Judicial Opinions of Judge Brett M. Kavanaugh

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Summary

On July 9, 2018, President Trump announced the nomination of Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to succeed Supreme Court Justice Anthony M. Kennedy, who is scheduled to retire from active status on July 31, 2018. Judge Kavanaugh has served as a judge on the D.C. Circuit since May 30, 2006. He has also sat, by designation, on judicial panels of the U.S. Court of Appeals for the Eighth Circuit and the U.S. Court of Appeals for the Ninth Circuit, and also served on three-judge panels of the U.S. District Court for the District of Columbia.

During his tenure on the bench, Judge Kavanaugh has adjudicated more than 1,500 cases, almost all while a member of either a three-judge or en banc panel of the D.C. Circuit. In part because of the D.C. Circuit's location in the nation's capital and the number of statutes providing it with special or even exclusive jurisdiction to review certain agency actions, legal commentators generally agree that the D.C. Circuit's docket, relative to the dockets of other circuits, contains a greater percentage of nationally significant legal matters. Cases adjudicated by the D.C. Circuit are more likely to concern the review of federal agency action or civil suits involving the federal government than cases adjudicated in other circuits, while the D.C. Circuit docket has a lower percentage of cases involving criminal matters, prisoner petitions, or civil suits between private parties.

Arguably, Judge Kavanaugh's authored opinions provide the greatest insight into the nominee's judicial approach, as a judge's vote or decision to join an opinion authored by a colleague may not necessarily represent full agreement with a colleague's views. This report provides a tabular listing of 306 cases in which Judge Kavanaugh authored a majority, concurring, or dissenting opinion. The opinions are categorized into three tables: **Table 1** identifies 148 opinions authored by Judge Kavanaugh on behalf of a unanimous panel; **Table 2** contains 47 controlling opinions authored by Judge Kavanaugh in which one or more panelists wrote a separate opinion; and **Table 3** lists 111 cases where Judge Kavanaugh wrote a concurring or dissenting opinion (decisions where Judge Kavanaugh wrote both the controlling opinion *and* a separate concurrence are included in this final table). Opinions are identified and briefly discussed in each table in reverse chronological order based on where the case appears in the *Federal Reporter*. The opinions are also categorized by their primary legal subjects (e.g., administrative law, criminal law & procedure, environmental law, federal courts & civil procedure, labor & employment law, and national security).

While this report identifies and briefly describes judicial opinions authored by Judge Kavanaugh during his time on the federal court, it does not analyze the implications of his judicial opinions or suggest how he might approach legal issues if appointed to the Supreme Court. Those matters will be discussed in a forthcoming CRS report. Key CRS products related to the Supreme Court vacancy and Judge Kavanaugh's nomination are collected in CRS Legal Sidebar LSB10160, *Supreme Court Nomination: CRS Products*, by Andrew Nolan.

Contents

Methodology 5

Tables

Table 1. Opinions Authored by Judge Kavanaugh for a Unanimous Panel 6
Table 2. Controlling Opinions Authored by Judge Kavanaugh for Which Another Judge Wrote a Concurrence or Dissent 32
Table 3. Concurring and Dissenting Opinions Authored by Judge Kavanaugh 51

Appendixes

Appendix. Glossary of Common Abbreviations Used in Tables 106

Contacts

Author Contact Information 107

On July 9, 2018, President Trump announced the nomination of Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to succeed Supreme Court Justice Anthony M. Kennedy, who is scheduled to retire from active status on July 31, 2018.[1] Judge Kavanaugh has served as an appellate judge for the D.C. Circuit since his appointment by President George W. Bush on May 30, 2006.[2] He has also sat, by designation, on judicial panels for the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit), the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit),[3] and the U.S. District Court for the District of Columbia.[4]

During his tenure on the bench, Judge Kavanaugh has adjudicated more than 1,500 cases,[5] almost all while a member of either a three-judge or en banc panel of the D.C. Circuit.[6] The D.C. Circuit considers far fewer cases each year than other federal appellate courts.[7] But in part because of the D.C. Circuit's location in the nation's capital and the number of statutes providing it with special or even exclusive jurisdiction to review certain agency actions, legal commentators generally agree that the D.C. Circuit's docket, relative to the dockets of other circuits, contains a greater percentage of nationally significant legal matters.[8] Cases adjudicated by the D.C. Circuit are more

[1] The White House, President Donald J. Trump Announces Intent to Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States, https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/ (last visited July 23, 2018). Judge Kavanaugh's nomination was formally submitted to the Senate the following day. *See* U.S. Senate, Supreme Court Nominations: present-1789, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited July 23, 2018).

[2] U.S. Court of Appeals for the District of Columbia Circuit, Brett M. Kavanaugh: Professional Biography, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK (last visited July 23, 2018).

[3] The Chief Justice of the U.S. Supreme Court "may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit." 28 U.S.C. § 291(a).

[4] *See id*. § 2284 (providing for three-judge district court panels to be convened with respect to certain actions, including challenges to the constitutionality of the apportionment of congressional districts or state legislative bodies, and that at least one judge on the panel be a circuit judge).

[5] On July 23, 2018, CRS searched all federal cases in the Westlaw legal database using the search strategy *pa(Kavanaugh) or ju(Kavanaugh) or wb(Kavanaugh)*, which are the segments for "Panel," "Judge," and "WrittenBy," presumably identifying all cases identified by Westlaw editors on which Judge Kavanaugh sat on a judicial panel (including, but not limited to, those cases where he wrote an opinion). This search retrieved 1,579 results. A search of federal cases in the LexisAdvance legal database, using the search strategy *judge(Kavanaugh*) retrieved 3,858 results. The significant discrepancy in results appears mainly due to the LexisAdvance database search retrieving numerous, terse judicial orders concerning routine procedural motions that were not retrieved using Westlaw, and which are not included in this report's tables.

[6] Searches of the Westlaw and LexisAdvance legal databases conducted by CRS on July 23, 2018 identified Judge Kavanaugh as a member of a Ninth Circuit panel that issued a judicial opinion in 7 cases; a member of an Eighth Circuit panel rendering decisions in 2 cases; and a member of a federal district court panel issuing a ruling in 5 cases. *See supra* note 5 (describing methodology used to identify cases adjudicated by Judge Kavanaugh). Although a search of the LexisAdvance database retrieved 8 decisions by the Ninth Circuit where Judge Kavanaugh was a panelist compared to 7 decisions retrieved using Westlaw, this discrepancy is due to Westlaw including only the published version of the Ninth Circuit's opinion in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), while the LexisAdvance database also lists an earlier, unpublished version of the decision, No. 10-50248, 2011 U.S. App. LEXIS 10707 (9th Cir. May 24, 2011). The search of the LexisAdvance database identified 2 Eighth Circuit cases on which Judge Kavanaugh was a panelist; these were not identified in the Westlaw database search.

[7] *See* Hon. Harry T. Edwards, *Working Paper No. 17-47: Collegial Decision Making in the US Court of Appeals*, NYU SCHOOL OF LAW PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES (Nov. 2017), at 73 (listing total published and unpublished decisions issued by the 12 regional courts of appeals).

[8] *See* Aaron Nielson, *D.C. Circuit Review — Reviewed: The Second Most Important Court?*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 4, 2015), http://yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-

likely to concern the review of federal agency action or civil suits involving the federal government than cases adjudicated in other circuits, while the D.C. Circuit docket has a lower percentage of cases involving criminal matters, prisoner petitions, or civil suits between private parties.[9]

Unlike the Supreme Court, which enjoys "almost complete discretion" in selecting its cases, the federal courts of appeals are required to adjudicate many cases as a matter of law and, as a result, tend to hear "many routine cases in which the legal rules are uncontroverted."[10] Arguably indicative of the nature of federal appellate work, the vast majority of cases decided by three-judge panels of federal courts of appeals are issued without a dissenting opinion.[11] However, while the vast majority of cases adjudicated by the D.C. Circuit are decided without a dissenting opinion, perhaps because of the nature of the D.C. Circuit's docket, a greater percentage of the court's decisions draw a dissenting opinion relative to its sister circuits.[12]

This report provides tabular listings of 306 cases in which Judge Kavanaugh authored a majority, concurring, or dissenting opinion. Arguably, these written opinions provide the greatest insight into Judge Kavanaugh's judicial approach, as a judge's vote or decision to join an opinion authored by a colleague may not necessarily represent full agreement with a colleague's views.[13] Accordingly, this report does not include cases in which Judge Kavanaugh sat on a reviewing judicial panel, but is not credited as the author of an opinion. For example, instances where Judge

court-by-aaron-nielson/ (discussing reasons for the D.C. Circuit's reputation as the "second most important court" after the U.S. Supreme Court).

[9] *See, e.g.*, Hon. Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 715 (2014) ("[T]he bread and butter of our docket, is our administrative law docket. What I mean by that is determining in a particular case whether an administrative agency, like the EPA, the NLRB, or the FCC, exceeded statutory limits on their authority or violated a statutory prohibition on what they can do. These are the cases that come up to our court constantly. We see very complicated administrative records, and we adjudicate very complex statutes."); Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 131-34, 154 (2013) (describing D.C. Circuit docket and contrasting it with those of other judicial circuits, and listing federal statutes providing the D.C. Circuit with special jurisdiction over "matters likely to have national effect"); Hon. John G. Roberts, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 377 (2006) ("[W]hen you look at the docket . . . you really see the differences between the D.C. Circuit and the other courts. One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.").

[10] Louis J. Sirico, Jr., *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1052 n.8 (1991); *see generally* HON. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (2009) (observing that "more of the work of [the federal appellate] courts really is technical. . . . Most of the appeals they get can be decided uncontroversially by the application of settled principles").

[11] *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 160 (2007) (noting the "relative paucity of circuit court panel dissents").

[12] *See* Edwards, *supra* note 7, at 70-71 (providing data indicating that, during a 5-year period beginning September 30, 2011, roughly 4.5% of cases decided on the merits by the D.C. Circuit drew at least one dissenting opinion, compared to the nationwide average of 1.3% for the geographic circuit courts of appeals).

[13] *See* Hon. Ruth Bader Ginsburg, as quoted in Irin Carmon, *Opinion, Justice Ginsburg's Cautious Radicalism*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/opinion/sunday/justice-ginsburgs-cautious-radicalism.html (observing that "an opinion of the court very often reflects views that are not 100 percent what the opinion author would do, were she writing for herself"); Steven D. Smith, *Lessons from Lincoln: A Comment on Levinson*, 38 PEPP. L. REV. 915, 924 (2011) ("[T]he fact that a judge joins in a majority opinion may not be taken as indicating complete agreement. Rather, silent acquiescence may be understood to mean something more like 'I accept the outcome in this case, and I accept that the reasoning in the majority opinion reflects what a majority of my colleagues has agreed on.'").

Kavanaugh was part of a panel that issued a per curiam opinion, in which no particular judge was credited as an author, are omitted from this report. This report also does not attempt to identify the various rulings made by circuit panels on procedural issues in the midst of the appeal (e.g., granting a litigator's request for an extension of time to file a brief).[14] Finally, the report does not address subsequent legal proceedings that may have occurred after a cited decision was issued, except to note where Westlaw or Lexis editors have indicated that a decision was subsequently abrogated, affirmed, reversed, or vacated by the Supreme Court or the D.C. Circuit.[15]

The opinions discussed in this report are categorized into three tables: **Table 1** identifies 148 opinions authored by Judge Kavanaugh on behalf of a unanimous panel; **Table 2** contains 47 controlling opinions authored by Judge Kavanaugh in which one or more panelists wrote a separate opinion; and **Table 3** lists 111 cases where Judge Kavanaugh wrote a concurring or dissenting opinion, including cases where Judge Kavanaugh wrote both the majority opinion and a separate concurrence.[16] A concurring opinion is identified as a "concurrence in the judgment"—that is, an opinion where the author agrees with the ultimate conclusion reached by the majority but not the manner in which it was reached—only when the concurrence is expressly labeled as such.[17]

Cases are listed in reverse chronological order based on where the case appears in the *Federal Reporter*. In each instance, the key ruling or rulings of the case are succinctly described. A glossary of common abbreviations for statutes, agencies, and Supreme Court cases referenced in the tables is attached as an **Appendix**. Judicial opinions discussed in this report are categorized using the following legal subject areas:

- Administrative Law (77 cases)
- Communications Law (14 cases)
- Antitrust Law (4 cases)
- Bankruptcy Law (1 case)
- Business & Corporate Law (6 cases)
- Civil Rights Law (24 cases)
- Contracts Law (7 cases)
- Criminal Law & Procedure (45 cases)

[14] An arguable exception is made for an opinion by Judge Kavanaugh denying a motion to recuse himself from a Freedom of Information Act lawsuit on account of his prior executive service. Baker & Hostetler LLP v. Dep't of Commerce, 471 F.3d 1355 (D.C. Cir. 2006).

[15] A forthcoming CRS report will provide a list of D.C. Circuit decisions subsequently reviewed by the Supreme Court in which Judge Kavanaugh had been a member of the reviewing circuit court panel.

[16] *See* Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006) (writing for the panel and also issuing a separate concurrence).

[17] James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519-20 (2011) ("[A] simple concurring opinion indicates that the [judge] writing separately agrees with the legal rule and its application in the majority opinion but that there is some aspect of the case worthy of further discussion. . . . [A]n opinion concurring in the judgment is the functional equivalent of a dissent from the [controlling opinion's] reasoning even if it represents agreement with the result reached in the case."). The nature of a concurring opinion, including the legal significance that should be given to whether the opinion labels itself a "concurrence" or a "concurrence in the judgment," is a matter of scholarly discussion and occasional judicial importance, particularly in cases where there is a question as to whether a majority of the court shared the same legal rationale to support the court's ruling. *See generally* Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1955-56, 1958 (2006) (arguing that "the phrase following the comma" after the authoring judge's name—e.g., "concurring" or "concurring in the judgment"—has been "used in an inconsistent, unclear, and often contradictory manner" that has led to confusion among commentators and courts regarding the degree to which the judge endorses the analysis of the majority opinion).

- Elections Law (7 cases)
- Energy & Utilities Law (17 cases)
- Environmental Law (33 cases)
- Federal Courts & Civil Procedure (covering matters such as standing, justiciability, civil procedure, legal ethics, and the admission of evidence in non-criminal proceedings) (53 cases)
- Indian Law (2 cases)
- Firearms Law (1 case)
- Freedom of Religion (4 cases)
- Freedom of Speech (including the right to petition) (13 cases)
- Food & Drug Law (including agriculture) (7 cases)
- Government Operations (concerning the structure and functions of executive and legislative branch entities) (18 cases)
- Healthcare Law (14 cases)
- Immigration Law (3 cases)
- Intellectual Property Law (4 cases)
- International Law (6 cases)
- Labor & Employment Law (38 cases)
- Military & Veterans Law (6 cases)
- National Security (17 cases)
- Pensions & Benefits Law (6 cases)
- Privacy & Records (15 cases)
- Securities Law (7 cases)
- Tax Law (8 cases)
- Torts (10 cases)
- Transportation Law (17 cases)
- Workers' Compensation & Social Security (5 cases)

Where appropriate, up to three subject areas are identified as primarily relevant to a particular case. The goal of the subject matter listing is to provide those interested in particular issues concerning Judge Kavanaugh a means to identify key judicial opinions he authored in a given subject area. However, the list above is not an exhaustive accounting of all possible legal subjects addressed in Judge Kavanaugh's judicial writings. Moreover, categorization of a case under a particular legal subject area does not necessarily mean other categories are wholly inapplicable. For example, several listed cases that concern challenges by wartime detainees held at the U.S. Naval Station at Guantanamo Bay, Cuba, are solely categorized under the legal subject area of "National Security," though the cases may touch on other issues, such as "Federal Courts & Civil Procedure" (because detainee challenges concern judicial review of executive discretion in wartime matters) or "Administrative Law" (because the cases involve review of determinations made through an administrative process employed by the U.S. military to assess whether a person is properly detained). Accordingly, while the categories used in this report may prove helpful to readers seeking to locate judicial opinions by Judge Kavanaugh concerning certain legal topics, these categories do not necessarily capture the full range of legal issues those opinions address.

While this report identifies and briefly describes opinions authored by Judge Kavanaugh during his tenure on the federal bench, it does not analyze the implications of those opinions or suggest how he might approach legal issues if appointed to the Supreme Court. Those matters will be discussed in a forthcoming CRS report.

Methodology

The cases included in this report were compiled by searching all federal cases in the LexisAdvance legal database for "writtenby(Kavanaugh)."[18] A search was then conducted of all federal cases in the Westlaw legal database using "wb(Kavanaugh)"[19] as a cross-check because editors of different legal databases may vary in how they identify cases.[20] These search results were then compared to the listing of authored opinions submitted by Judge Kavanaugh to the Senate Committee on the Judiciary.[21]

These results were last compared on July 23, 2018. Not every identified result proved relevant.[22] Moreover, in a handful of cases, an opinion authored by Judge Kavanaugh was subsequently republished with minimal, and sometimes only stylistic, changes. In cases where there are little, if any, substantive changes between two versions of a judicial opinion, only the most recent published version is listed.[23] On the other hand, if there is a meaningful substantive difference between the two versions, both are included.[24]

Ultimately, this methodology was used to identify 306 cases in which Judge Kavanaugh is credited authoring an opinion: 301 cases decided by the D.C. Circuit and 5 cases decided on three-judge district court panels (Judge Kavanaugh is not credited as an author of any opinions issued by Eighth or Ninth Circuit panels on which he served).

[18] The "WrittenBy" segment in LexisAdvance restricts searches to the names of the judge(s) writing an opinion, as identified by Lexis editors.

[19] The "WB" or "Writtenby" segment in Westlaw restricts searches to the names of the judge(s) writing an opinion, as identified by Westlaw editors.

[20] In searches conducted on July 23, 2018 using these methodologies, 311 opinions were identified using LexisAdvance compared to 307 opinions using Westlaw.

[21] U.S. Sen. Comm. on the Judiciary, Responses to Questionnaire for the Nominee of the Supreme Court, Appendix 13B, https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%2013(b)%20Attachments.pdf (last visited July 23, 2018).

[22] For example, a July 23, 2018 search of Westlaw for opinions written by Judge Kavanaugh lists *Bloss v. People of the State of Mich.*, 421 F.2d 903 (6th Cir. 1970), a decision by the U.S. Court of Appeals for the Sixth Circuit written decades before Judge Kavanaugh took the bench that mentions Michigan Supreme Court Judge Thomas M. Kavanaugh. The Westlaw search also did not identify *Redman v. Graham*, No. 05-7160, 2006 U.S. App. LEXIS 28147 (D.C. Cir. Nov. 13, 2006), in which Judge Kavanaugh authored an opinion dissenting in part.

[23] *See* Angellino v. Royal Family Al-Saud, 681 F.3d 463, *amended and superseded by* 688 F.3d 771, n.7 (D.C. Cir. 2012) (making no changes to the substantive analysis of the majority or dissent, but adding a footnote to the majority opinion clarifying that it expressed no opinion on whether the defendant is equivalent to the Kingdom of Saudi Arabia or a political subdivision thereof).

[24] *See, e.g.*, FTC v. Whole Foods Mkt., Inc., 533 F.3d 869 (D.C. Cir. 2008), *amended and reissued by* 548 F.3d 1028 (clarifying and elaborating upon differences in reasoning and conclusions of the panelists, including to specify that Judge Tatel concurred in the judgment of the panel rather than joining another panelist's opinion).

Table 1. Opinions Authored by Judge Kavanaugh for a Unanimous Panel

Case Name	Citation	Year	Role	Subject	Holding
United States v. Haight	892 F.3d 1271	2018	Authored majority	Criminal Law & Procedure	*Affirmed in part, vacated in part, and remanded for resentencing*: District court did not abuse its discretion in denying defendant's request to postpone trial and correctly admitted certain non-hearsay and prior-bad-acts evidence relevant to identity and intent. However, the district court erred in sentencing because defendant had three prior offenses subjecting him to a 15-year mandatory minimum sentence under the Armed Career Criminal Act.
Santa Fe Discount Cruise Parking, Inc. v. Fed. Maritime Comm'n	889 F.3d 795	2018	Authored majority	Transportation Law	*Petition for review granted, order vacated and remanded*: Federal Maritime Commission erred in finding that shuttle bus operators were not injured by being charged more than taxis and limousines for access to Galveston Port parking terminal.
Laccetti v. SEC	885 F.3d 724	2018	Authored majority	Administrative Law; Securities Law	*Petition for review granted, order vacated and remanded with instructions*: Public Company Accounting Oversight Board acted arbitrarily and capriciously by denying request for accounting expert to be present during an investigative interview.
Nw. Corp. v. FERC	884 F.3d 1176	2018	Authored majority	Administrative Law; Energy & Utilities Law	*Petition for review denied*: FERC did not act arbitrarily in ordering an electric utility to revise the rate it wished to charge its customers because FERC's decision was "reasonable and reasonably explained."
Fourstar v. Garden City Grp., Inc.	875 F.3d 1147	2017	Authored majority	Federal Courts & Civil Procedure	*Reversed:* When a district court declines to exercise supplemental jurisdiction over a prisoner's state law claims, a dismissal does not count as a "strike" under the Prison Litigation Reform Act (PLRA), and district courts must independently determine whether a prior dismissal counts as a strike under the PLRA.
Americans for Clean Energy v. EPA	864 F.3d 691	2017	Authored majority	Administrative Law; Environmental Law	*Petition for review granted in part and denied in part, order vacated and remanded in part*: EPA's final rule setting renewable fuel requirements under the CAA was generally within its statutory authority, reasonable, and not arbitrary and capricious. However, EPA could only consider supply-side factors affecting the volume of renewable fuel under the Act's "inadequate domestic supply" waiver provision.

