced and reflective of modern economic principles. Judge Kavanaugh's judicial record indicates that he will do exactly that.

For example, in *United States v. Anthem*, where the D.C. Circuit allowed the Justice Department to block the merger of two health insurance companies, Judge Kavanaugh dissented, arguing that the majority failed to sufficiently consider consumer welfare, the touchstone of modern, economics-based antitrust jurisprudence.<sup>12</sup> In *FTC v. Whole Foods*, Kavanaugh again dissented, arguing that the merger of Whole Foods and Wild Oats would not be anticompetitive, based on his application of an economically rigorous approach to market definition.<sup>13</sup>

## **Conclusion**

In the areas of the law most important to the future of America's tech industry—antitrust, agency deference, and free speech—Judge Kavanaugh's record demonstrates that, if he is confirmed, his addition to the Supreme Court will contribute to the continued vibrancy of America's tech industry and the innovation and economic growth it spurs.

We ask that this letter be entered in the record for this week's hearing on Judge Kavanaugh's nomination.

Sincerely,

Curt Levey  
President  
The Committee for Justice

Ashley Baker  
Director of Public Policy  
The Committee for Justice

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<sup>12</sup> 855 F.3d 345 (D.C. Cir. 2017).

<sup>13</sup> 548 F.3d 1028 (D.C. Cir. 2008).