Case Name	Citation	Year	Role	Subject	Holding
Envtl. Integrity Project v. EPA	864 F.3d 648	2017	Authored majority	Privacy & Records	*Affirmed:* Exemption to FOIA permitted EPA to withhold records containing commercial or financial information, despite provision in the Clean Water Act requiring that certain records be available to the public.
Allina Health Servs. v. Price	863 F.3d 937	2017	Authored majority	Administrative Law; Healthcare Law	*Reversed and remanded*: HHS violated the Medicare Act when it changed the formula for Medicare reimbursement without providing the public notice and an opportunity to comment.
NRG Power Mktg., LLC v. FERC	862 F.3d 108	2017	Authored majority	Administrative Law; Energy & Utilities Law	*Petitions for review granted, order vacated and remanded*: FERC's proposed modifications to a Regional Transmission Organization's rate structure for the transmission of electricity from generators to utilities violated the Federal Power Act because FERC's modifications were more than "minor."
Ames v. DHS	861 F.3d 238	2017	Authored majority	Privacy & Records	*Affirmed*: DHS did not violate the Privacy Act when it disclosed an investigative report concerning its prior employee to her subsequent federal employer, who then fired the employee.
Limnia, Inc. v. Dep't of Energy	857 F.3d 379	2017	Authored majority	Administrative Law	*Reversed and remanded*: Granting an agency's request for a voluntary remand was an abuse of discretion when the agency did not actually intend to revisit the challenged agency decisions under judicial review.
Taylor v. Huerta	856 F.3d 1089	2017	Authored majority	Administrative Law; Transportation Law	*Petitions for review granted in part and denied in part*: The FAA lacked statutory authority to promulgate rule requiring that owners of small unmanned aircraft (drones) operated for recreational purposes register with FAA. Petitioner's separate challenge to an FAA prohibition on the operation of drones in restricted flight areas was untimely.
Kahl v. Bureau of Nat'l Affairs	856 F.3d 106	2017	Authored majority	Communications Law; Freedom of Speech	*Reversed and remanded with instructions*: In prisoner's defamation suit against legal publisher, the prisoner was a limited public figure under D.C. law, but prisoner's evidence was insufficient to show that the publisher acted with actual malice necessary to overcome summary judgment.
Kincaid v. Dist. of Columbia	854 F.3d 721	2017	Authored majority	Criminal Law & Procedure	*Affirmed*: District of Columbia's post-and-forfeit procedure, under which certain misdemeanor arrestees can resolve their charges by paying a small amount of money, is consistent with the Due Process Clause.
Carpenters Indus. Council v. Zinke	854 F.3d 1	2017	Authored majority	Environmental Law; Federal Courts & Civil Procedure	*Reversed and remanded*: Lumber companies' trade association had standing to challenge the U.S. Fish and Wildlife Service's designation of 9.5 million acres of land as critical habitat for an endangered species.

Case Name	Citation	Year	Role	Subject	Holding
Ctr. for Regulatory Reasonableness v. EPA	849 F.3d 453	2017	Authored majority	Administrative Law; Environmental Law	*Petition for review dismissed:* The petition for review was dismissed for lack of subject matter jurisdiction, as the statement did not announce a limit on the discharge of pollutants as is required for direct review. Further, the court was unable to review the underlying policy letters invalidated by the Eighth Circuit, as the petitioners had sought review outside the 120-day window to challenge the letters.
United States v. Burnett	827 F.3d 1108	2016	Authored majority	Criminal Law & Procedure	*Affirmed in part, vacated in part, and remanded:* The police officers had probable cause to believe the defendants' rental car contained heroin, police officers' destruction of the heroin did not violate due process, and any error arising from the admission of prior convictions was harmless. However, the district court erred in calculating a defendant's base offense level using evidence that included periods of time before the defendant joined the conspiracy.
Stovic v. R.R. Ret. Bd.	826 F.3d 500	2016	Authored majority	Administrative Law; Pensions & Benefits Law	*Petition for review denied:* The Railroad Retirement Board's denial of retired railroad worker's request to reopen its initial benefits determination was final and reviewable, and the Board did not act unreasonably in denying the request where the petitioner did not seek to reopen a decision that he "did not have insured status" and provided little to no explanation of how the initial decision contained "a clerical error or an error that appears on the face of the evidence."
United States v. Knight	824 F.3d 1105	2016	Authored majority	Criminal Law & Procedure	*Affirmed and remanded:* The defendants' arrests for D.C. Code offenses did not count as arrests for federal criminal offenses for purposes of the Speedy Trial Act's 30-day clock, and the sentence of one defendant was affirmed where, among other things, the district court reasonably concluded that a 25-year sentence was appropriate. The case was remanded to address claims of ineffective assistance of counsel in the first instance.
Sack v. Dep't of Def.	823 F.3d 687	2016	Authored majority	Privacy & Records	*Affirmed in part and reversed in part:* A FOIA request by graduate student for Department of Defense reports regarding polygraph examinations qualified as a request made by an educational institution, and, therefore, the requester was entitled to reduced FOIA fees, but the records requested were exempt under FOIA Exemption 7(E), as they were records of information compiled for law enforcement purposes.

Case Name	Citation	Year	Role	Subject	Holding
In re Khadr	823 F.3d 92	2016	Authored majority	Military & Veterans Law; National Security	*Petition denied:* The petitioner did not make a proper showing for obtaining a writ of mandamus ordering the disqualification of a civilian judge from the U.S. Court of Military Commission Review where none of the petitioner's arguments established a "clear and indisputable" right to the civilian judge's disqualification.
Dist. of Columbia v. Dep't of Labor	819 F.3d 444	2016	Authored majority	Administrative Law; Labor & Employment Law	*Affirmed:* The text of the Davis-Bacon Act did not support the Department of Labor's conclusions that (1) lease and development agreements between the District of Columbia and private developers concerning the construction of a privately funded development on property leased from the District of Columbia were "contracts for construction" under the Act and (2) the development was a "public work" under the Act. The agency was therefore not accorded deference under *Chevron,* and the district court's judgment was affirmed.
Jackson v. Mabus	808 F.3d 933	2015	Authored majority	Administrative Law; Military & Veterans Law	*Affirmed:* The decision of the Board for Correction of Naval Records to not amend a veteran's record to remove references to, among other things, his nonjudicial punishment for unauthorized absence from his base was reasonable given the substantial evidence in support of his disciplinary infractions and adverse evaluations, and the Board acted reasonably in denying the veteran's request for reconsideration where, among other things, evidence submitted by the veteran showed that, at most, he was mistaken rather than willful in his violation of the base's leave policy due to his reading of relevant military regulations.
Friends of Animals v. Ashe	808 F.3d 900	2015	Authored majority	Administrative Law; Environmental Law	*Affirmed:* The district court's judgment dismissing action for lack of subject matter jurisdiction was affirmed where the plaintiff failed to provide 60-days' notice to the U.S. Fish and Wildlife Service before commencing a suit alleging the agency did not issue timely determinations on citizen petitions, as was required by the Endangered Species Act.
Abtew v. DHS	808 F.3d 895	2015	Authored majority	Privacy & Records	*Affirmed:* A DHS document recommending whether to grant alien's asylum was exempt from disclosure under FOIA Exemption 5, as the document was pre-decisional and deliberative and, therefore, fell within the ambit of the deliberative process privilege incorporated by the exemption.

Case Name	Citation	Year	Role	Subject	Holding
EME Homer City Generation, LP v. EPA	795 F.3d 118, *rev'd and remanded*, 134 S. Ct. 1584 (2014)	2015	Authored majority	Environmental Law	*Petitions for review granted in part and denied in part:* The sulfur dioxide and nitrogen oxide emissions budgets under EPA's Cross-State Air Pollution Rule were invalid, as they required petitioner-states "to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked," and the budgets were remanded without vacatur to EPA for the agency's reconsideration. However, petitioner's various facial challenges to the Rule were denied, as EPA had authority to promulgate the Rule's Federal Implementation Plans. Note: The Supreme Court subsequently reversed and remanded the decision in *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584 (2014).
State Nat'l Bank of Big Spring v. Lew	795 F.3d 48	2015	Authored majority	Federal Courts & Civil Procedure	*Affirmed in part, reversed in part, and remanded:* The plaintiff-bank had standing in its pre-enforcement action claiming the CFPB and recess appointment of the agency's director were unconstitutional, as the bank was regulated by the CFPB, and its claim was ripe for judicial review because regulated entities need not generally violate the law in order to challenge agency actions. However, the bank did not have standing to challenge the constitutionality of the Financial Stability Oversight Council as it was not regulated by the Council, nor did the state plaintiffs have standing to challenge the government's power to liquidate failing financial institutions under the Dodd-Frank Act, as the states had not been injured by such power in relation to their positions as possible creditors in future liquidations or reorganizations.
Initiative & Referendum Inst. v. USPS	794 F.3d 21	2015	Authored majority	Federal Courts & Civil Procedure	*Reversed and remanded:* The plaintiffs were "prevailing parties" under the Equal Justice to Access Act (EAJA) once they obtained a favorable judgment in a prior suit challenging the constitutionality of a Postal Service regulation that prohibited, among other things, the collection of signatures on petitions on post office sidewalls that ran alongside public streets. Plaintiffs thus were potentially entitled to attorney's fees under EAJA.

Case Name	Citation	Year	Role	Subject	Holding
Energy Future Coalition v. EPA	793 F.3d 141	2015	Authored majority	Administrative Law; Environmental Law	*Petition for review denied:* The petitioners had standing to challenge EPA regulation permitting only commercially available fuels to be used to test emissions of new vehicles, and their claim was ripe and filed within the applicable time period permitted by the CAA. On the merits, the regulation was not arbitrary and capricious because, among other things, it was reasonable for EPA to mandate that manufacturers use the same fuels in emissions testing that vehicles will use on the road, and, moreover, the regulation was rooted in the text of the Act.
S. New England Tel. Co. v. NLRB	793 F.3d 93	2015	Authored majority	Labor & Employment Law	*Petition granted and cross-application denied:* A NLRB order finding the petitioner-employer engaged in an unfair labor practice when it banned employees who interacted with customers or worked in public from wearing union shirts which read "Inmate" on the front and "Prisoner of (Company)" on the back was unreasonable, as, under the "special circumstances" exception to employees' general right to wear union apparel at work under the NLRA, the petitioner-employer could reasonably have believed that the message on the shirts might harm its relationship with its customers or its public image.
Venetian Casino Resort, LLC v. NLRB	793 F.3d 85	2015	Authored majority	Labor & Employment Law	*Petition granted, cross-application to enforce order denied, and order vacated:* The NLRB order finding the petitioner-employer committed unfair labor practices when it requested that police officers issue criminal citations to union demonstrators and block them from the walkway of the petitioner-employer's private property was vacated, as the employer's actions constituted a direct petition to government under the *Noerr-Pennington* doctrine and, thus, were shielded from liability under the NLRA. The proceeding was remanded to the NLRB for consideration as to whether the petitioner-employer's conduct was a sham petition that was in fact not entitled to protection under the *Noerr-Pennington* doctrine.
Indep. Producers Grp. v. Librarian of Cong.	792 F.3d 132	2015	Authored majority	Administrative Law; Intellectual Property Law	*Affirmed:* Interlocutory orders of the Copyright Royalty Board concluding that the appellant had not established its authority to represent certain claimants and rejecting its proposed valuation methodology were judicially reviewable as part of the Board's final determination. The Board's determination as to the appellant's royalty fees in the sports programming and program suppliers categories was affirmed.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Bostick	791 F.3d 127	2015	Authored majority	Criminal Law & Procedure; Federal Courts & Civil Procedure	*Affirmed in part, vacated in part, and remanded:* The defendants' convictions for participation in a single drug distribution conspiracy and continuing criminal enterprise were affirmed. Further, the district court did not err in inadvertently omitting from the jury instructions a sentence that the parties agreed to include, nor did the district court abuse its discretion in excluding rebuttal expert testimony. However, two of the defendants who raised Sixth Amendment objections to the then-mandatory Sentencing Guidelines were entitled to vacatur of their sentences and resentencing under the advisory Sentencing Guidelines.
In re Stevenson	789 F.3d 197	2015	Authored majority	Bankruptcy Law	*Affirmed:* The lender was entitled to assert a claim to be equitably subrogated, as actual knowledge that the lender would not receive the same property rights as the previous lender did not bar the lender from asserting a claim to be equitably subrogated.
United States v. Williams	784 F.3d 798	2015	Authored majority	Criminal Law & Procedure	*Affirmed but remanded to the district court to address the defendant's claim of ineffective assistance of counsel in the first instance:* The record contained sufficient evidence to support the jury's verdict of conspiracy to distribute drugs. The district court did not abuse its discretion by excluding evidence of the defendant's prior acquittal on drug distribution counts. In a case like the defendant's, a claim of ineffective assistance of counsel had to be considered first by the district court.
Abbas v. Foreign Policy Group, LLC	783 F.3d 1328	2015	Authored majority	Federal Courts & Civil Procedure; Torts	*Affirmed:* The district court, exercising diversity jurisdiction, should not have applied the rules for granting pre-trial judgment to defendants contained in a D.C. law but instead should have applied the Federal Rules of Civil Procedure. Nonetheless, under Rule 12(b)(6), the plaintiff failed to state a claim for defamation because the alleged defamatory statements were posed in the form of questions rather than statements.
Cannon v. Dist. of Columbia	783 F.3d 327	2015	Authored majority	Federal Courts & Civil Procedure; Pensions & Benefits Law	*Affirmed:* The plaintiffs failed to establish that the D.C. government had violated the Public Salary Tax Act by reducing their D.C. Protective Services Division salaries by the amount of their D.C. Metropolitan Police Department pensions. The district court did not abuse its discretion by declining to exercise jurisdiction over the plaintiffs' novel D.C. law claims.

Case Name	Citation	Year	Role	Subject	Holding
Alaska v. Dep't of Agric.	772 F.3d 899	2014	Authored majority	Environmental Law; Federal Courts & Civil Procedure	*Reversed and remanded:* Despite a six-year statute of limitations, the State of Alaska timely filed a challenge in 2011 to a rule initially promulgated by the U.S. Forest Service in 2001 but repealed in 2005. The Forest Service had reinstated the rule to comply with a 2006 order by the U.S. District Court for the Northern District of California, which caused a new right of action to accrue with a new limitations period.
Mathew Enter. v. NLRB	771 F.3d 812	2014	Authored majority	Government Operations	*Issuance of mandate ordered:* Under *NLRB v. Noel Canning*, 124 S. Ct. 2250 (2014), President Obama's recess appointment of a member to the NLRB during an intra-session Senate recess of 17 days was constitutionally valid.
Nat'l Mining Ass'n v. McCarthy	758 F.3d 243	2014	Authored majority	Administrative Law; Environmental Law	*Reversed and remanded:* EPA and Army Corps of Engineers acted within their statutory authority when they agreed on a process for coordinating their consideration of certain Clean Water Act mining permits. EPA's promulgation of a Final Guidance document related to those permits was not subject to judicial review.
In re Kellogg Brown & Root, Inc.	756 F.3d 754	2014	Authored majority	Federal Courts & Civil Procedure	*Petition for writ of mandamus granted and district court document production order vacated:* The district court erred when it ruled that the attorney-client privilege did not apply to documents from an internal company investigation because the investigation was not conducted solely to obtain legal advice, but also to comply with regulatory requirements and company policy. The remedy of mandamus was appropriate under the circumstances.
Ill. Pub. Telcomms. Ass'n v. FCC	752 F.3d 1018	2014	Authored majority	Communications Law; Federal Courts & Civil Procedure	*Petitions for review denied in part and dismissed in part:* The FCC reasonably determined that states could (but were not required to) order the Bell Operating Companies to provide retroactive refunds to independent payphone operators that were allegedly charged excessive rates. However, the independent operators lacked Article III standing to seek judicial review of the FCC's refusal to order the Bell Operating Companies to disgorge payments received from long-distance carriers because such an order, even if implemented, would not redress the independent operators' alleged injuries.

Case Name	Citation	Year	Role	Subject	Holding
Foote v. Moniz	751 F.3d 656	2014	Authored majority	Labor & Employment Law; National Security	*Affirmed:* An unsuccessful applicant for a national security position at the Department of Energy could not maintain a Title VII claim for racial discrimination against the agency because Supreme Court precedent precluded judicial review of the agency's decision not to certify the applicant as eligible to apply for the sensitive position.
Wu v. Stomber	750 F.3d 944	2014	Authored majority	Securities Law	*Affirmed*: The district court properly dismissed investors' fraud and misrepresentation claims as they failed to allege a material misstatement or omission by the investment fund.
Nat'l Ass'n of Mfrs. v. EPA	750 F.3d 921	2014	Authored majority	Administrative Law; Environmental Law	*Petitions for review denied:* EPA acted reasonably when it promulgated a rule tightening the emissions standards for particulate matter.
Natural Res. Def. Council v. EPA	749 F.3d 1055	2014	Authored majority	Administrative Law; Environmental Law	*Petitions for review granted in part and denied in part:* EPA exceeded its authority when it promulgated one provision of a rule regulating the Portland cement manufacturing industry by allowing a regulated entity to plead, as an affirmative defense to a civil suit alleging a violation of emissions standards, that its equipment had suffered an unavoidable malfunction. EPA acted reasonably when promulgating the other provisions of the rule.
BNSF Ry. Co. v. Surface Transp. Bd.	748 F.3d 1295	2014	Authored majority	Administrative Law; Transportation Law	*Cross-petitions for review denied:* The Surface Transportation Board acted reasonably when setting the maximum rates that interstate railroads could charge a shipper.
Teltschik v. Williams & Jensen, PLLC	748 F.3d 1285	2014	Authored majority	Elections Law; Torts	*Affirmed:* A treasurer of a political action committee could not maintain defamation and negligence claims against a law firm and its lawyers for statements contained in a conciliation agreement between the committee and the Federal Election Commission because such statements were protected by judicial privilege.

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The Constitution of the United States
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Case Name	Citation	Year	Role	Subject	Holding
Cmtys. for a Better Env't v. EPA	748 F.3d 333	2014	Authored majority	Administrative Law; Environmental Law; Federal Courts & Civil Procedure	*Petition for review of primary standards denied; petition for review of secondary standards dismissed:* EPA acted reasonably in retaining primary National Ambient Air Quality Standards (NAAQS) for carbon monoxide. Environmental groups lacked standing to challenge the agency's failure to promulgate secondary standards for the pollutant because they failed to demonstrate that EPA's decision to establish secondary standards for carbon monoxide would reduce global warming below the baseline level that would exist in the absence of such standards.
United States v. Wright	745 F.3d 1231	2014	Authored majority	Criminal Law & Procedure	*Affirmed:* A defendant who had pled guilty to drug possession charges failed to demonstrate on appeal that his plea was coerced or that his counsel was ineffective due to conflicts of interest.
Loving v. IRS	742 F.3d 1013	2014	Authored majority	Administrative Law; Tax Law	*Affirmed*: An Internal Revenue Code provision authorizing the IRS to "regulate the practice of representatives of persons before the Department of the Treasury" does not encompass regulation of tax-return preparers, based on the provision's text, history, structure, and context. Deference to IRS's interpretation under *Chevron* framework was unwarranted because the provision lacks ambiguity and, in the alternative, construing the statute to reach tax-return preparers would be unreasonable.
Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary and Water Comm'n, U.S.-Mex.	740 F.3d 195	2014	Authored majority	Privacy & Records	*Affirmed in part, vacated and remanded in part:* Whether dam report produced for a U.S. agency, allegedly with assistance from a Mexican government agency, constitutes an "intra-agency" document exempt from FOIA requests was a legal issue of first impression. However, because this issue would only be presented if the Mexican agency had actually assisted in the creation of the report, and it was unknown whether such assistance was actually provided, the district court's judgment recognizing exemption was vacated, and the case remanded to resolve that factual issue. The portion of district court's judgment exempting emergency action plans and inundation maps as documents compiled for law enforcement purposes was affirmed.

Case Name	Citation	Year	Role	Subject	Holding
Howard R.L. Cook & Tommy Shaw Found. *ex rel.* Black Emps. of Library of Cong., Inc. v. Billington	737 F.3d 767	2013	Authored majority	Civil Rights Law; Federal Courts & Civil Procedure; Labor & Employment Law	*Affirmed*: The Library of Congress's refusal to grant "employee organization status" to a non-profit organization that was created to help Library employees pursue claims of racial discrimination constituted an injury for Article III standing purposes. However, the complaint failed to allege that this adverse action was in response to any protected conduct engaged in by the plaintiffs and, consequently, failed to state a claim for retaliation under Title VII.
Int'l Bhd. of Teamsters v. DOT	724 F.3d 206	2013	Authored majority	Transportation Law	*Petition for review denied*: Panel filed a corrected opinion to add an alternate ground upon which to uphold the DOT's interpretation of a statutory provision requiring trucks to display a decal certifying compliance with American safety standards if the truck has been "import[ed]" or "introduce[d]" into interstate commerce. Note: The panel's earlier opinion, 714 F.3d 580 (D.C. Cir. 2013), is discussed below.
Park v. Comm'r of IRS	722 F.3d 384	2013	Authored majority	Tax Law	*Reversed and remanded*: A provision of the Internal Revenue Code taxing non-resident aliens on "gains" should not be calculated based on each individual winning bet during a gambling session, particularly where "gains" are construed for purposes of U.S. citizens' taxes as net gains over losses during an entire gambling session.
Int'l Internship Program v. Napolitano	718 F.3d 986	2013	Authored majority	Immigration Law	*Affirmed*: Organization that had helped people from Asian countries find employment in American schools but had not paid its participants any wages was not a qualified employer for purposes of Q-1 cultural exchange visas.
N. Valley Commc'ns, LLC v. FCC	717 F.3d 1017	2013	Authored majority	Communications Law	*Petitions for review denied*: Competitive local exchange companies (CLECs) were not authorized to charge tariffs on long-distance telephone carriers for incoming calls where the recipient was not charged a fee by the CLEC.
U.S. Postal Serv. v. Postal Regulatory Comm'n	717 F.3d 209	2013	Authored majority	Government Operations	*Petitions for review denied*: Because a statute authorizing the U.S. Postal Service (USPS) to offer discounts to customers that presort bulk mail limits the amount of any discounts to no more than the cost that the USPS avoids through presorting, a Postal Regulatory Commission decision that the USPS discounts for presorted mail were too large because they exceeded USPS's savings was upheld.

Case Name	Citation	Year	Role	Subject	Holding
Beaumont Indep. Sch. Dist. v. United States	944 F. Supp. 2d 23 (D.D.C.)	2013	Co-authored joint opinion (district court panel)	Elections Law; Federal Courts & Civil Procedure	*Majority (Kavanaugh, J., Huvelle, J., and Contreras J.), dismissed as moot:* A declaratory judgment action seeking to pre-clear a school district's redistricting plan pursuant to Section 5 of the Voting Rights Act was moot.
Cytori Therapeutics, Inc. v. FDA	715 F.3d 922	2013	Authored majority	Administrative Law; Food & Drug Law	*Petitions for review denied*: An FDA determination that a device is not "substantially equivalent" to another device was properly reviewable directly by the D.C. Circuit, and it was reasonable for the FDA to conclude that a proposed device was not "substantially equivalent" to another device.
Int'l Bhd. of Teamsters v. DOT	714 F.3d 580	2013	Authored majority	Federal Courts & Civil Procedure; Transportation Law	*Petitions for review denied*: The increased competition caused by a DOT pilot program allowing Mexico-domiciled trucking companies to operate in the United States constitutes sufficient injury to American truck drivers for Article III and prudential standing. The pilot program does not violate statutory provision requiring drivers' licenses to be issued by a *state*, because other statutory provisions allow truckers with Mexican licenses to drive in the United States, and statute should be construed as a whole. The Department's interpretation of statutory prohibition against importation or introduction of trucks into *interstate* commerce as not applying to Mexico-U.S. border crossings is reasonable given the statute's omission of *foreign commerce*. The pilot program also satisfies U.S. requirements relating to medical fitness requirements for drivers, drug testing, procedural requirements, and environmental review. Note: For the amended order following the denial of an en banc rehearing, see decision discussed above, 724 F.3d 206 (D.C. Cir. 2013).
United States v. Fareri	712 F.3d 593	2013	Authored majority	Criminal Law & Procedure	*Affirmed in part and remanded in part*: Sentencing enhancement that took into consideration "vulnerable victims" to the convicted offense was appropriate based on fraud victims' inexperience in investing, health problems, and bereavement that made them "particularly susceptible" to appellant's fraud. However, remand was required to correct the amount of restitution and consider an ineffective assistance of counsel claim.

Case Name	Citation	Year	Role	Subject	Holding
Ind. Boxcar Corp. v. R.R. Ret. Bd.	712 F.3d 590	2013	Authored majority	Administrative Law; Pensions & Benefits Law; Workers' Compensation & Social Security	*Vacated and remanded*: Under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, an "employer" that is not itself a railroad must be "under common control" with a railroad. In determining that two companies in a parent-subsidiary relationship were in "common control," the Railroad Retirement Board deviated from its precedents without a reasonable justification, in violation of the APA.
Citizens for Responsibility & Ethics in Wash. v. FEC	711 F.3d 180	2013	Authored majority	Privacy & Records	*Reversed and remanded*: In order to warrant dismissal of a FOIA suit for failure to exhaust administrative remedies, an agency must provide a meaningful opportunity for an administrative appeal. Specifically, the agency must (1) gather and review the documents; (2) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (3) inform the requester that it can appeal whatever portion of the "determination" is adverse.
Farouki v. Petra Int'l Banking Corp.	705 F.3d 515	2013	Authored majority	Business & Corporate Law; Federal Courts & Civil Procedure	*Vacated and remanded*: Efforts by a bank to collect on a defaulted loan did not toll the statute of limitations. However, summary judgment entered by the district court was vacated because the bank did not have notice of, or an opportunity to respond to, the court's *sua sponte* grant of summary judgment.
Am. Road & Transp. Builders Ass'n v. EPA	705 F.3d 453	2013	Authored majority	Environmental Law; Federal Courts & Civil Procedure	*Petition for review dismissed*: The D.C. Circuit was not the appropriate venue for association's suit challenging EPA's approval of California's State Implementation Plan under the CAA, because the Act authorizes petitions for review in the D.C. Circuit only for nationally applicable regulations or for plans determined to have nationwide scope or effect. The association's additional claims challenging EPA regulations were time barred.
Hodge v. FBI	703 F.3d 575	2013	Authored majority	Privacy & Records	*Affirmed*: FOIA requester's speculative allegations that undiscovered documents existed were insufficient to overcome a determination, based on sworn declarations, that the FBI's methodology was "reasonably calculated" to uncover all relevant documents. The FBI properly asserted FOIA exemptions to withhold information about grand jury proceedings, investigators, witnesses, informants, suspects, and confidential sources.

Case Name	Citation	Year	Role	Subject	Holding
Vann v. Dep't of Interior	701 F.3d 927	2012	Authored majority	Federal Courts & Civil Procedure; Indian Law	*Reversed:* In a suit against the Principal Chief of the Cherokee Nation, acting in his official capacity, the Cherokee Nation was not a required party under Federal Rule of Civil Procedure 19.
Judicial Watch, Inc. v. Soc. Sec. Admin.	701 F.3d 379	2012	Authored majority	Privacy & Records	*Affirmed*: List of employers that received the most letters from the Social Security Administration indicating that their employees' names did not match social security numbers on W-2 forms was exempt from a FOIA request because the records were protected by another statute.
Chevron Corp. v. Weinberg Grp.	682 F.3d 96	2012	Authored majority	Federal Courts & Civil Procedure	*Vacated and remanded*: Additional proceedings were necessary to determine whether the crime-fraud exception to the attorney-client privilege and the work product doctrine still applied in ongoing litigation after the district court decision identifying the fraud had been reversed on appeal.
United States v. Glover	681 F.3d 411	2012	Authored majority	Criminal Law & Procedure	*Affirmed*: There was no reversible error in the conviction of three individuals convicted of drug offenses when there was no serious risk that a joint trial would compromise a defendant's rights or prevent the jury from making a reliable judgment. The searches of one of the defendant's homes did not violate the Fourth Amendment, there was no reversible error related to law enforcement's use of a wiretap, and the district court's evidentiary and jury-related decisions were either harmless error or within the trial court's discretion.
Nat'l Ass'n of Indep. Labor v. Fed. Labor Relations Auth.	680 F.3d 839	2012	Authored majority	Labor & Employment Law	*Petition for review denied*: The Federal Labor Relations Authority correctly decided that an agreement between two unions and a navy supervisor of shipbuilding was contrary to law and therefore could be repudiated because it defined the privileges of members of a third union that was not a party to the agreement.
Mobil Pipe Line Co. v. FERC	676 F.3d 1098	2012	Authored majority	Energy & Utilities Law	*Petition for review granted, order vacated and remanded*: FERC erred in concluding that the market for a crude oil pipeline running from Illinois to Texas, which transported approximately 3% of oil from western Canada, was not competitive and therefore subject to capped pipeline rates.
Mfrs. Ry. Co. v. Surface Transp. Bd.	676 F.3d 1094	2012	Authored majority	Administrative Law; Transportation Law	*Petition for review granted, order vacated and remanded*: Surface Transportation Board (STB) decision was arbitrary and capricious when the STB did not reasonably explain and justify why the "entire-system exception" to the requirement that the railroad pay its employees dismissal allowances did not apply to the facts of the case.

Case Name	Citation	Year	Role	Subject	Holding
Metroil, Inc. v. ExxonMobil Oil Corp.	672 F.3d 1108	2012	Authored majority	Business & Corporate Law; Contracts Law	*Affirmed*: Sale of gas station did not violate D.C. or federal law related to franchising of gas stations or D.C. law prohibiting contract assignments that materially increase the risk or burden on the non-assigning party.
Coal. for Mercury-Free Drugs v. Sebelius	671 F.3d 1275	2012	Authored majority	Federal Courts & Civil Procedure; Food & Drug Law	*Affirmed*: Plaintiffs lacked standing to sue the FDA and HHS in suit alleging the agencies violated a duty to ensure the safety of vaccines. The plaintiffs did not have a "certainly impending" or even likely risk of harm when they could elect not to receive the vaccines. Any reputational harm to plaintiff members of the medical community was not legally attributable to the government because the federal agencies did not force physicians to administer vaccines and did not require patients to receive such vaccines. The existence of a price differential between the challenged vaccines and readily available alternative vaccines was insufficient to provide standing.
Veritas Health Servs., Inc. v. NLRB	671 F.3d 1267	2012	Authored majority	Administrative Law; Labor & Employment Law	*Petition for review denied, cross-application granted*: Decision from the NLRB that defendant committed an unfair labor practice by refusing to certify nurses' union was not arbitrary and capricious, and the alleged pro-union activities of supervising nurses did not require invalidation of the union election.
Keohane v. United States	669 F.3d 325	2012	Authored majority	Tax Law; Workers' Compensation & Social Security	*Affirmed*: Taxpayer's lawsuit to recover expenses incurred in disputing the IRS's alleged over-withholding of Social Security benefits was not timely filed.
Bakhtiar v. Islamic Republic of Iran	668 F.3d 773	2012	Authored majority	International Law; Torts	*Affirmed*: The National Defense Authorization Act for Fiscal Year 2008 set forth the exclusive procedures for plaintiffs with pending cases under the rubric of the Foreign Sovereign Immunities Act to obtain punitive damages against foreign sovereigns, and because plaintiffs did not follow those procedures, they were not entitled to seek punitive damages in their lawsuit against Iran.

Case Name	Citation	Year	Role	Subject	Holding
Dep't of Navy v. Fed. Labor Relations Auth.	665 F.3d 1339	2012	Authored majority	Government Operations; Labor & Employment Law	*Vacated and remanded*: Additional proceedings before the Federal Labor Relations Authority were necessary to determine whether water from onsite taps at a naval facility was safe to drink, and, if the water was safe. The Navy had no duty to bargain with the union before discontinuing its supply of free bottled water because federal appropriations law prohibited the Navy from expending appropriated funds for federal employees' "personal expenses," and bottled water generally is treated as a personal expense.
United States v. Franklin	663 F.3d 1289	2011	Authored majority	Criminal Law & Procedure	*Affirmed*: Criminal defendant claiming ineffective assistance of counsel after being convicted for his role in a drug ring could not show a reasonable probability that he would have accepted a plea deal, and there was no basis in the record to disturb the district court's finding that certain testimony was not credible.
Bluman v. FEC	800 F. Supp. 2d 281 (D.D.C.), *aff'd*, 565 U.S. 1104 (2012)	2011	Authored majority (district court panel)	Elections Law; Freedom of Speech	*Defendant's motion to dismiss granted, plaintiffs' motion for summary judgment denied:* A provision of the Bipartisan Campaign Reform Act prohibiting certain foreign nationals from making political contributions did not violate the First Amendment. Note: The panel decision was later affirmed by the Supreme Court in *Bluman v. FEC*, 565 U.S. 1104 (2012).
Univ. of Tex. M.D. Anderson Cancer Ctr. v. Sebelius	650 F.3d 685	2011	Authored majority	Administrative Law; Healthcare Law	*Reversed and remanded in part*: HHS improperly imposed a new requirement on the plaintiff hospital, without adequate notice, requiring it prove the net financial impact of new drugs, rather than their gross cost. But HHS reasonably interpreted, and therefore did not misapply, Medicare's statutory formula in determining the level of reimbursement for the hospital's outpatient costs.
United States v. Brice	649 F.3d 793	2011	Authored majority	Criminal Law & Procedure	*Affirmed*: Defendant sentenced to 25 years' imprisonment for various federal sexual abuse crimes did not have a right under the First Amendment to access material witness proceedings regarding his victims because, even assuming that amendment applied, closure of the record was the only way to protect the sensitive and intensely personal information that it contained. Neither the Sixth Amendment nor federal or common law provided that right of access either.

Case Name	Citation	Year	Role	Subject	Holding
Otay Mesa Prop., L.P. v. Dep't of Interior	646 F.3d 914	2011	Authored majority	Environmental Law	*Reversed and remanded*: U.S. Fish and Wildlife Service did not reasonably explain how one sighting of an endangered species on plaintiffs' property demonstrated that the endangered species "occupied" the property such that it constituted a "critical habitat" for the endangered species.
Knop v. Mackall	645 F.3d 381	2011	Authored majority	Federal Courts & Civil Procedure	*Reversed in part:* Defendants' argument for removing the case to federal district court was reasonable, and the district court therefore erred in awarding the plaintiff attorney's fees after deciding to remand the case back to the D.C. Superior Court.
Companhia Brasileira Carbureto de Calicio v. Applied Indus. Materials Corp.	640 F.3d 369	2011	Authored majority	Federal Courts & Civil Procedure	*Affirmed in part and question certified*: The allegation that the defendant corporations conspired with a trade association located in the District of Columbia was insufficient to support personal jurisdiction. Whether the District of Columbia's personal jurisdiction statute provided an exception that would support jurisdiction was certified as a question for the D.C. Court of Appeals.
United States v. Smith	640 F.3d 358	2011	Authored majority	Criminal Law & Procedure	*Affirmed in part, vacated in part, and remanded*: The government's use of letters from a state court clerk to prove the defendant's prior felony conviction were testimonial, and the letters' admission without the defendant having the opportunity to cross-examine the clerk violated the Sixth Amendment's Confrontation Clause, requiring the defendant's conviction on the count relying on that evidence to be vacated. Nevertheless, the testimony of an FBI agent about the meaning of slang the defendant used was admissible only as expert testimony, but any error was harmless. Other objected-to testimony was not based on hearsay and was therefore proper. The district court properly instructed the jury to disregard other improper police testimony, and the court did not violate the Sixth Amendment by finding that the defendant had a prior drug conviction and relying on that fact to double his mandatory minimum sentence.
United States v. Papagno	639 F.3d 1093	2011	Authored majority	Criminal Law & Procedure	*Reversed*: The costs of an internal investigation conducted by the Naval Research Laboratory into its employee's theft of computer equipment did not constitute "necessary … expenses incurred during participation in the investigation or prosecution of [an] offense" for purposes of the Mandatory Victims Restitution Act. The district court therefore erred in ordering restitution under the Act.

Case Name	Citation	Year	Role	Subject	Holding
Uthman v. Obama	637 F.3d 400	2011	Authored majority	National Security	*Reversed and remanded, with instructions to deny the petition for a writ of habeas corpus*: To show that the petitioner detainee was more likely than not a part of al Qaeda, and therefore subject to detention under the AUMF, the Government did not have to demonstrate that he belonged to the terrorist organization's command structure. The detainee's "actions and recurrent entanglement" with al Qaeda sufficed to establish that he was more likely than not a part of the organization.
Hoopa Valley Tribe v. FERC	629 F.3d 209	2010	Authored majority	Energy & Utilities Law	*Petition for review denied*: FERC appropriately applied the "unanticipated, serious impacts" standard to deny a request by the Hoopa Valley Tribe that the agency impose conditions on the annual licenses issued to the operator of a hydroelectric project in order to preserve the affected river's trout fishery.
Vatel v. All. of Auto. Mfrs.	627 F.3d 1245	2011	Authored majority	Civil Rights Law; Labor & Employment Law	*Affirmed*: Plaintiff employee failed to establish that the defendant CEO's decision to fire her allegedly because of their dysfunctional work relationship was pretext for race or gender discrimination. Defendants were therefore entitled to summary judgment on plaintiff's discrimination claims under the D.C. Human Rights Act.
Riordan v. SEC	627 F.3d 1230, *abrogated by* Kokesh v. SEC, 137 S. Ct. 1635 (2017)	2010	Authored majority	Securities Law	*Petition for review denied*: Substantial evidence supported the SEC's findings that the operator of several brokerage firms paid New Mexico's state treasurer kickbacks in return for transactions involving sales of state securities. Evidence that the operator helped to unravel one of the treasurer's corrupt deals was irrelevant, and the five-year statute of limitations under 28 U.S.C. § 2462 for certain actions by the federal government did not cover disgorgement nor the SEC's cease-and-desist order. Note: The panel decision was later abrogated by *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).
Apache Corp. v. FERC	627 F.3d 1220	2010	Authored majority	Administrative Law; Energy & Utilities Law	*Petition for review denied in part and remanded:* A natural gas producer waived appellate review of its claim that FERC discriminated against it when approving a lease for an interstate pipeline to transport natural gas over intrastate pipeline. FERC nevertheless lacked a reasoned explanation of its decision after failing to apply the standards set forth in the agency's precedents.

Case Name	Citation	Year	Role	Subject	Holding
Blumenthal v. FERC	613 F.3d 1142	2010	Authored majority	Administrative Law; Energy & Utilities Law	*Petition for review denied*: FERC was not required to hold an evidentiary hearing to assess a consultant's choice of peer companies in determining the reasonableness of an electric utility's proposed executive compensation. Nor was the Commission's approval of the executive's compensation arbitrary and capricious because the consultant's choice of comparison group was not unreasonable, the Commission properly relied on estimated compensation, and the economic downturn did not necessitate a different compensation package.
In re Any and All Funds or Other Assets in Brown Bros. Harriman & Co. Account # 8870792 in the Name of Tiger Eye Invs. Ltd.	613 F.3d 1122	2010	Authored majority	Criminal Law & Procedure	*Affirmed*: In order for a district court to freeze "property subject to a foreign forfeiture or confiscation judgment" pursuant to 28 U.S.C. § 2467(d)(3) the foreign court must already have entered a forfeiture judgment.
Recording Indus. Ass'n of Am., Inc. v. Librarian of Cong.	608 F.3d 861	2010	Authored majority	Administrative Law; Intellectual Property Law	*Affirmed:* The Copyright Royalty Board appropriately took market evidence into account and otherwise acted reasonably when instituting a 1.5 percent per month late fee for late royalty payments. The Board also reasonably weighed the costs and benefits in deciding to impose a penny-rate royalty structure for cell phone ringtones.
Schaefer v. McHugh	608 F.3d 851	2010	Authored majority	Administrative Law; Military and Veterans Law	*Affirmed*: The U.S. Army Board for Correction of Military Records reasonably determined that the plaintiff was not validly discharged from the Army, notwithstanding an "administrative foul-up" that resulted in him temporarily obtaining a discharge. As a result, he was not entitled to have the records relating to his fraudulently obtained discharge expunged. The plaintiff also failed to establish that he suffered any prejudice as a result of several alleged procedural lapses.
RLI Ins. Co. v. All Star Transp. Inc.	608 F.3d 848	2010	Authored majority	Business & Corporate Law; Transportation Law	*Affirmed*: The $10,000 face value of a surety bond limited the surety's liability for a transportation broker's default to $10,000 on all claims combined, rather than on each claim, because the standardized federal form governing those bonds clearly indicated that the surety's liability would be "discharged" when payments under the bond "amount in the aggregate" to $10,000, and would in no event exceed that amount.

Case Name	Citation	Year	Role	Subject	Holding
Action Alliance of Senior Citizens v. Sebelius	607 F.3d 860	2010	Authored majority	Healthcare Law; Workers' Compensation & Social Security	*Affirmed:* The Social Security Act did not entitle Medicare Part D participants to a waiver of the government's recovery of Medicare Part D premium refunds erroneously paid out by the Social Security Administration because the Act specifically limits those waivers to overpaid Social Security benefits.
Wash. Gas Light Co. v. FERC	603 F.3d 55	2010	Authored majority	Energy & Utilities Law	*Petition for review denied*: FERC satisfactorily ensured on remand that a proposed expansion of a natural gas pipeline would not result in an increased risk of unsafe natural gas leakage.
Republican Nat'l Committee v. FEC	698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 561 U.S. 1040	2010	Authored majority (district court panel)	Elections Law; Freedom of Speech	*Defendant's motion for summary judgment granted, plaintiffs' motion for summary judgment denied:* A provision of the Bipartisan Campaign Reform Act limiting the receipt and spending of "soft money" by national political parties did not violate the First Amendment. Note: The panel decision was subsequently affirmed by the Supreme Court in *Republican Nat'l Committee v. FEC,* 561 U.S. 1040 (2010).
Pasternack v. Nat'l Transp. Safety Bd.	596 F.3d 836	2010	Authored majority	Administrative Law; Transportation Law	*Petition for review granted and decision vacated and remanded:* The National Transportation Safety Board lacked substantial evidence that a pilot's behavior precluded a specimen collector from informing him that his departure from a drug-testing site would constitute a refusal, justifying the revocation of his airman certificates.
Stewart v. St. Elizabeths Hosp.	589 F.3d 1305	2010	Authored majority	Civil Rights Law; Labor & Employment Law	*Affirmed:* The evidence supported the district court's grant of summary judgment and judgment as a matter of law where a hospital employee failed to produce sufficient evidence that she notified her employer of her disability or that hospital had denied her request for an accommodation.
Nyunt v. Chairman, Broad. Bd. of Governors	589 F.3d 445	2009	Authored majority	Government Operations; Labor & Employment Law	*Affirmed:* District court properly dismissed employment claim brought by employee of government agency under the APA, as such a claim should have been brought under the procedures set up by the Civil Service Reform Act of 1978, and employee's claim did not fit within the narrow exception to statutory preclusion of judicial review set forth in *Leedom v. Klyne*, 358 U.S. 184 (1958).

Case Name	Citation	Year	Role	Subject	Holding
Winslow v. FERC	587 F.3d 1133	2009	Authored majority	Federal Courts & Civil Procedure	*Affirmed:* Motion for mandatory prejudgment interest, made two-and-a-half-years after the entry of judgment, was properly denied as an untimely motion to alter or amend the judgment which, under Federal Rule of Civil Procedure 59(e), would have had to have been filed within ten (now twenty-eight) days after entry of the judgment.
Camden Cty. Council on Econ. Opportunity v. HHS	586 F.3d 992	2009	Authored majority	Administrative Law; Healthcare Law	*Affirmed:* HHS did not act arbitrarily or capriciously in terminating Head Start grant to Camden, New Jersey-area organization for failing to rectify safety-related deficiencies on playgrounds at Camden locations, with the agency providing the organization adequate notice of the need to address such deficiencies.
AD HOC Telecom. Users Committee v. FCC	572 F.3d 903	2009	Authored majority	Administrative Law; Communications Law	*Petitions denied:* FCC did not act arbitrarily and capriciously in granting partial forbearance relief from regulations that applied to incumbent local exchange carriers that controlled the special access broadband lines to most businesses.
Stilwell v. Office of Thrift Supervision	569 F.3d 514	2009	Authored majority	Business & Corporate Law; Federal Courts & Civil Procedure; Securities Law	*Petition denied:* Plaintiff had standing to bring his claim, and the claim was ripe for adjudication. However, the challenged Office of Thrift Supervision regulation allowing subsidiaries of mutual holding companies to limit the holdings of minority shareholders to ten percent of subsidiaries' total minority stock was not arbitrary and capricious.
Landstar Exp. Am., Inc. v. Fed. Mar. Comm'n	569 F.3d 493	2009	Authored majority	Administrative Law; Transportation Law	*Petition granted, order vacated and remanded:* Shipping Act's requirement that "Ocean Transportation Intermediaries" obtain licenses from the Federal Maritime Commission did not extend to agents of those intermediaries, unless such agents met the relevant statutory definition. Although sound policy, the Commission's contrary conclusion ran counter to the plain language of the statute.
Westar Energy, Inc. v. FERC	568 F.3d 985	2009	Authored majority	Energy & Utilities Law	*Petitions denied*: FERC did not act arbitrarily and capriciously in applying "point of sale" test to determine price for energy wholesalers, where alternative "sink-based" test would require complex administrative monitoring.

Case Name	Citation	Year	Role	Subject	Holding
Montanans for Multiple Use v. Barbouletos	568 F.3d 225	2009	Authored majority	Administrative Law; Environmental Law	*Affirmed:* Montana residents' complaints against the National Forest Service and other federal agencies pertaining to the Service's management of a federally owned forest failed to allege any specific act or failure to act that violated a federal law or policy or was arbitrary or capricious. Plaintiffs' complaint was better directed to the legislative or executive branches, as their grievance was with legally permissible policy decisions made by Congress and the Service.
Baptist Mem'l Hosp.-Golden Triangle v. Sebelius	566 F.3d 226	2009	Authored majority	Healthcare Law	*Affirmed:* Certain reimbursement claims filed by hospitals were properly denied by the Provider Reimbursement Review Board where the hospitals failed to comply with the Board's administrative reinstatement procedures.
National Tel. Co-op Ass'n v. FCC	563 F.3d 536	2009	Authored majority	Administrative Law; Communications Law	*Petition denied:* FCC analysis regarding conditions under which wireline telecommunications carriers were required to transfer telephone numbers to wireless carriers was not arbitrary and capricious, and the FCC's analysis complied with the Regulatory Flexibility Act.
Grosdidier v. Chairman, Broad. Bd. of Governors	560 F.3d 495	2009	Authored majority	Government Operations; Labor & Employment Law	*Affirmed:* District court properly dismissed employment claim brought by employee of government agency under the APA, as the Civil Service Reform Act of 1978 provided the exclusive means by which employees can challenge their personnel actions.
United States v. Washington	559 F.3d 573	2009	Authored majority	Criminal Law & Procedure	*Affirmed:* Search of an automobile was reasonable under the Fourth Amendment where suspect appeared to be extremely nervous and had moved his hand and body as if to reach under his seat and lied about why he did so.
E. Niagara Pub. Power Alliance and Pub. Power Coal. v. FERC	558 F.3d 564	2009	Authored majority	Administrative Law; Energy & Utilities Law	*Petition denied:* FERC's decision to issue new 50-year license to New York Power Authority for operating the Niagara Power Project was not arbitrary and capricious and supported by substantial evidence, despite several concerns raised by several Western New York communities.
City of Anaheim, Cal. v. FERC	558 F.3d 521	2009	Authored majority	Energy & Utilities Law	*Petitions granted, order vacated and remanded:* The plain language of the Federal Power Act prohibited FERC from applying new electricity rates retroactively.

Case Name	Citation	Year	Role	Subject	Holding
Baloch v. Kempthorne	550 F.3d 1191	2008	Authored majority	Civil Rights Law; Labor & Employment Law	*Affirmed*: Summary judgment for federal employer in employee's workplace age, race, and religious discrimination challenge was proper because employee failed to present sufficient evidence that he suffered an adverse employment action or, even if he did, that any such action was due to discrimination.
Raymond F. Kravis Ctr. for Performing Arts, Inc. v. NLRB	550 F.3d 1183	2008	Authored majority	Labor & Employment Law	*Petition denied, cross application granted:* Substantial evidence supported the NLRB's finding that employer engaged in unfair labor practice when it made a unilateral change to the bargaining unit and withdrew recognition of its workers' union.
Long v. Howard Univ.	550 F.3d 21	2008	Authored majority	Civil Rights Law; Federal Courts & Civil Procedure	*Affirmed*: University did not waive its statute of limitations defense by failing to assert it in its opposition to summary judgment, and jury instructions on statute of limitations were not plainly erroneous.
United States v. Spencer	530 F.3d 1003	2008	Authored majority	Criminal Law & Procedure	*Affirmed:* Warrant to search defendant's house was not supported by sufficient evidence officer had noticed defendant was dealing drugs in front of his house and defendant had been arrested with 70 small ziplock bags of heroin in his car.
United States v. Settles	530 F.3d 920	2008	Authored majority	Criminal Law & Procedure	*Affirmed:* The district court did not reversibly err by considering conduct of which the defendant had been acquitted when determining the defendant's sentence.
Rossello *ex rel.* Rossello v. Astrue	529 F.3d 1181	2008	Authored majority	Workers' Compensation & Social Security	*Reversed and remanded with instructions:* The Social Security Administration's conclusion that a mentally ill adult had engaged in "substantial gainful activity" disqualifying her from Social Security benefits was not supported by the evidence.
BNSF Ry. Co. v. Surface Transp. Bd.	526 F.3d 770	2008	Authored majority	Administrative Law; Transportation Law	*Petitions denied:* The Surface Transportation Board adequately explained its changes to its rail rate-setting methodology, and those changes were reasonable.
Kay v. FCC	525 F.3d 1277	2008	Authored majority	Communications Law	*Affirmed:* Expired radio station licenses could not be assigned to an assignee.

Case Name	Citation	Year	Role	Subject	Holding
Adeyemi v. Dist. of Columbia	525 F.3d 1222	2008	Authored majority	Civil Rights Law; Labor & Employment Law	*Affirmed:* A hearing-impaired applicant who was not hired for employment with the District of Columbia failed to produce sufficient evidence that the District intentionally discriminated against him because of his disability.
Clark Cty., Nev. v. FAA	522 F.3d 437	2008	Authored majority	Administrative Law; Transportation Law	*Petition granted, agency decision vacated, and remanded:* The FAA failed to provide a reasoned explanation for its conclusion that the construction of certain wind turbines would not obstruct the airspace of a nearby airport or interfere with the airport's radar systems.
Harbury v. Hayden	522 F.3d 413	2008	Authored majority	Federal Courts & Civil Procedure; National Security	*Affirmed:* The political question doctrine and the doctrine of sovereign immunity barred the plaintiff's claims for damages arising from the alleged torture and killing of the plaintiff's husband by Guatemalan army officers allegedly affiliated with the CIA.
Brady v. Office of the Sergeant at Arms	520 F.3d 490	2008	Authored majority	Civil Rights Law; Labor & Employment Law	*Affirmed:* The plaintiff failed to present sufficient evidence for a reasonable jury to conclude that a public employer's proffered reason for demoting an employee—namely, that the employee had violated the employer's sexual harassment policy—was a pretext for race discrimination.
United Food & Commercial Workers, AFL-CIO v. NLRB	519 F.3d 490	2008	Authored majority	Labor & Employment Law	*Petitions denied; enforcement granted:* The NLRB reasonably concluded that, although a retailer had no general duty to bargain with a particular union, that retailer was still required to bargain with that union on certain specific issues.
Essex Ins. Co. v. Doe *ex rel.* Doe	511 F.3d 198	2008	Authored majority	Contract Law	*Affirmed in part and reversed in part:* A person assigned rights under an insurance liability policy was entitled to recover $300,000 from the insurer, minus certain investigation and defense costs the insurer incurred.
United States v. Bullock	510 F.3d 342	2007	Authored majority	Criminal Law & Procedure	*Affirmed:* A police officer did not violate the Fourth Amendment by ordering the defendant to exit the vehicle he was driving or by frisking the defendant when the officer had a reasonable suspicion that the defendant had stolen the vehicle.
Nuclear Info. & Res. Serv. v. NRC	509 F.3d 562	2007	Authored majority	Energy & Utilities Law; Environmental Law	*Petition denied:* The Nuclear Regulatory Commission did not violate federal law by granting a license to a nuclear facility.

Case Name	Citation	Year	Role	Subject	Holding
Mills v. Giant of Md., LLC	508 F.3d 11	2007	Authored majority	Federal Courts & Civil Procedure; Food & Drug Law; Torts	*Affirmed:* The district court correctly dismissed a putative class action that alleged that certain milk sellers had unlawfully failed to warn purchasers that consuming milk could result in temporary digestive maladies.
Hester v. Dist. of Columbia	505 F.3d 1283	2007	Authored majority	Civil Rights Law; Government Operations	*Reversed and remanded with directions:* The District of Columbia was not required to provide additional special education services to a disabled student after the State of Maryland had already provided that student with special education services.
Hundley v. Dist. of Columbia	494 F.3d 1097	2007	Authored majority	Civil Rights Law; Torts	*Reversed and remanded:* Whereas the estate of a motorist shot and killed by a police officer was entitled to a new trial on its assault and battery and excessive force claims after the jury rendered an impermissibly inconsistent verdict in the defendants' favor on those claims, the jury's verdict in the estate's favor on its negligence claim could not stand.
E.I. Du Pont de Nemours & Co. v. NLRB	489 F.3d 1310	2007	Authored majority	Labor & Employment Law	*Petitions for review denied, cross-petition for enforcement granted:* The NLRB correctly concluded that (1) an employer had permissibly declared an impasse with respect to the overall collective bargaining agreement; and (2) the employer had wrongfully declared an impasse with respect to certain subcontracting negotiations.
Doe *ex rel.* Tarlow v. Dist. of Columbia	489 F.3d 376	2007	Authored majority	Civil Rights Law; Healthcare Law	*Reversed in part:* The District of Columbia's policy for authorizing surgeries for intellectually disabled persons who lack the mental capacity to make medical decisions for themselves did not violate the Due Process Clause.
United States v. Lathern	488 F.3d 1043	2007	Authored majority	Criminal Law & Procedure; Federal Courts & Civil Procedure	*Affirmed:* The district court did not reversibly err by excluding expert witness testimony concerning the amount of time it would have taken a criminal defendant to walk from one point to another because the witness did not know the actual distance between those two points.
United States v. Bryson	485 F.3d 1205	2007	Authored majority	Criminal Law & Procedure	*Affirmed:* The district court did not err when calculating a restitution award in a Medicare fraud case.
Transcont'l Gas Pipe Line Corp. v. FERC	485 F.3d 1172	2007	Authored majority	Energy & Utilities Law	*Petition denied:* A natural gas pipeline owner's challenge to a FERC order requiring the owner to pay money to a different company lacked merit.

The House of Representatives and Senate Explained

Congressional Procedure

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Richard A. Arenberg

Foreword by Alan S. Frumin

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N. Baja Pipeline, LLC v. FERC	483 F.3d 819	2007	Authored majority	Administrative Law; Energy & Utilities Law	*Petition denied:* FERC reasonably rejected a pipeline's proposed shipping rate formula and adequately explained its reasons for rejecting that formula.
Watts v. SEC	482 F.3d 501	2007	Authored majority	Federal Courts & Civil Procedure	*Case transferred:* Because the Court of Appeals lacked jurisdiction to adjudicate the petitioner's challenge to a particular decision by the Securities & Exchange Commission, his petition had to be transferred to the district court.
United States v. Martinez	476 F.3d 961	2007	Authored majority	Criminal Law & Procedure	*Affirmed:* A jury verdict finding a defendant guilty of certain drug crimes was valid, and there was no reversible error in the trial court's evidentiary decisions or jury instructions.
Steven R. Perles, P.C. v. Kagy	473 F.3d 1244	2007	Authored majority	Contracts Law	*Affirmed in part, reversed in part, vacated in part, and remanded:* Two attorneys did not create an enforceable verbal contract governing the younger attorney's work on two lawsuits, but the younger attorney was nonetheless potentially entitled to equitable compensation for her work.
Baker & Hostetler LLP v. Dep't of Commerce	471 F.3d 1355	2006	Single-judge order	Federal Courts & Civil Procedure	*Motion denied:* Judge Kavanaugh's prior service in the executive branch did not mandate his recusal from a FOIA case.
Nat'l Fuel Gas Supply Corp. v. FERC	468 F.3d 831	2006	Authored majority	Administrative Law; Energy & Utilities Law	*Petition granted, orders vacated, case remanded:* FERC acted arbitrarily and capriciously when it issued an order significantly expanding the scope of certain standards regulating natural gas pipelines.

Table 2. Controlling Opinions Authored by Judge Kavanaugh for Which Another Judge Wrote a Concurrence or Dissent

Case Name	Citation	Year	Role	Subject	Holding
FTC v. Boehringer Ingelheim Pharm., Inc.	892 F.3d 1264	2018	Authored majority	Antitrust Law; Federal Courts & Civil Procedure	*Majority (Kavanaugh J.), affirmed*: Documents subpoenaed by the FTC from a pharmaceutical company as part of antitrust investigation of a reverse-payment-patent settlement were protected by attorney-client privilege. *Concurring (Pillard, J.)*: District court did not commit clear error in finding that the attorney-client privilege applied to the documents.
United States v. Lee	888 F.3d 503	2018	Authored majority	Criminal Law & Procedure	*Majority (Kavanaugh, J.), appeal dismissed*: Defendant's waiver of right to appeal sentence in plea agreement was knowing, voluntary, and intelligent—and therefore enforceable—even though the district court failed to discuss the waiver at the plea colloquy, as required by Federal Rule of Criminal Procedure 11(b)(1)(N). *Dissenting (Rogers, J.)*: Appeal was not barred by waiver because the failure to inform the defendant of the appellate waiver during the plea colloquy constituted plain error that affected the defendant's substantial rights.
Casey v. McDonald's Corp.	880 F.3d 564	2018	Authored majority	Torts	*Majority (Kavanaugh, J.), affirmed in part and reversed in part*: In a negligence case under D.C. law regarding a drunken brawl, plaintiffs stated a claim against the bars that allegedly over-served the assailant, but did not state a claim against the fast-food restaurant where the altercation began. *Concurring (Wilkins, J.)*: District court was incorrect to presume that establishing the requisite standard of care for facilities required evidence of national practices, as opposed to only comparable local practices.

Case Name	Citation	Year	Role	Subject	Holding
Multicultural Media, Telecom & Internet Council v. FCC	873 F.3d 932	2017	Authored majority	Administrative Law; Communications Law	*Majority (Kavanaugh, J.), petition for review denied*: Statute did not compel FCC to require broadcasters to translate emergency alerts into languages others than English, and FCC's decision to gather more information before imposing a translation requirement was reasonably explained and not arbitrary. *Concurring in part and dissenting in part (Millett, J.)*: FCC's decision to gather still more information before acting on the translation issue, even after spending a decade studying the problem and potential solutions, was arbitrary and capricious.
Mexichem Fluor, Inc. v. EPA	866 F.3d 451	2017	Authored majority	Administrative Law; Environmental Law	*Majority (Kavanaugh, J.), petition for review granted in part and denied in part*: EPA acted beyond its statutory authority by requiring manufacturers to replace hydrofluorocarbons (HFCs) with other substances because HFCs were not ozone-depleting substances under the CAA. However, EPA's decision to remove HFCs from the list of safe substitutes for ozone-depleting substances was not arbitrary and capricious. *Concurring in part and dissenting in part (Wilkins, J.)*: EPA's HFC regulation should have been upheld under the *Chevron* standard of deference because the statutory grant of authority was ambiguous, and EPA's rule interpreting the statute was not unreasonable.
Bais Yaakov of Spring Valley v. FCC	852 F.3d 1078	2017	Authored majority	Communications Law	*Majority (Kavanaugh, J.), vacated and remanded*: FCC lacked authority under the Junk Fax Prevention Act to require solicited fax advertisements contain opt-out notices. *Dissenting (Pillard, J.)*: FCC reasonably concluded, in implementing Congress's ban on unsolicited fax ads, that opt-out notices were needed on all fax ads so that recipients are easily able to withdraw their permission.

Case Name	Citation	Year	Role	Subject	Holding
Johnson v. Interstate Mgmt. Co., LLC	849 F.3d 1093	2017	Authored majority	Civil Rights Law; Labor & Employment Law	*Majority (Kavanaugh, J.), affirmed:* The anti-retaliation provision of the Occupational Safety and Health Act does not establish a private cause of action in favor of employees alleging discrimination, and the plaintiff failed to present sufficient evidence in support of his retaliation claim, as the evidence did not suggest the employer's explanation for firing the plaintiff was pretextual. *Concurring in part and concurring in the judgment (Millett, J.):* The dissent disagreed with much of how the majority analyzed the summary judgment record, but agreed with the statement in the opinion that the employee did not provide sufficient evidence from which a reasonable jury could have concluded that the employer did not "honestly and reasonably believe[]" he engaged in misconduct.

Case Name	Citation	Year	Role	Subject	Holding
PHH Corp. v. CFPB	839 F.3d 1, *vacated en banc*, 881 F.3d 75 (D.C. Cir. 2018)	2017	Authored majority	Government Operations	*Majority (Kavanaugh, J.), vacated and remanded:* The structure of the independent CFPB violated Article II of the Constitution as the agency's single director was not removable by the President at will. Further, the agency violated due process by retroactively applying a new interpretation of the Real Estate Settlement Procedures Act to the petitioner without fair notice, and the Dodd-Frank Act's three-year statute of limitations applied to the CFPB's administrative and judicial enforcement actions below. *Concurring (Randolph, J.):* The underlying administrative hearing over which the administrative law judge (ALJ) presided was unconstitutional because the ALJ was not appointed by the President, "Courts of Law," or the head of a "department," as is required by Article II for the appointment of "inferior Officers." *Concurring in part and dissenting in part (Henderson, J.):* The petitioner's statutory claims entitled it to relief. The court unnecessarily reached the petitioner's constitutional challenge. Note: The panel decision was subsequently vacated by the D.C. Circuit sitting en banc, 881 F.3d 75 (D.C. Cir. 2018). The en banc decision is discussed below.

Case Name	Citation	Year	Role	Subject	Holding
Verizon New England Inc. v. Nat'l Labor Relations Bd.	826 F.3d 480	2016	Authored majority	Administrative Law; Labor & Employment Law	*Majority (Kavanaugh, J.), petition for review granted and cross-application for enforcement denied:* The NLRB acted unreasonably in overturning arbitration decision finding that the employer did not violate a collective bargaining agreement (CBA) when it required that employees cease displaying pro-union signs on their vehicles while parked on the employer's private property, as the arbitration decision was not clearly repugnant to the NLRA. *Concurring in part and concurring in the judgment (Henderson, J.):* The concurring opinion expressed doubt as to the majority's description of the arbitration deferral standard of the NLRB, opining that the court should ask only whether the arbitration decision is susceptible of an interpretation consistent with the NLRA. *Concurring in part and dissenting in part (Srinivasan, J.):* The majority's explanation of the legal standards governing the NLRB's review of an arbitration decision's interpretation of a CBA was correct. However, the dissent disagreed with the majority's conclusion that the NLRB acted unreasonably in setting aside the arbitration decision.
United States v. Nwoye	824 F.3d 1129	2016	Authored majority	Criminal Law & Procedure	*Majority (Kavanaugh, J.), reversed and remanded:* Defendant was prejudiced by her trial counsel's failure to introduce expert testimony on battered woman syndrome (BWS), evidence of which could be relevant to her defense of duress. *Dissenting (Sentelle, J.):* The defendant suffered no prejudice on account of her trial counsel's failure to offer expert testimony on BWS, as she did not establish sufficient evidence during her trial in support of a duress defense.

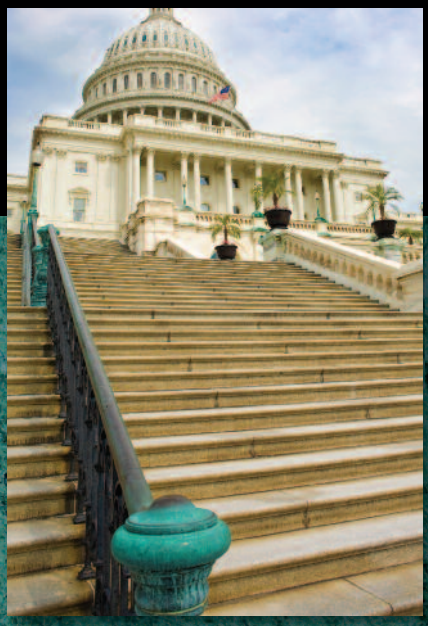
Case Name	Citation	Year	Role	Subject	Holding
Indep. Inst. v. FEC	816 F.3d 113	2016	Authored majority	Elections Law; Freedom of Speech	*Majority (Kavanaugh, J.), reversed, vacated, and remanded:* The appellant was entitled to assert its claim that the Bipartisan Campaign Reform Act of 2002 (BCRA) donor-disclosure provisions violated the First Amendment before a three-judge district court, as the appellant's claim raised a substantial federal question. The bar for substantiality was "low," and plaintiff advanced at least one argument that was not "essentially fictitious." *Dissenting (Wilkins, J.):* The appellant's claim did not present a substantial federal question because the appellant failed to explain how it could succeed going forward without prevailing on its core contention that electioneering communications under the BCRA must be limited to speech that is "unambiguously campaign related."
Fla. Bankers Ass'n v. Dep't of the Treasury	799 F.3d 1065	2015	Authored majority	Tax Law	*Majority (Kavanaugh, J.), vacated and remanded:* Suit brought by trade organizations challenging the IRS's nonresident alien interest-income reporting regulation was barred by the Anti-Injunction Act and tax exception to the Declaratory Judgment Act because (1) the regulation was deemed a tax under the Internal Revenue Code; and (2) the suit, if successful, would have invalidated the regulation and, thus, directly prevented collection of the regulatory tax imposed on banks for violation of the regulation. *Concurring (Randolph, J.): Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), on which the dissent relied, did not stand for the proposition that the Anti-Injunction Act cannot apply to a case even if the penalty in the case was a tax within the meaning of the Act. *Dissenting (Henderson, J.):* Under Supreme Court and D.C. Circuit precedent, the Anti-Injunction Act did not bar challenges to tax-reporting requirements or regulations with tax penalties attached.

Case Name	Citation	Year	Role	Subject	Holding
In re Murray Energy Corp.	788 F.3d 330	2015	Authored majority	Administrative Law; Federal Courts & Civil Procedure	*Majority (Kavanaugh, J.), petitions for review and petition for writ of prohibition denied:* Proposed EPA regulation was not final agency action and thus not judicially reviewable, as proposed regulations did not mark the "consummation of the agency's decisionmaking process." In addition, the All Writs Act did not confer authority on the court to consider the challenge, as reviewing the proposed regulation was not necessary or appropriate to aid the court's jurisdiction. *Concurring in the judgment (Henderson, J.):* Contrary to the majority's "cramped view" of the court's extraordinary writ authority, the court does have authority to issue a writ of prohibition in the case, but it should not do so, as "the passage of time has rendered the issuance all but academic."
Ivy Sports Med., LLC v. Burwell	767 F.3d 81	2014	Authored majority	Administrative Law; Food & Drug Law	*Majority (Kavanaugh, J.), judgment vacated and remanded:* FDA did not follow the proper statutory procedure for reclassifying a medical device. Therefore, the agency's decision to rescind the clearance determination for the device was vacated. *Dissenting (Pillard, J.):* FDA properly exercised its authority to revoke its mistaken clearance of the medical device without undertaking full notice and comment rulemaking.
Odhiambo v. Republic of Kenya	764 F.3d 31	2014	Authored majority	Contracts Law; Federal Courts & Civil Procedure	*Majority (Kavanaugh, J.), affirmed:* The Foreign Sovereign Immunities Act (FSIA) barred a whistleblower from suing the government of Kenya in federal court for breach of contract stemming from Kenya's alleged underpayment of the whistleblower for revealing instances of tax evasion. *Concurring in part and dissenting in part (Pillard, J.):* The case should have been allowed to proceed under the third clause of the commercial activity exception to FSIA.

Case Name	Citation	Year	Role	Subject	Holding
Nat'l Sec. Archive v. CIA	752 F.3d 460	2014	Authored majority	Privacy & Records	*Majority (Kavanaugh, J.), affirmed:* The CIA properly withheld from public disclosure a draft written account of the Bay of Pigs Invasion authored by a CIA staff historian because the information fell within FOIA's deliberative process exemption. *Dissenting (Rogers, J.):* The court should have reversed the district court's grant of summary judgment and remanded the case for further proceedings because the agency did not demonstrate that the particular draft document at issue qualified for the privilege, and some information in the volume may not have qualified for the exemption and thus should have been subject to disclosure.
United States v. Brice	748 F.3d 1288	2014	Authored majority	Criminal Law & Procedure; Federal Courts & Civil Procedure	*Majority (Kavanaugh, J.), affirmed:* Criminal defendant waived objection that his trial judge was not impartial by failing to raise it during the initial appeal of his conviction. *Concurring in the judgment (Williams, J.):* The majority opinion should have relied only on D.C. Circuit precedent to determine that waiver had occurred and not also on the circuit's rules governing waiver of issues on appeal.
Ali v. Obama	736 F.3d 542	2013	Authored majority	National Security	*Majority (Kavanaugh, J.), affirmed*: The government demonstrated by a preponderance of the evidence that petitioner was a member of a force associated with al Qaeda, and thus his detention was lawful under the AUMF and circuit precedent governing habeas relief in military detention cases. No statute imposed a time limit on such detention or created a sliding-scale standard that became more stringent over time, and it is not proper for the court to devise one, in order to address petitioner's concerns about "lifetime detention." *Concurring in the judgment (Edwards, J.)*: While the majority opinion is based on binding circuit precedent, the law of the circuit has made habeas corpus proceedings like the one afforded this petitioner functionally useless, which is troubling given that Ali may well be detained for the rest of his life.

Case Name	Citation	Year	Role	Subject	Holding
In re Aiken County	725 F.3d 255	2013	Authored majority	Administrative Law; Energy & Utilities Law	*Majority (Kavanaugh, J.), petition for mandamus granted*: Where previously appropriated money was available to the Nuclear Regulatory Commission (NRC) to perform statutorily mandated licensing processes for storage of nuclear waste in Yucca Mountain, the agency could not ignore its statutory mandates simply because Congress had not appropriated all of the money necessary to complete the project. NRC had not asserted that the mandate was unconstitutional, and the executive's prosecutorial discretion under Article II does not include the power to disregard statutory obligations imposed by Congress. *Concurring (Randolph, J.)*: The majority's discussion of executive power and prosecutorial discretion principles was unnecessary to decide the case. *Dissenting (Garland, C.J.)*: Given the limited funds that remain available to the NRC, issuing a writ of mandamus would not allow the agency to do anything productive, and courts should not issue writs of mandamus to "do a useless thing."
United States v. Cardoza	713 F.3d 656	2013	Authored majority	Criminal Law & Procedure	*Majority (Kavanaugh, J.), reversed*: After excising false statements made by a police officer in a search warrant affidavit, the corrected affidavit still established a "fair probability" that the defendant was involved in drug dealing, which was sufficient to establish probable cause. *Concurring (Brown, J.)*: It was unlikely that affidavits with even slightly less evidence than the one in this case would satisfy the probable cause standard.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Duvall	705 F.3d 479	2013	Authored majority	Criminal Law & Procedure	*Majority (Kavanaugh, J.), affirmed*: The prison sentence of a drug dealer made pursuant to a plea agreement specifying an agreed-upon sentence or sentencing range was not eligible for reduction based on a subsequent change in the sentencing range by U.S. Sentencing Commission, where the plea agreement was not "based on" that sentencing range. *Concurring in the judgment (Williams, J.)*: The Supreme Court decision relied upon by the majority, Justice Sotomayor's concurring opinion in *Freeman v. United States*, 564 U.S. 522 (2011), was not controlling. Circuit precedent required affirmation of the decision below, but that precedent should be overturned by the en banc court.
Honeywell Int'l, Inc. v. EPA	705 F.3d 470	2013	Authored majority	Environmental Law; Federal Courts & Civil Procedure	*Majority (Kavanaugh, J.), petition for review denied*: The statutory framework established under the CAA regulates hydrochlorofluorocarbons (HCFCs) through a cap-and-trade program. Plaintiff's challenge to EPA's approval of competitors' permanent interpollutant transfers was timely because the challenge was filed within 60 days of the D.C. Circuit's decision in *Arkema, Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010), which "changed the legal landscape" regarding the permanency of the transfers. However, that same decision also established binding circuit precedent that permanent interpollutant transfers were permissible under the CAA. *Dissenting (Brown, J.)*: *Arkema* did not change the legal status of the interpollutant transfers. Therefore, it should not count as "after-arising grounds" giving rise to a new 60 days within which to file a challenge.



A Practical Guide to Preparing and Delivering Testimony Before Congress and Congressional Hearings for Agencies, Associations, Corporations, Military, NGOs, and State and Local Officials

By William N. LaForge

Testifying Before Congress

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Case Name	Citation	Year	Role	Subject	Holding
Hamdan v. United States	696 F.3d 1238, *overruled by* Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014)	2012	Authored majority	International Law; Military & Veterans Law; National Security	*Majority (Kavanaugh, J.), reversed and remanded with direction to vacate conviction*: Appeal of conviction of Guantanamo detainee under the Military Commission Act of 2006 for providing material support to terrorism was not moot after the detainee's transfer to a foreign country, and the conviction was vacated because the crime of material support did not exist as a war crime under international law at the time the relevant conduct occurred. *Concurring (Ginsburg, J.)*: Because the detainee faced no adverse consequences of his conviction after his transfer overseas, the detainee's case was moot in fact even though Supreme Court precedent required that the case not be deemed moot in law. Note: The decision was subsequently overruled by the D.C. Circuit on a petition for rehearing en banc in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), discussed below.
South Carolina v. United States	898 F. Supp. 2d 30 (D.D.C.)	2012	Authored majority (district court panel)	Civil Rights Law; Elections Law	*Majority (Kavanaugh, J.)*: South Carolina's voter identification law satisfied the federal Voting Rights Act's preclearance requirements with respect to elections beginning in 2013, but not with respect to the 2012 elections because the state law could not be properly implemented in time to ensure it did not have retrogressive effects. *Concurring (Kollar-Kotelly, J.):* If South Carolina decided to narrow its interpretation of one of the exceptions to its voter identification law at some point in the future, that new interpretation would have to undergo preclearance under the federal Voting Rights Act. *Concurring (Bates, J.):* The Voting Rights Act's preclearance provisions are socially desirable because they induced South Carolina to enact a less restrictive voter identification law than it otherwise would have enacted.

Case Name	Citation	Year	Role	Subject	Holding
EME Homer City Generation, L.P. v. EPA	696 F.3d 7, *rev'd and remanded,* 134 S. Ct. 1584 (2014)	2012	Authored majority	Environmental Law	*Majority (Kavanaugh, J.), vacated and remanded*: EPA rule related to air pollution that crosses state lines exceeded the agency's authority under the CAA. *Dissenting (Rogers, J.)*: The challenge to the EPA rule did not comply with the CAA's statutory limitations on judicial review and, therefore, the court lacked jurisdiction over the case. Note: The panel's decision was subsequently reversed and remanded by the Supreme Court in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).
New York-New York, LLC v. NLRB	676 F.3d 193	2012	Authored majority	Labor & Employment Law	*Majority (Kavanaugh, J.), petition for review denied and cross-petition for enforcement granted*: NLRB correctly concluded that the casino could not bar employees of an onsite contractor from distributing union-related handbills in public areas of the casino. *Concurring (Henderson, J.)*: In reaching a proper accommodation between employee rights under Section 7 of the NLRA and private property rights, the NLRB correctly concluded that, for the purposes of Section 7, the contractor's employees were more analogous to the casino's own employees than to non-employee union organizers.
Hall v. Sebelius	667 F.3d 1293	2012	Authored majority	Healthcare Law; Pensions & Benefits Law	*Majority (Kavanaugh, J.), affirmed:* Federal law did not authorize citizens above the age of 65 to disclaim their legal entitlement to Medicare Part A benefits in order to become eligible for more favorable private insurance coverage. *Dissenting (Henderson, J.)*: The challenged provisions in the Social Security Administration's Program Operations Manual System lacked a statutory basis and were ultra vires.

Case Name	Citation	Year	Role	Subject	Holding
Sw. Airlines Co. v. Transp. Sec. Admin.	650 F.3d 752	2011	Authored majority	Administrative Law; Transportation law	*Majority (Kavanaugh, J.), petitions for review denied*: The TSA, on remand, did not act arbitrarily or capriciously by relying on an expert report commissioned to determine how many individual screenings in 2000 were of passengers versus non-passengers, and the TSA adequately considered and explained its rejection of the conflicting findings offered in a separate DOT report. *Dissenting (Brown, J.)*: The TSA failed to articulate reasons for rejecting the conflicting evidence found in the DOT report.
Blackwell v. FBI	646 F.3d 37	2011	Authored majority	Privacy & Records	*Majority (Kavanaugh, J.), affirmed*: The FBI records sought by the requester under FOIA qualified as "records or information complied for law enforcement purposes," but the requester failed to show sufficient government misconduct to overcome FOIA Exemption 7(C)'s protection for certain withholding and redactions based on personal privacy under the test articulated in *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). The FBI also adequately justified redactions and withholding pursuant to FOIA Exemption 7(E)'s protection of records that might "disclose techniques and procedures for law enforcement investigations or prosecutions;" and the FBI justifiably limited its search and provided an adequate index of withheld documents. *Concurring (Rogers, J.)*: The government misread precedent to the extent that it claimed that the disclosure of exculpatory evidence relevant to an appeal of or collateral attack on a conviction would not categorically be in the public interest for purposes of Exemption 7(C).

Case Name	Citation	Year	Role	Subject	Holding
Omar v. McHugh	646 F.3d 13	2011	Authored majority	Federal Courts & Civil Procedure; National Security	*Majority (Kavanaugh J.), affirmed*: Notwithstanding the detainee's belief that he was likely to be tortured by Iraqi officials to whom he was going to be transferred, a Jordanian-American citizen detained by the U.S. military in Iraq was not entitled to habeas corpus relief challenging the United States' intention to transfer him to Iraqi custody because federal law did not provide military transferees with a right to judicial review of their likely treatment in a receiving foreign country. *Concurring in the judgment (Griffith, J.)*: While federal law did not grant plaintiff a right against being transferred to Iraqi custody, it did not strip federal courts of jurisdiction to hear the plaintiff's claim for unlawful transfer.
Am. v. Mills	643 F.3d 330	2011	Authored majority	Contracts Law	*Majority (Kavanaugh J.), affirmed*: The Small Business Administration (SBA) did not commit a material breach of its settlement agreement with a former employee in which the SBA promised that it would only provide neutral references about the former employee and refer all inquiries from prospective employers to the human resources division, when the SBA current employees did not refer the matter to human resources and instead gave statements about the former employee that were generally positive, and at worst neutral. *Dissenting (Brown, J.)*: The evidence presented at trial constituted a material breach of the settlement because evidence was presented that some SBA employees' statements concerning the plaintiff were negative, and questions concerning the plaintiff were not referred to human resources as required by the agreement.

Case Name	Citation	Year	Role	Subject	Holding
Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep't of Treasury	638 F.3d 794	2011	Authored majority	Intellectual Property Law	*Majority (Kavanaugh, J.), affirmed*: A Cuban trademark holder did not have a vested right to renew its trademark as of the date of the enactment of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, and, as a result, the presumption against retroactivity did not apply. The Act accordingly barred renewal of the trademark holder's mark, and that bar was consistent with substantive due process. *Dissenting (Silberman, J.)*: In order to reach its retroactivity holding the majority misapplied governing Supreme Court jurisprudence regarding the interpretation of statutes and did so in a way that "dr[ove] a large hole in the presumption against retroactivity."
Koretoff v. Vilsack	614 F.3d 532	2010	Authored majority	Administrative Law; Food & Drug Law	*Majority (Kavanaugh, J.), affirmed in part and reversed in part*: The Agriculture Marketing Agreement Act (AMAA) did not preclude 10 California almond producers who also retailed their almonds directly to consumers from raising a legal challenge to Department of Agriculture regulations restricting retail sales by such producers. The AMAA did require them, however, to exhaust their administrative remedies with the department before pursuing their claims in court. *Dissenting in part (Henderson, J.)*: The commodity at issue was almonds, not milk, and the AMAA provides no express right of review to producers of products other than milk.
Am. Trucking Ass'ns, Inc. v. EPA	600 F.3d 624	2010	Authored majority	Administrative Law; Environmental Law	*Majority (Kavanaugh, J.), petition for review denied*: EPA adequately considered the costs of compliance and otherwise properly explained its reasoning in acting, under the authority of the CAA, to authorize a California rule limiting emissions from in-use, non-road engines, including transportation refrigeration units powered by diesel engines. *Dissenting in part (Williams, J.)*: EPA's consideration of the petitioner's arguments amounted to a "paradigmatic instance of an agency's failure" to examine relevant data and provide an adequate explanation for its decision. Standard practice required the court to remand to the agency for the exercise of reasoned decision making.

Case Name	Citation	Year	Role	Subject	Holding
Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union	589 F.3d 437	2010	Authored majority	Contracts Law	*Majority (Kavanaugh, J.), affirmed*: In dispute over who was responsible for scanning foreign mail at service center of the U.S. Postal Service, the district court properly affirmed the arbitrator's award, even though the arbitrator "probably" erred as matter of contract interpretation in finding that dispute was subject to arbitration, because arbitrator was "arguably construing" the contract. *Dissenting (Sentelle, C.J.):* Arbitrator's decision was "wholly without regard" to the terms of the parties' contract and should have been reversed, irrespective of the deferential standard of review.
Emily's List v. FEC	581 F.3d 1	2009	Authored majority	Elections Law; Freedom of Speech	*Majority (Kavanaugh, J.), reversed*: FEC regulations restricting how non-profits may spend and raise money to advance their preferred policy positions and candidates violated the First Amendment and exceeded FEC's authority under the Federal Election Campaign Act. *Concurring in part (Brown, J.):* Because the FEC regulations exceeded FEC's statutory authority, there existed no reason to reach the constitutional question. The majority opinion's constitutional analysis wrongly ignored Supreme Court precedent and will profoundly impact campaign finance regulation in the circuit.
Moshea v. Nat'l Transp. Safety Bd.	570 F.3d 349	2009	Authored majority	Administrative Law; Transportation Law	*Majority (Kavanaugh, J.), petition granted, decision vacated, and remanded:* National Transportation Safety Board had jurisdiction over pilot's appeal of the FAA's suspension of his pilot certification and should have entertained plaintiff's affirmative defense to a claim that he failed to conform to certain recordkeeping requirements. *Concurring in part (Randolph, J.):* The majority wrongly characterized the statute governing the Board's proceeding, but the Board nonetheless acted arbitrarily in refusing to consider the affirmative defense for appellant when it had done so for other individuals.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Gardellini	545 F.3d 1089	2008	Authored majority	Criminal Law & Procedure	*Majority (Kavanaugh, J.), affirmed:* District court did not abuse its discretion in sentencing defendant to probation and $15,000 restitution in guilty plea for filing false tax return, although the sentence was below the advisory Sentencing Guidelines range of 10-16 months. *Dissenting (Williams, J.):* The district court abused its discretion because the Sentencing Guidelines range was 10-16 months' imprisonment and the court failed to consider goal of deterring others from committing similar crimes.
Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. *ex rel.* Fed. Nat'l Mortg. Ass'n v. Raines	534 F.3d 779, *abrogated by* Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553 (2017)	2008	Authored majority	Business & Corporate Law; Federal Courts & Civil Procedure	*Majority (Kavanaugh, J.) affirmed:* Shareholder complaint against Fannie Mae was properly dismissed because no demand was made of the company's board of directors and such demand would not have been futile. Federal subject matter jurisdiction existed under statute that authorized Fannie Mae to "sue and be sued" in the courts. *Concurring in the judgment (Brown, J.):* No federal subject matter jurisdiction existed in this case because the jurisdictional statute provided that Fannie Mae could only be sued in a court with "competent jurisdiction," requiring a separate jurisdictional basis. Note: The court's opinion was subsequently abrogated by the Supreme Court in *Lightfoot v. Cendant Mortg. Corp*., 137 S. Ct. 553 (2017).
In re Navy Chaplaincy	534 F.3d 756	2008	Authored majority	Freedom of Religion; Federal Courts & Civil Procedure	*Majority (Kavanaugh, J.) affirmed:* Protestant chaplains did not have standing to sue the Navy for an alleged Establishment Clause violation for a program that allegedly favored Catholic chaplains when none of the plaintiffs alleged that they were actually discriminated against by the Navy as a result of their religion. *Dissenting (Rogers, J.)*: Protestant chaplains had standing to sue the Navy because they received "a message of denominational preference," and they were in a unique position as chaplains in relation to their service in the Navy Chaplain Corps.

Case Name	Citation	Year	Role	Subject	Holding
Puerto Rico Ports Auth. v. Fed. Mar. Comm'n	531 F.3d 868	2008	Authored majority	Federal Courts & Civil Procedure; Government Operations	*Majority (Kavanaugh, J.) petition granted, order vacated and remanded:* Puerto Rico Ports Authority was an "arm of the state" entitled to sovereign immunity under the Eleventh Amendment against terminal operators' complaints alleging violations of the Shipping Act. *Concurring (Williams, J.):* Supreme Court precedents have made the sovereign immunity question unduly complex, but the court's decision was right under existing law.
Jackson v. Gonzales	496 F.3d 703	2007	Authored majority	Civil Rights Law; Labor & Employment Law	*Majority (Kavanaugh, J.), affirmed:* No reasonable jury would conclude that a public employer's decision not to promote an African-American employee was racially discriminatory. *Dissenting (Rogers, J.):* The employee presented sufficient evidence of pretext to survive summary judgment.
Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.	489 F.3d 1279	2007	Authored majority	Federal Courts & Civil Procedure; Transportation Law	*Majority (Kavanaugh, J.), dismissing petition and requiring supplemental submissions:* Although certain industry petitioners lacked standing to challenge a regulation promulgated by National Highway Traffic Safety Administration, an advocacy organization was entitled to file supplemental submissions demonstrating that it had standing to challenge the regulation. *Concurring in part and dissenting in part (Sentelle, J.):* None of the petitioners had standing to challenge the regulation, so the majority should not have allowed the advocacy group to file supplemental submissions.
Am. Fed'n of Gov't Emps., AFL-CIO v. Gates	486 F.3d 1316	2007	Authored majority	Administrative Law; Labor & Employment Law	*Majority (Kavanaugh, J.), reversed:* Although the Department of Defense possessed the authority to temporarily curtail collective bargaining for its civilian employees, it was required to reinstate collective bargaining after a specified date. *Dissenting in part (Tatel, J.):* Federal law did not empower the Department of Defense to abolish collective bargaining altogether.

Case Name	Citation	Year	Role	Subject	Holding
We the People Found., Inc. v. United States	485 F.3d 140	2007	Authored majority	Freedom of Speech	*Majority (Kavanaugh, J.), affirmed:* The First Amendment's Petition Clause does not create a right to a government response to—or official consideration of—a citizen's petition for redress of grievances. *Concurring (Rogers, J.):* Historical evidence might support such a right, but binding Supreme Court precedent barred the court from recognizing any such right.
United States v. Askew	482 F.3d 532, *rev'd en banc*, 529 F.3d 1119 (D.C. Cir. 2008)	2007	Authored majority	Criminal Law & Procedure	*Majority (Kavanaugh, J.), affirmed:* A police officer did not conduct an unconstitutional search by unzipping a suspect's jacket. *Dissenting (Edwards, J.):* The police officer violated the Fourth Amendment by searching the suspect for purely investigative purposes after an initial pat down did not uncover any weapons. Note: The D.C. Circuit, sitting en banc, subsequently reversed the panel decision in *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008), discussed below.
Baker & Hostetler LLP v. Dep't of Commerce	473 F.3d 312	2006	Authored majority	Privacy & Records	*Majority (Kavanaugh, J.), affirmed in part and reversed and remanded in part:* Remand was necessary to determine whether law firm was entitled to attorney's fees in FOIA case. *Dissenting in part (Henderson, J.)*: A law firm litigant acting through its member lawyers may not collect attorney's fees pursuant to FOIA's fee-shifting provisions.

Table 3. Concurring and Dissenting Opinions Authored by Judge Kavanaugh

Case Name	Citation	Year	Role	Subject	Holding
St. Francis Med. Ctr. v. Azar	No. 17-5098, 2018 U.S. App. LEXIS 17878 (June 29, 2018)	2018	Authored concurrence	Administrative Law; Healthcare Law	*Majority (Katsas, J.), reversed and remanded*: HHS regulation, which barred hospitals from challenging factual reimbursement determinations made more than three years previously, did not apply to appeals before the Provider Reimbursement Review Board (PRRB). *Concurring (Kavanaugh, J.)*: In addition to not applying to PRRB appeals, HHS's prohibition on challenging certain prior factual determinations was arbitrary and capricious and therefore invalid under the APA.
Island Architectural Woodwork, Inc. v. NLRB	892 F.3d 362	2018	Authored dissent	Labor & Employment Law	*Majority (Pillard, J.), petition for review denied and cross-application for enforcement granted*: Substantial evidence supported NLRB's findings that unionized manufacturer violated the NLRA by creating non-union shop with substantially identical business purposes, but refusing to recognize the union or apply the terms of the collective bargaining agreement to the shop. *Dissenting (Kavanaugh, J.)*: NLRB's determination that the non-union shop was an alter ego of unionized manufacturer was unreasonable, and therefore the two companies should not be treated as a single employer.
United States v. Brown	892 F.3d 385	2018	Authored opinion dissenting in part	Criminal Law & Procedure	*Majority (per curiam), affirmed in part, vacated in part, and remanded for resentencing*: Defendants' convictions for distribution of PCP were based on sufficient evidence and appropriate jury instructions. However, one co-defendant who pleaded guilty did not knowingly waive his right to appeal, and district court's consecutive sentence without acknowledging that the Sentencing Guidelines recommended a concurrent sentence was plain error. In addition, the district court failed to adequately justify an above-Guidelines sentence for final co-defendant. *Concurring (Millett, J.)*: The use of acquitted conduct as a basis to increase a defendant's sentence under the Sentencing Guidelines, although permitted under established circuit precedent, represented a "grave constitutional wrong."

Case Name	Citation	Year	Role	Subject	Holding
					Dissenting in part (Kavanaugh, J.): Waiver of right to appeal was not misrepresented by the district court at the plea colloquy, and therefore the one co-defendant's appeal of his consecutive sentence should have been dismissed. The above-Guidelines sentence for final co-defendant was both procedurally and substantively reasonable.
Clemente v. FBI	714 F. App'x 2 (denying rehearing en banc)	2018	Authored concurrence	Privacy & Records	*Majority (per curiam), petition for rehearing en banc denied.* *Concurring in the denial of rehearing en banc (Kavanaugh, J.)*: For the reasons stated in Judge Kavanaugh's concurrence in *Morley v. CIA*, 719 F.3d 689 (D.C. Cir. 2013), discussed below, the D.C. Circuit's four-factor test for awarding attorney's fees in FOIA cases should be reexamined by the en banc court.
PHH Corp. v. CFPB	881 F.3d 75 (en banc)	2018	Authored dissent	Government Operations	*Majority (Pillard, J.), petition for rehearing en banc granted in part, and remanded*: Dodd-Frank Act's provision that the Director of the CFPB shall serve a five-year term and be removable by the President only for "inefficiency, neglect of duty, or malfeasance in office" was consistent with Article II of the Constitution under the reasoning of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The three-judge panel's holding on the statutory issue of how the CFPB interpreted and applied the Real Estate Settlement Procedures Act (RESPA) to plaintiff was reinstated. *Concurring (Tatel, J.)*: If the en banc court considered the statutory issue, it should find, contrary to the panel decision, that the CFPB reasonably interpreted RESPA to impose liability. *Concurring (Wilkins, J.)*: The CFPB Director's significant adjudicatory responsibilities further undermines the separation-of-powers challenge to the for-cause removal provision. *Concurring in the judgment (Griffith, J.)*: The for-cause removal provision did not violate Article II of the Constitution because it imposes only a

Case Name	Citation	Year	Role	Subject	Holding
					minimal restriction on the President's removal powers, permitting removal for ineffective policy choices. *Dissenting (Henderson, J.)*: CFPB's structure violates Article II because the President must ordinarily have unrestricted power to remove executive officers if he is to faithfully execute the laws. Moreover, the removal provision cannot be severed from the rest of the Consumer Financial Protection Act, which should be invalidated in its entirety. *Dissenting (Kavanaugh, J.)*: CFPB's structure violates Article II because it vests the enormous powers of an independent agency in a single unaccountable director, but the for-cause removal provision can be severed from the rest of the statute. *Dissenting (Randolph, J.)*: In addition to the other Article II issues, the CFPB's order should be set aside because the administrative law judge who presided over the hearing was an "inferior Officer" who was not appointed properly under the Appointments Clause.
Garza v. Hargan	874 F.3d 735 (en banc), *cert. granted and vacated as moot*, 138 S. Ct. 1790 (2018)	2017	Authored dissent	Healthcare Law; Immigration Law	*Majority (per curiam)*, *petition for rehearing en banc granted, panel order vacated, emergency motion for a stay denied, and remanded*: The case is remanded to the district court to enforce its temporary restraining order permitting an unaccompanied alien minor, in the custody of the United States after crossing the United States border illegally, to obtain an abortion. *Concurring (Millett, J.)*: Pregnant minor's constitutional right to an abortion was unaffected by her custodial status or lack of legal immigration status. The minor did not bear the burden of extracting herself from custody to obtain a lawful abortion. *Dissenting (Henderson, J.)*: Alien minor who attempted to enter the United States illegally lacks any constitutional right to an abortion because she had not developed substantial connections with this country such that the Due Process Clause applied to her. *Dissenting (Kavanaugh, J.)*: It was not an undue burden on the unlawfully present alien minor's right to an abortion for the government to first

Case Name	Citation	Year	Role	Subject	Holding
					expeditiously transfer custody of the minor to an immigration sponsor, before the minor would be permitted to make the decision to obtain an abortion. Note: The Supreme Court subsequently granted certiorari, vacated the en banc order, and remanded the case with instructions to dismiss the claim for injunctive relief as moot because the minor had already obtained an abortion. *See* Azar v. Garza, 138 S. Ct. 1790 (2018).
Saad v. SEC	873 F.3d 297	2017	Authored concurrence	Securities Law	*Majority (Millett, J.)*, *petition for review denied in part and remanded in part*: Financial Industry Regulatory Authority's decision to permanently bar broker-dealer from practice based on unlawful misappropriation of funds was reasonably grounded in the record, but the case is remanded to the SEC to determine the impact, if any, of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). *Concurring (Kavanaugh, J.)*: Remand was required because *Kokesh* calls into question prior circuit precedent on SEC remedial sanctions. *Concurring dubitante in part (Millett, J.)*: Remand is likely unnecessary because it is doubtful that *Kokesh* has any relevance to this case.
Lorenzo v. SEC	872 F.3d 578, *cert. granted*, No. 17-1077, 2018 U.S. LEXIS 3813 (June 18, 2018)	2017	Authored dissent	Securities Law	*Majority (Srinivasan, J.)*, *petition for review granted in part, order vacated in part, and remanded*: Substantial evidence supported SEC's determination that investment banker committed securities fraud by sending false and misleading emails to investors. However, liability under SEC Rule 10b-5(b) was improper because the banker's boss, not the banker himself, had ultimate authority over the false statements. *Dissenting (Kavanaugh, J.)*: Banker should not be liable at all for the false statements because they were drafted by his boss and sent at the direction of his boss, negating the required element of a willful intent to defraud. Note: The Supreme Court granted a petition to review the case, No. 17-1077, 2018 U.S. LEXIS 3813 (U.S. June 18, 2018).

Case Name	Citation	Year	Role	Subject	Holding
Midwest Div.–MMC, LLC v. NLRB	867 F.3d 1288	2017	Authored opinion concurring in part and dissenting in part	Labor & Employment Law	*Majority (Srinivasan, J.), petition for review granted in part, and order enforced in part*: Hospital did not violate the NLRA by denying nurses' requests for union representation during non-obligatory interviews with peer-review committee. NLRB correctly found that the hospital engaged in unfair labor practices by denying the union's requests for information about the peer-review committee and maintaining a confidentiality rule barring workers from discussing the committee's investigations. *Concurring in part and dissenting in part (Kavanaugh, J.)*: Hospital did not violate the NLRA by denying union's requests for information about the workings of the peer-review committee.
Ortiz-Diaz v. Dep't of Hous. & Urban Dev., Office of Inspector Gen.	867 F.3d 70	2017	Authored concurrence	Civil Rights Law; Labor & Employment Law	*Majority (Rogers, J.), reversed and remanded*: Employer's allegedly discriminatory denial of a lateral transfer to a different geographical location could constitute an adverse employment action under Title VII, depending on the facts to be found by a jury. *Concurring in the judgment (Henderson, J.)*: Factual issues precluded summary judgment because the lateral transfer program could qualify as a "privilege" of employment. *Concurring (Rogers, J.)*: The en banc court should make clear that any transfer denial based on a protected characteristic was an adverse employment action under Title VII. *Concurring (Kavanaugh, J.)*: Because circuit precedent holds that discriminatory transfers are ordinarily not actionable under Title VII, the en banc court should resolve the uncertainty and hold that all discriminatory transfers, or denials of transfers, are actionable. Note: This opinion follows the *sua sponte* decision of the three-judge panel to reconsider its prior decision, *Ortiz-Diaz v. Dep't. Hous. & Urban Dev.,* 831 F.3d 488, 493 (D.C. Cir. 2016), discussed below, after a petition for rehearing en banc was filed.

Case Name	Citation	Year	Role	Subject	Holding
NLRB v. CNN Am., Inc.	865 F.3d 740	2017	Authored opinion concurring in part and dissenting in part	Labor & Employment Law	*Majority (Garland, C.J.), petitions for review granted in part and denied in part*: Broadcaster, as a successor (but not joint) employer of contractor's unionized employees, violated provisions of the NLRA when it replaced unionized contractor with in-house, non-union workforce and discriminated in hiring against union-member employees. *Concurring in part and dissenting in part (Kavanaugh, J.)*: Substantial evidence did not support the NLRB's finding that broadcaster engaged in discriminatory hiring, and therefore broadcaster was a successor employer under only the traditional test, which did not expose the employer to liability for back pay.
Competitive Enter. Inst. v. DOT	863 F.3d 911	2017	Authored concurrence	Administrative Law; Transportation Law	*Majority (Randolph, J.), petition for review denied*: DOT regulation prohibiting use of electronic cigarettes (e-cigarettes) on passenger airplanes was reasonable and non-arbitrary interpretation of statute prohibiting on-flight smoking. *Concurring (Kavanaugh, J.)*: The statutory term "smoking" is best understood to encompass both conventional and e-cigarettes, and thus the regulation should be upheld even without affording *Chevron* deference. *Dissenting (Ginsburg, J.)*: The Department's e-cigarette regulation was beyond its statutory authority because at the time of the statute's enactment in 1987, Congress would not have understood the word "smoking" to encompass e-cigarettes.
Wash. All. of Tech. Workers v. DHS	857 F.3d 907	2017	Authored dissent	Federal Courts & Civil Procedure	*Majority (Sentelle, J.), affirmed*: In awarding attorney's fees under the Equal Access to Justice Act (EAJA), district court did not abuse its discretion by awarding only partial fees attributable to the one claim on which plaintiff succeeded. *Dissenting (Kavanaugh, J.)*: Attorney's fees should not have been reduced because the plaintiff received substantially all the relief it sought, despite raising a number of alternative arguments.

Case Name	Citation	Year	Role	Subject	Holding
U.S. Telecom Ass'n v. FCC	855 F.3d 381 (denying rehearing en banc)	2017	Authored dissent	Administrative Law; Communications Law; Freedom of Speech	*Majority (per curiam), petitions for rehearing en banc denied.* *Concurring in the denial of rehearing en banc (Srinivasan, J.)*: FCC's Open Internet Order, commonly known as the net neutrality rule, was within the FCC's statutory authority and did not run afoul of the First Amendment. *Dissenting from the denial of rehearing en banc (Brown, J.)*: Because the net neutrality rule reclassified broadband Internet access to subject it to common carrier regulation, it implicated a "major question" requiring clear statutory authority from Congress, which is absent because the net neutrality rule conflicts with the deregulatory structure of the Telecommunications Act of 1996. *Dissenting from the denial of rehearing en banc (Kavanaugh, J.)*: FCC lacked authority to issue the net neutrality rule because agencies may not issue regulations with vast economic and political significance (i.e., major rules) without clear congressional authorization. The net neutrality rule was also invalid because it violated the First Amendment rights of Internet Service Providers (ISPs) to exercise editorial discretion and control over the content they carry.
United States v. Anthem, Inc.	855 F.3d 345	2017	Authored dissent	Antitrust Law	*Majority (Rogers, J.), affirmed*: District court's permanent injunction against the merger of two of the four major national health insurance carriers was not an abuse of discretion because the insurance carriers failed to show extraordinary efficiencies resulting from the merger that would offset the anticompetitive effects in markets where the two firms compete. *Concurring (Millett, J.)*: Insurers' unverifiable claims of price decreases resulting from the merger, standing alone, could not justify a merger with substantial anticompetitive effects.

Case Name	Citation	Year	Role	Subject	Holding
					Dissenting (Kavanaugh, J.): Permanent injunction was based on clear factual error because the record conclusively showed that the merger would benefit consumers through lower provider rates.
Navajo Nation v. Dep't of the Interior	852 F.3d 1124	2017	Authored concurrence	Indian Law; Government Operations	*Majority (Sentelle, J.), reversed*: Time period for the Bureau of Indian Affairs (BIA) to act on the Tribe's proposed funding agreement began to run on the date that the proposal was submitted to a worker furloughed by a government shutdown, and neither the shutdown itself nor the Tribe's silence equitably tolled the deadline. *Concurring (Kavanaugh, J.)*: Although it did not apply in this case, equitable tolling may apply in certain government shutdown situations.
John Doe Co. v. CFPB	849 F.3d 1129	2017	Authored dissent	Administrative Law	*Majority (per curiam), emergency motion for injunction pending appeal denied*: District court did not abuse its discretion in denying company's motion to preliminarily enjoin a CFPB investigation based on the now-vacated opinion in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), which found that the CFPB Director's for-cause removal provision was unconstitutional under Article II. *Dissenting (Kavanaugh, J.)*: Injunction pending appeal should be granted because the company is likely to succeed on its claim that it is being regulated by an unconstitutionally structured agency.

Case Name	Citation	Year	Role	Subject	Holding
Al Bahlul v. United States	840 F.3d 757	2016	Authored concurrence	Military & Veterans Law; National Security	*Majority (per curiam), affirmed:* Judgment of the U.S. Court of Military Commission Review upholding defendant's conviction by a military commission for conspiracy to commit war crimes and providing material support for terrorism was affirmed, notwithstanding the question as to whether Congress could have constitutionally made conspiracy to commit war crimes triable by commission. *Concurring (Henderson, J.):* The concurrence incorporated by reference an earlier dissent in *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015), which maintained that the defendant forfeited his constitutional claims by not raising them during his military commission trial and that the court should review his challenge for plain error. *Concurring (Kavanaugh, J.):* The structure, text, and original understanding of the Constitution, along with Supreme Court precedent, longstanding congressional practice, and deeply rooted executive branch practice provide that Congress may establish military commissions to try unlawful enemy combatants for conspiracy to commit war crimes, even if conspiracy is not an offense under the international law of war. *Concurring (Millett, J.):* It was unnecessary to reach the constitutional questions raised in the claim. The conviction should be affirmed on plain error review. *Concurring (Wilkins, J.):* The particular features of the defendant's conviction demonstrated that he was not convicted of an inchoate conspiracy offense. The features of his conviction have sufficient roots in international law. *Dissenting (Rogers, Tatel, and Pillard, JJ.):* Article III of the Constitution prohibits Congress from making inchoate conspiracy a triable offense by law-of-war military commissions.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Williams	836 F.3d 1	2016	Authored concurrence	Criminal Law & Procedure; Military & Veterans Law	*Majority (Griffith, J.), affirmed in part, reversed in part, and remanded:* Evidence at trial was sufficient to establish second-degree murder resulting from a violent hazing incident on Air Force base, and the prosecutor did not engage in misconduct when she accused the defense of blaming the victim for his death. But the government's error in stating to the jury that the jury could not consider evidence of the victim's consent when determining the defendant's state of mind substantially prejudiced the defendant, thus requiring reversal of the conviction and remand for new trial. *Concurring (Kavanaugh, J.):* The jury did not have a correct understanding of the relevant law due to the prosecutor's inaccurate statement regarding assessment of the defendant's state of mind. *Concurring in part and dissenting in part (Henderson, J.)*: The government did not incorrectly state the law, and any misstatement had little to no effect on the jury, as the evidence in support of the defendant's state of mind for second-degree murder was compelling and the jury charge was correct and measured on all accounts.

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Ortiz-Diaz v. Dep't Hous. & Urban Dev.	831 F.3d 488, *vacated*, 697 F. App'x 6 (D.C. Cir. 2017)	2016	Authored concurrence	Civil Rights Law; Labor & Employment Law	*Majority (Henderson, J.), affirmed:* In racial discrimination case, employer's denial of plaintiff's transfer request did not constitute a "materially adverse [employment] action." *Concurring (Henderson, J.):* The plaintiffs' lawyer's claim during oral argument that, if the court were to accept the defendant's argument, the court's reasoning similarly would compel the dismissal of a suit challenging an employer's placement of a "whites-only" sign on a water cooler was of no relevance to the court's "materially adverse action" precedent. *Concurring (Kavanaugh, J.):* Judge Kavanaugh joined the majority opinion because it followed the court's precedents, but wrote separately to note that, in his view, the denial of a requested lateral transfer on the basis of race is actionable under Title VII. *Dissenting (Rogers, J.):* Summary judgment was inappropriate because a reasonable jury could have found that the denial of the plaintiff's transfer requests adversely affected his opportunity for professional advancement and because the reasons for the denial were "hotly disputed." Note: The decision was subsequently reconsidered *sua sponte* by the panel and the decision vacated in 697 F. App'x 6 (D.C. Cir. 2017).

Case Name	Citation	Year	Role	Subject	Holding
Mingo Logan Coal Co. v. EPA	829 F.3d 710	2016	Authored dissent	Administrative Law; Environmental Law	*Majority (Henderson, J.), affirmed:* EPA's consideration of water quality was supported by the underling statute. Moreover, the agency's explanation for its interpretation was adequate because, among other things, EPA acknowledged new information that the appellant's project would result in unacceptable adverse effects to wildlife, describing in detail its assessment of those effects. The project operator's objection to EPA's failure to consider costs was waived. *Dissenting (Kavanaugh, J.):* EPA did not consider all relevant factors when it failed to consider costs and reliance interests before deciding to revoke the discharge permit, and the agency did not provide a sufficiently detailed justification of its change in position.
Int'l Union, Sec., Police and Fire Professionals of Am. v. Faye	828 F.3d 969	2016	Authored dissent	Labor and Employment Law	*Majority (Tatel. J.), reversed:* A provision of the Labor-Management Reporting and Disclosure Act (LMRDA), which provided a cause of action to union members against union agents for breach of fiduciary duty, also provided an implied cause of action to the union against its agent for breach of fiduciary duty. The district court erred in ruling that it did not have subject matter jurisdiction, as whether the court had jurisdiction was a distinct question from whether the union had a cause of action. *Concurring (Tatel, J.):* The text and structure of the LMRDA evinced Congress's intent to create federal rights and to allow unions to vindicate such rights in court. *Concurring (Millett, J.):* Judge Millett wrote separately to acknowledge the strength of the dissent's arguments and to note that, unless a union is able to sue under the LMRDA, the Act's enforcement scheme could raise due process and Article III standing concerns. *Dissenting (Kavanaugh, J.):* The LMRDA by its terms does not create a private right of action in favor of unions.

Case Name	Citation	Year	Role	Subject	Holding
Wesby v. Dist. of Columbia	816 F.3d 96 (denying rehearing en banc)	2016	Authored dissent	Criminal Law & Procedure	*Majority (per curiam), petition for rehearing en banc denied.* *Concurring in denial of rehearing en banc (Pillard and Edwards, JJ.):* The defendant officers in the plaintiffs' Fourth Amendment challenge could not have reasonably concluded that the plaintiff-partygoers had a culpable state of mind in regard to whether they had been legitimately invited into the house where they were arrested and, therefore, were not entitled to qualified immunity. *Dissenting from denial of rehearing en banc (Kavanaugh, J.):* Police officers were entitled to qualified immunity, as they were not "'plainly incompetent'" and did not "'knowingly violate[]'" clearly established law.
United States v. Bell	808 F.3d 926 (denying rehearing en banc)	2015	Authored concurrence	Criminal Law & Procedure	*Majority (per curiam), petitions for rehearing en banc denied.* *Concurring in the denial of rehearing en banc (Kavanaugh, J.):* Individual district judges may refuse to rely on acquitted or uncharged conduct in sentencing in the absence of a systematic change in sentencing policy by Congress or the Sentencing Commission. *Concurring in the denial of rehearing en banc (Millett, J.):* The Supreme Court must resolve the contradictions in Sixth Amendment and sentencing precedent that authorize judges to use uncharged or acquitted conduct to impose higher sentences than they would absent such consideration.

Case Name	Citation	Year	Role	Subject	Holding
Priests for Life v. HHS	808 F.3d 1 (denying rehearing en banc)	2015	Authored dissent	Healthcare Law; Freedom of Religion	*Majority (per curiam), denied petition for rehearing en banc.* *Concurring in the denial of rehearing en banc (Pillard, J.):* The judges dissenting from the denial of the petition for rehearing en banc have mischaracterized Supreme Court precedent. Religious adherents may not base a claim that a federal law substantially burdens their religious exercise on a sincere but erroneous interpretation of that law. *Dissenting from the denial of rehearing en banc (Brown, J.):* The case was worthy of en banc review because Supreme Court precedent required the court to accept the plaintiffs' assertion that the federal regulations governing contraceptive coverage would compel them to perform acts contrary to their religious beliefs. The court also should not have accepted certain evidence purporting to show a compelling government interest in facilitating access to contraception in the manner provided by the regulations at issue. *Dissenting from the denial of rehearing en banc (Kavanaugh, J.):* The panel misapplied the Religious Freedom Restoration Act and controlling Supreme Court precedent. The court should have granted en banc review and ruled for the plaintiff religious organizations. The regulations substantially burdened the religious organizations' exercise of religion by requiring them to submit a form notifying employees that they had opted out of providing contraceptive coverage and identifying or notifying their insurers. Although the government has a compelling interest in facilitating access to contraception, it did not employ the least restrictive means of furthering that interest.
Klayman v. Obama	805 F.3d 1148 (denying rehearing en banc)	2015	Authored concurrence	National Security	*Majority (per curiam), emergency petition for rehearing en banc denied.* *Concurring in the denial of rehearing en banc (Kavanaugh, J.):* Judge Kavanaugh wrote separately to express his view that the Fourth Amendment does not bar the government's bulk collection of telephony metadata for national security reasons.

Case Name	Citation	Year	Role	Subject	Holding
Meshal v. Higgenbotham	804 F. 3d 417	2015	Authored concurrence	Civil Rights Law; National Security	*Majority (Brown, J.), affirmed:* Plaintiff was unable to assert a *Bivens* action under the Fourth and Fifth Amendments against FBI agents and other U.S. officials for alleged violations committed when he was detained in three African countries. Plaintiff's claim implicated national security interests and involved the extraterritorial application of *Bivens*. *Concurring (Kavanaugh, J.):* Congress, not the courts, had authority to decide whether to recognize a cause of action against U.S. officials for torts allegedly committed abroad in connection with the conflict against al Qaeda and other terrorist organizations. *Dissenting (Pillard, J.):* The case should have been remanded for further proceedings because (1) congressional action supports a constitutional damages claim where it would not intrude on the unique disciplinary structure of the military and where there is no comprehensive regulation or alternative remedy; and (2) the mere recitation of foreign policy and national security interests does not foreclose a constitutional damages remedy where FBI agents and other U.S. officials arbitrarily detain a U.S. citizen overseas without charges and threaten him with death and disappearance for months.
Sissel v. HHS	799 F.3d 1035 (denying rehearing en banc)	2015	Authored dissent	Government Operations; Healthcare Law; Tax Law	*Majority (per curiam), petition for rehearing en banc denied.* *Concurring in denial of rehearing en banc (Rogers, Pillard, and Wilkins, JJ.):* The original panel opinion holding that the Patient Protection and Affordable Care Act did not implicate the Constitution's Origination Clause maintained the balance of power between the two Houses of Congress. The dissent sought to revisit Origination Clause doctrine in ways foreclosed by Supreme Court precedent and unsupported by the text and history of the Constitution. *Dissenting from denial of rehearing en banc (Kavanaugh, J.):* The panel opinion exempts a substantial swath of tax legislation from the Origination Clause's ambit, thus degrading the House's constitutional authority to originate revenue bills in a way contrary to congressional practice and the text and history of the Constitution.

Case Name	Citation	Year	Role	Subject	Holding
Eley v. Dist. of Columbia	793 F.3d 97	2015	Authored concurrence	Federal Courts & Civil Procedure	*Majority (Henderson, J.), vacated and remanded:* The district court abused its discretion when it awarded the plaintiff attorney's fees under the Individuals with Disabilities Education Act (IDEA) without requiring that she justify the reasonableness of her requested rates. *Concurring (Kavanaugh, J.):* Writing separately to add that the "*Laffey* Matrix" schedule of prevailing rates maintained by the District of Columbia's United States Attorney's Office is appropriate for use in IDEA cases.
Mexichem Speciality Resins, Inc. v. EPA	787 F.3d 544	2015	Authored dissent	Environmental Law; Administrative Law	*Majority (Pillard, J.), petitions for review denied:* In challenge to an EPA regulation limiting emissions of hazardous air pollutants from polyvinyl chloride (PVC) production, EPA did not functionally deny the petitioners' requests for reconsideration, as EPA is, among other things, actively gathering data to inform its decision on the reconsideration requests, and the petitioners failed to establish either that the EPA deprived them of a statutory right to a timely decision or that they will be irreparably harmed if the court awaited the outcome of EPA's reconsideration proceeding. Because there was no evidence of irreparable harm, the regulation was not stayed pending reconsideration. Several of the petitioners' challenges to the regulation were barred because they were not raised during the agency's notice-and-comment proceedings, and their preserved claims were rejected because the regulations were not arbitrary and capricious. *Dissenting in part (Kavanaugh, J.):* The wastewater limits imposed by the regulation should be stayed pending judicial review under the APA, as the wastewater limits were based on bad data, and EPA is currently reconsidering them.

Case Name	Citation	Year	Role	Subject	Holding
Morgan Drexen, Inc. v. CFPB	785 F.3d 684	2015	Authored dissent	Business & Corporate Law; Federal Courts & Civil Procedure; Government Operations	*Majority (Rogers, J.), affirmed:* A law firm's constitutional challenges to the independent structure of the CFPB were dismissed because the firm had an adequate remedy at law in raising these challenges as a defense to a CFPB enforcement action in a California district court. An attorney who contracted with the firm for paralegal services and was not a target of CFPB enforcement action lacked standing to sue. *Dissenting (Kavanaugh, J.):* The attorney had standing even if she was not subject to enforcement action because the enforcement proceeding targeted her business model.
Ege v. DHS	784 F.3d 791	2015	Authored opinion concurring in the judgment	Federal Courts & Civil Procedure; National Security	*Majority (Henderson, J.), petition for review dismissed:* A foreign airline pilot lacked Article III standing to challenge his purported inclusion on the U.S. No-Fly List because the court lacked jurisdiction to issue an order binding the department of the FBI that administered the list. *Concurring in the judgment (Kavanaugh, J.):* The pilot had standing to bring his claims, but his petition for review was untimely.
Fogo de Chao (Holdings) Inc. v. DHS	769 F.3d 1127	2014	Authored dissent	Administrative Law; Immigration Law	*Majority (Millett, J.), reversed and remanded:* The Administrative Office of Appeals within DHS failed to explain adequately its adoption of a strict bar on issuing L-1B work visas to persons who claimed specialized knowledge acquired from their family or community rather than company training. *Dissenting (Kavanaugh, J.):* The agency's longstanding position that specialized knowledge cannot be acquired from one's status as a foreign national or cultural background in order to warrant the issuance of certain visas is grounded in the nation's immigration laws.

Case Name	Citation	Year	Role	Subject	Holding
Am. Meat Inst. v. Dep't of Agric.	760 F.3d 18 (en banc)	2014	Authored opinion concurring in the judgment	Communications Law; Food & Drug Law; Freedom of Speech	*Majority (Williams, J.), judgment reinstated:* Federal laws and regulations requiring that certain food products contain labels disclosing their country of origin did not violate the First Amendment. Government interests other than correcting deception in the marketplace may sustain such a disclosure requirement. *Concurring in part (Rogers, J.):* The court improperly conflated two separate Supreme Court precedents concerning First Amendment tests for government restrictions on commercial speech and government-compelled commercial speech. *Concurring in the judgment (Kavanaugh, J.):* The First Amendment does not bar the mandatory disclosure requirements at issue. Therefore, it was appropriate to write separately to provide a detailed explanation of how to conduct the First Amendment analysis. *Dissenting (Henderson, J.):* The court's opinion is wrong on the merits. Moreover, the original panel of three judges improperly discarded circuit precedent in rendering its decision. *Dissenting (Brown, J.):* The government's interest in conveying factual information to the consumers in the absence of an objective related to preventing deception or ensuring health and safety cannot sustain the disclosure requirement. The court should have applied a more stringent form of First Amendment scrutiny to the labeling requirement.

Case Name	Citation	Year	Role	Subject	Holding
Al Bahlul v. United States	767 F.3d 1 (en banc)	2014	Authored opinion concurring in the judgment in part and dissenting in part	Military & Veterans Law; National Security	*Majority (Henderson, J.), affirmed in part, vacated in part, and remanded:* The U.S. Court of Military Commission Review committed plain error with respect to the defendant's convictions on the charges of material support and solicitation. However, the conviction for conspiracy was not plainly erroneous, and it does not plainly violate the Ex Post Facto Clause to try a pre-existing federal criminal offense by military commission. *Concurring (Henderson, J.):* The court should have determined that the Ex Post Facto Clause was inapplicable to the defendant. *Concurring in the judgment in part and dissenting in part (Rogers, J.):* The court should not have affirmed the conspiracy charge because inchoate conspiracy is not a violation of the international law of war. The court should not have applied the plain error standard in reviewing the defendant's convictions. *Concurring in the judgment in part and dissenting in part (Brown, J.):* The court should not have applied the plain error standard in reviewing the defendant's convictions. The court should not have remanded the outstanding issues to a panel. *Concurring in the judgment in part and dissenting in part (Kavanaugh, J.):* The court should not have applied the plain error standard in reviewing the defendant's convictions. The court should not have remanded the outstanding issues to a panel. Note: The original panel decision at *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) is discussed above.

Case Name	Citation	Year	Role	Subject	Holding
White Stallion Energy Ctr., LLC v. EPA	748 F.3d 1222, *judgment reversed by* Michigan v. EPA,135 S. Ct. 2699 (2015)	2015	Authored opinion concurring in part and dissenting in part	Administrative Law; Environmental Law	*Majority (per curiam), petitions for review denied*: The EPA acted reasonably in promulgating air emissions standards for coal- and oil-fired electric utility steam generating units (EGUs), including when the EPA declined to consider the costs of regulation in determining that it was appropriate to list EGUs as sources of hazardous air pollutants. *Concurring in part and dissenting in part (Kavanaugh, J.):* EPA acted unreasonably and outside of its authority when it failed to consider the costs of regulating EGUs in determining that it was appropriate to set new emissions standards. Note: The decision was subsequently reversed and remanded by the Supreme Court in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).
SeaWorld of Fla., LLC v. Perez	748 F.3d 1202	2014	Authored dissent	Administrative Law; Labor & Employment Law	*Majority (Rogers, J.), petition for review denied:* Substantial evidence supported the Occupational Safety and Health Review Commission's factual determinations that working with killer whales during a SeaWorld performance was a recognized employment hazard and that it was feasible to abate that hazard. Furthermore, the Commission's decision to cite Sea World for violating the General Duty Clause of the Occupational Safety and Health Act was not arbitrary or capricious or in excess of its statutory authority. *Dissenting (Kavanaugh, J.)*: The Department of Labor's decision to issue the citation was arbitrary and capricious and in excess of the agency's statutory authority. The Department acted arbitrarily when it: (1) ignored administrative precedent holding that an employer's reduction or elimination of a hazard was not required when it was not feasible due to the dangerous nature of the activity; and (2) drew "illusory and arbitrary distinctions" by treating close contact with killer whales as a proper subject of regulation, but excluded tackling in the National Football League from its regulatory purview. In addition, Congress did not intend for the agency to use the General Duty Clause "to regulate and re-make some undefined swath of America's sports and entertainment" industries, and thus the agency lacked the authority to issue the citation.

Case Name	Citation	Year	Role	Subject	Holding
Util. Air Regulatory Grp. v. EPA	744 F.3d 741	2014	Authored concurrence	Administrative Law; Environmental Law	*Majority (Garland, C.J.), petitions for review denied*: Several challenges to EPA's rules relating to particulate matter from fossil-fuel-fired steam generating units were not properly before the court because courts may not consider issues raised for the first time in a petition for reconsideration until the agency has acted on those objections. The filing of a petition for reconsideration with the EPA did not render the rule non-final for purposes of judicial review, but any objections raised in court must have been presented during the public comment period. The objections properly before the court were without merit. *Concurring (Kavanaugh, J.)*: The rule established by the majority regarding what issues may be heard by the court while a petition for reconsideration is pending before the agency should not be considered jurisdictional.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Duvall	740 F.3d 604 (denying rehearing en banc)	2013	Authored concurrence	Criminal Law & Procedure	*Majority (per curiam), petition for rehearing en banc denied.* *Concurring in the denial of en banc (Rogers, J.)*: The manner in which the D.C. Circuit determines which Justice's opinion, if any, of a splintered Supreme Court decision is binding precedent is governed by the en banc decision of the D.C. Circuit in *King v. Palmer*, 950 F.2d 771 (D.C. Cir.1991). In *Freeman v. United States*, 131 S. Ct. 2685 (2011), a recent Supreme Court decision discussing sentencing in plea-agreements, three separate opinions of the Supreme Court all provided mutually exclusive rationales for their conclusions. Under *King*, none of the opinions was controlling because there was no "common reasoning" that a majority of the justices accepted. *Concurring in the denial of rehearing en banc (Kavanaugh, J.)*: The panel in this case correctly treated Justice Sotomayor's opinion in *Freeman* as controlling because following her reasoning would most frequently result in outcomes with which a majority of Supreme Court Justices in *Freeman* would have agreed. *Concurring in the denial of rehearing en banc (Williams, J.)*: Whether a particular Justice's opinion is the "narrowest" is not easily determined where no opinion is a perfect logical subset of any other. In this case, because under either rule provided for in *Freeman*, some cases will fall outside of the other, and not garner the support of a majority of justices. As a result, some splintered decisions will yield no binding precedent in some situations, but this result is similar to 4-4 decisions and does not raise vertical stare decisis concerns.

Case Name	Citation	Year	Role	Subject	Holding
Agape Church, Inc. v. FCC	738 F.3d 397	2013	Authored concurrence	Communications Law; Freedom of Speech	*Majority (Edwards, J.), petition for review denied*: Analog television broadcasters' claim that the Cable Act requires analog signals to be delivered to customers without the need for a converter was not supported by the text of the federal statute. Deference to FCC's interpretation of "viewability" under the *Chevron* framework was warranted because the statutory provision did not unambiguously address the question of converters, and allowing the use of analog-to-digital converters was reasonable given advancements in technology and availability of low-cost devices. *Concurring (Kavanaugh, J.)*: An earlier Supreme Court decision holding that an FCC rule requiring analog signals to be delivered directly to cable customers did not violate the First Amendment was premised on the fact that the regulation was no more burdensome than necessary to advance important governmental interest. With recent changes in technology, that FCC rule may no longer pass scrutiny, and FCC is correct to modify its rule to avoid a potential constitutional issue.
United States v. Martinez-Cruz	736 F.3d 999	2013	Authored dissent	Criminal Law & Procedure	*Majority (Williams, J.), vacated and remanded*: The Due Process Clause does not permit convicted persons to bear the burden of persuasion when challenging the validity of a prior guilty plea that would potentially result in a sentencing enhancement. It is permissible for the convicted person to bear the burden of production, and it appears that the appellant met that burden. *Dissenting (Kavanaugh, J.)*: The Supreme Court's decision in *Parke v. Raley,* 506 U.S. 20 (1992), strongly suggests that the Due Process Clause does not prohibit assigning the burden of proof to the defendant in a collateral attack on a prior conviction. Every other federal court of appeals had reached a similar conclusion, and the creation of a circuit split by the majority was unwarranted.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Malenya	736 F.3d 554	2013	Authored dissent	Criminal Law & Procedure	*Majority (Williams, J.), vacated and remanded*: The district court failed to adequately consider the defendant's liberty interests, as required by federal law, when imposing conditions for supervised release that included, among other things, restrictions relating to computer use, computer pornography, romantic relationships, and required penile plethysmograph testing. *Dissenting (Kavanaugh, J.)*: Most of the conditions imposed by the district court were common in cases involving sex offenders and reasonable in light of this defendant's conviction for using a website to arrange to have sexual contact with a minor. However, penile plethysmograph testing implicated significant liberty interests and required a more substantial justification.
Texas v. EPA	726 F.3d 180	2013	Authored dissent	Environmental Law; Federal Courts & Civil Procedure	*Majority (Rogers, J.), dismissed*: Statutory provisions of the CAA unambiguously prohibited construction or modification of a pollutant emitting facility without a permit. Prior circuit precedent had construed these provisions as unambiguously self-executing. To the extent that EPA regulations would allow construction or modification that the statutes would not, those regulations did not trump the statutory prohibitions. Therefore, challengers to EPA's greenhouse gas permitting rule did not have Article III standing because they were not injured by the rule, as the source of the prohibition on construction or modification of an emitting facility without a permit was the CAA itself. *Dissenting (Kavanaugh, J.)*: EPA regulations allowed a state to continue using its current implementation plan to issue permits while its implementation plan was being revised to account for a new-regulated pollutant, such as greenhouse gases. EPA's argument that these regulations were trumped by the statute was unavailing because EPA could not disclaim the validity of its own regulations in litigation without actually amending or withdrawing the regulation.

Case Name	Citation	Year	Role	Subject	Holding
Ctr. for Biological Diversity v. EPA	722 F.3d 401	2013	Authored concurrence	Administrative Law; Environmental Law	*Majority (Tatel, J.), vacated*: EPA's decision to temporarily defer regulation of biogenic carbon dioxide was arbitrary and capricious. EPA's failure to regulate air pollutant pursuant to clear statutory mandate could not be justified by *de minimis*, one-step-at-a-time, or administrative necessity doctrines. *Concurring (Kavanaugh, J.)*: Binding circuit precedent held that carbon dioxide, whether biogenic or not, was subject to regulation under the CAA. However, EPA's decision to temporarily exempt biogenic carbon dioxide suggests that this precedent was wrongly decided. *Dissenting (Henderson, J.)*: EPA's deferral rule was justified under the pragmatic one-step-at-a-time doctrine. Alternatively, the petition should be dismissed on prudential ripeness grounds.
Huthnance v. Dist. of Columbia	722 F.3d 371	2013	Authored dissent	Civil Rights Law	*Majority (Brown, J.), affirmed:* Although the district court erred by tendering a "missing evidence" jury instruction at the conclusion of a police misconduct trial, that error did not prejudice the defendants. *Dissenting (Kavanaugh, J.):* A new trial was necessary because the district court's erroneous jury instruction did indeed prejudice the defendants.

Case Name	Citation	Year	Role	Subject	Holding
Gordon v. Holder	721 F.3d 638	2013	Authored opinion concurring in part and dissenting in part	Tax Law	*Majority (Griffith, J.), affirmed*: The district court did not abuse its discretion in issuing preliminary injunction enjoining the enforcement provisions of a federal law requiring tobacco retailers to collect state and local taxes on sales in other jurisdictions because seller must have minimum contacts with the state or local government that defines the tax. However, plaintiff did not meet his burden to obtain a preliminary injunction based on his Tenth Amendment challenge or his claim that a ban on mailing tobacco products lacks a rational basis. *Concurring in the judgment in part and dissenting in part (Kavanaugh, J.)*: Preliminary injunction was not warranted because plaintiff's obligation to collect state and local taxes arose from federal law, and the plaintiff clearly had sufficient contacts with the federal government to satisfy the Due Process Clause. Whether plaintiff had sufficient contacts with a state government was immaterial in the context of a federal enforcement proceeding. *Concurring in part and concurring in the judgment (Sentelle, J.)*: Agreeing in the result, but declining to join the majority's discussion of "gratuitous" and "novel" matters neither before the court nor necessary to the decision.

Case Name	Citation	Year	Role	Subject	Holding
Howard v. Office of Chief Admin. Officer of U.S. House of Representatives	720 F.3d 939	2013	Authored dissent	Civil Rights Law; Government Operations; Labor & Employment Law	*Majority (Edwards, J.), affirmed in part and reversed in part*: The Speech or Debate Clause of the Constitution does not bar a congressional employee's claim against the Chief Administrative Officer of the U.S. House of Representatives alleging racial discrimination and retaliation, insofar as the plaintiff could rely on evidence unrelated to legislative acts to show that the employer's legislative explanation for adverse employment action was pretextual. *Dissenting (Kavanaugh, J.)*: A plaintiff who attempts to prove that her employer's legislative explanation of adverse action was pretextual necessarily requires employer to produce evidence of legislative activities in violation of the Speech or Debate Clause. As a result, a discrimination suit against a congressional office should be dismissed if the office's stated reason for the adverse action was the plaintiff's performance of legislative activities.
Morley v. CIA	719 F.3d 689	2013	Authored concurrence	Privacy & Records	*Majority (per curiam), vacated and remanded*: When denying a FOIA requester's claim for attorney's fees as a prevailing party, the district court failed to consider circuit precedent establishing that records about individuals involved in the assassination of President Kennedy serve a public benefit. *Concurring (Kavanaugh, J.)*: The four-factor test for attorney's fees in FOIA cases—which looks at (1) the public benefit of the information; (2) the commercial value of the information; (3) the nature of the requester's interest; and (4) the reasonableness of the agency's conduct—had no basis in the statutory text and should be reconsidered by the en banc court. Instead, attorney's fees should be based on whether the plaintiff exhibited bad faith or whether the agency's conduct was reasonable.

Case Name	Citation	Year	Role	Subject	Holding
Chlorine Inst., Inc. v. Fed. R.R. Admin.	718 F.3d 922	2013	Authored concurrence	Federal Courts & Civil Procedure; Transportation Law	*Majority (Henderson, J.), petition for review dismissed:* A trade association's challenge to a regulation promulgated by the Federal Railroad Administration requiring qualified rail carriers to submit implementation plans to install positive train control systems on certain tracks was unripe for adjudication because the association had failed to establish that the regulation threatened its members with a present or imminent injury. *Concurring (Kavanaugh, J.)*: Although the trade association's challenge was presently unripe, it could become ripe in the future.
Comcast Cable Commc'ns, LLC v. FCC	717 F.3d 982	2013	Authored concurrence	Communications Law; Freedom of Speech	*Majority (Williams, J.), petition for review granted:* An FCC order requiring cable company to provide an unaffiliated sports programming network with carriage equal to the carriage it afforded its own affiliated sports programming networks was not supported by substantial evidence. *Concurring (Kavanaugh, J.)*: Prohibiting a cable company from discriminating against unaffiliated programming networks would violate the First Amendment unless the company possesses market power in the national video programming distribution market. *Concurring (Edwards, J.):* The unaffiliated sports programming network's FCC complaint was untimely under the statute of limitations.
In re Sealed Case	716 F.3d 603	2013	Authored concurrence	Criminal Law & Procedure	*Majority (Griffith, J.), appeal dismissed:* The court lacked jurisdiction to adjudicate the interlocutory appeal from an order denying a motion for the return of documents seized pursuant to a grand jury investigation. *Concurring (Kavanaugh, J.)*: Although the court lacked jurisdiction to adjudicate this particular appeal, the court would have jurisdiction over other types of appeals presenting issues pertaining to the attorney-client privilege.

Case Name	Citation	Year	Role	Subject	Holding
Ayissi-Etoh v. Fannie Mae	712 F.3d 572	2013	Authored concurrence	Civil Rights Law; Labor & Employment Law; Torts	*Majority (per curiam), affirmed in part and reversed in part:* Although the district court correctly granted summary judgment in the defendant's favor on a former employee's defamation claim against his employer, the district court erred by granting summary judgment in the employer's favor on the former employee's discrimination claims. *Concurring (Kavanaugh, J.)*: A single discriminatory act could be sufficient to create a hostile work environment under federal anti-discrimination laws if that act was sufficiently severe.
Moore v. Hartman	704 F.3d 1003	2013	Authored dissent	Civil Rights Law; Criminal Law & Procedure	*Majority (per curiam), remanded*: A recent Supreme Court decision, *Reichle v. Howards*, 566 U.S. 658 (2012), holding that defendants in a First Amendment retaliatory *arrest* suit were entitled to qualified immunity did not require reconsideration of D.C. Circuit precedent holding that defendants in a retaliatory *prosecution* claim in the D.C. Circuit were not entitled to qualified immunity, because retaliatory arrest and retaliatory prosecution are distinct violations. *Dissenting (Kavanaugh, J.)*: In its opinion, the Supreme Court characterized First Amendment law on retaliatory prosecutions as "not clear." Therefore, the defendants could not have violated "clearly established" First Amendment law and were entitled to qualified immunity.
Grocery Mfrs. Ass'n v. EPA	704 F.3d 1005 (denying rehearing en banc)	2013	Authored dissent	Environmental Law; Federal Courts & Civil Procedure	*Majority (per curiam), petitions for rehearing en banc denied.* *Dissenting from the denial of rehearing en banc (Kavanaugh, J.)*: The D.C. Circuit panel incorrectly held that food and petroleum industry groups lacked Article III standing and prudential standing to challenge an EPA waiver that would require petroleum producers to refine and sell blend of gasoline and ethanol. Note: The original panel decision, 693 F.3d 169 (D.C. Cir. 2012), is discussed below.

Case Name	Citation	Year	Role	Subject	Holding
Rollins v. Wackenhut Servs., Inc.	703 F.3d 122	2012	Authored concurrence	Torts	*Majority (Rogers, J.), affirmed:* The mother of a decedent who committed suicide using a gun provided by his employer after taking an antipsychotic drug failed to state a viable tort claim against either the decedent's employer or the pharmaceutical companies who manufactured and distributed the drug. *Concurring (Kavanaugh, J.)*: The district court properly dismissed the plaintiff's claims with prejudice to refiling, as opposed to without prejudice.
Coal. for Responsible Regulation, Inc. v. EPA	Nos. 09-1322 et al., 2012 U.S. App. LEXIS 25997 (Dec. 20, 2012) (denying rehearing en banc)	2012	Authored dissent	Administrative Law; Environmental Law	*Majority (per curiam), petitions for rehearing en banc denied.* *Concurring in the denial for rehearing en banc (Sentelle, C.J., Rogers, J., Tatel, J.)*: Three-judge panel correctly concluded that EPA's greenhouse-gas-related rules comported with the CAA and were not arbitrary or capricious. *Dissenting from the denial for rehearing en banc (Brown, J.)*: Because the panel incorrectly concluded that Supreme Court precedent dictates that EPA has authority to regulate greenhouse gases in its Prevention of Significant Deterioration Program, the panel decision should be reheard *en banc.* *Dissenting from the denial for rehearing en banc (Kavanaugh, J.)*: Case should be reheard *en banc* because the panel incorrectly concluded that EPA's interpretation of the term "air pollutants" as including greenhouse gases in the context of the Prevention of Significant Deterioration Program was not grounded in statute and was legally impermissible. Note: The Supreme Court reversed the original panel's decision in part in *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

Case Name	Citation	Year	Role	Subject	Holding
United States v. Mohammed	693 F.3d 192	2012	Authored opinion concurring in part and concurring in the judgment	Criminal Law & Procedure	*Majority (Griffith, J.), affirmed in part and remanded in part*: Trial court did not err in admitting defendant's statements made during interrogation at Jalalabad airfield in Afghanistan into evidence. The trial court correctly rejected defendant's challenges to his conviction under the narcoterrorism statute (21 U.S.C. § 960a). But defendant raised a colorable claim of ineffective assistance of counsel that required additional development in the district court. *Concurring in part and concurring in the judgment (Kavanaugh, J.)*: Because ineffective assistance of counsel claims are best explored in collateral proceedings under 28 U.S.C. § 2255, it was unnecessary for the majority to include a detailed discussion of the claim in its opinion.
South Carolina v. United States	No. 12-203, 2012 U.S. Dist. LEXIS 188558 (D.D.C. Aug. 3, 2012)	2012	Authored opinion dissenting in part (district panel)	Federal Courts & Civil Procedure	*Majority (per curiam):* Certain documents relating to draft legislation were not protected by the attorney-client privilege because they primarily concerned political and strategic issues rather than legal advice. *Dissenting in part (Kavanaugh, J.):* The attorney-client privilege protected the documents because the privilege protects attorneys when they research, draft, and negotiate legislation.
Grocery Mfrs. Ass'n v. EPA	693 F.3d 169	2012	Authored dissent	Environmental Law; Federal Courts & Civil Procedure	*Majority (Sentelle, C.J.), dismissed.* Groups representing engine manufacturers and petroleum companies did not have Article III standing because their alleged harm would not be caused by the challenged EPA waiver authorizing the use of a blend of gasoline and ethanol. Whether or not the groups representing the food industry had established injury or causation was immaterial because they were not within the "zone of interests" of the statute required for prudential standing. *Dissenting (Kavanaugh, J.)*: The food and petroleum industry groups adequately alleged facts to meet Article III and prudential standing requirements to challenge the EPA waiver. On the merits, the EPA waiver exceeded the agency's statutory authority.

Case Name	Citation	Year	Role	Subject	Holding
					Note: The D.C. Circuit's order declining to rehear the case en banc, 704 F.3d 1005 (D.C. Cir. 2013), is discussed above.
Miller v. Clinton	687 F.3d 1332	2012	Authored dissent	Government Operations; Labor & Employment Law	*Majority (Garland, J.), reversed and remanded*: The State Department Basic Authorities Act did not abrogate the Age Discrimination in Employment Act's prohibition against personnel actions that discriminate on the basis of age. *Dissenting (Kavanaugh, J.)*: A provision in the State Department Basic Authorities Act authorizing the State Department to contract with American workers in foreign locations "without regard" to "statutory provisions" relating to the "performance of contracts and performance of work in the United States" authorized the State Department to impose a mandatory retirement age of 65.
In re Aiken Cty.	No. 11-1271, 2012 WL 3140360, *mandamus granted*, 725 F.3d 255 (D.C. Cir. 2013)	2012	Authored concurrence	Energy & Utilities Law; Environmental Law	*Majority (per curiam), petition for writ of mandamus held in abeyance*: Petition for writ of mandamus requiring the Nuclear Regulatory Commission to act on a Department of Energy application to store nuclear waste at Yucca Mountain was held in abeyance. *Concurring (Kavanaugh, J.)*: The case should be held in abeyance in light of (1) the Nuclear Regulatory Commission's position that it did not have sufficient appropriated funds to complete action on the license application; (2) the then-pending appropriations decisions being made in Congress; and (3) the practical considerations to be taken into consideration in the equitable remedy of mandamus,. *Dissenting (Randolph, J.)*: The Nuclear Regulatory Commission disregarded a statutory mandate to consider the application at issue, and the remedy for its violation should not be held in abeyance based on the possibility that Congress could take action in the future. Note: The D.C. Circuit subsequently granted mandamus at 725 F.3d 255 (D.C. Cir. 2013), discussed below.

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Case Name	Citation	Year	Role	Subject	Holding
United States v. Burwell	690 F.3d 500 (en banc)	2012	Authored dissent	Criminal Law & Procedure	*Majority (Brown, J.), affirmed*: Federal law imposing a mandatory 30-year sentence for anyone who carries a machine gun while committing a crime of violence did not require a defendant to have known the weapon he was carrying was capable of firing automatically. *Concurring (Sentelle, C.J.)*: Because the question presented is "exceedingly close" and difficult to resolve, the majority was correct to rely on existing precedent, but the majority's approach risked criminalizing a defendant's action for facts for which the defendant was unaware. *Concurring (Henderson, J.)*: The petition for *en banc* review should have been summarily denied because existing precedent resolved the legal question presented and because the case did not present "a question of exceptional importance." *Dissenting (Rogers, J.)*: Existing precedent did not control the case, and the severe additional punishment mandated by the statute at issue should be read to require proof of the defendant's knowledge that the firearm was capable of firing automatically. *Dissenting (Kavanaugh, J.)*: The presumption of a mens rea requirement should have applied to each element of the offense, and the automatic character of the gun was an element of the crime at issue.
Rattigan v. Holder	689 F.3d 764	2012	Authored dissent	Civil Rights Law; Government Operations; National Security	*Majority (Tatel, J.), vacated and remanded*: A federal employee could bring a claim for retaliation under Title VII based on a report or referral to the FBI concerning the employee's eligibility for a security clearance, but only to the extent that the report or referral was knowingly false. *Dissenting (Kavanaugh, J.)*: Under Supreme Court precedent, federal agencies' security clearance decisions, including reports or referrals to the FBI, were not judicially reviewable. Note: The panel's prior opinion at 643 F.3d 975 (D.C. Cir. 2011) is discussed below.

Case Name	Citation	Year	Role	Subject	Holding
Taylor v. Reilly	685 F.3d 1110	2012	Authored concurrence	Administrative Law; Civil Rights Law	*Majority (Garland, J.), affirmed*: U.S. Parole Commission's application of parole regulations did not violate any clearly established right under the Ex Post Facto Clause of which a reasonable official would have known at the time of the hearing, and therefore qualified immunity applied and mandated dismissal of the plaintiff's claims for damages. *Concurring (Kavanaugh, J.)*: Although the U.S. government was entitled to qualified immunity under the facts of the case, U.S. Parole Commissioners were executive branch officials removable at will by the President and were, therefore, not entitled to absolute immunity like judges or agency adjudicators.
Angellino v. Royal Family Al-Saud	681 F.3d 463, *amended and superseded by* 688 F.3d 771 (D.C. Cir. 2012)	2012	Authored dissent	Federal Courts & Civil Procedure	*Majority (Henderson, J.), reversed and remanded*: Breach of contract complaint against Saudi royal family for nonpayment for items shipped to Kingdom of Saudi Arabia and members of the royal family did not warrant dismissal for failure to prosecute based on lack of service of process under the Foreign Sovereign Immunities Act (FSIA) because the *pro se* plaintiff had a reasonable probability of effecting service, and the plaintiff's inability to effect service prior to dismissal was not the result of inactivity. *Dissenting (Kavanaugh, J.)*: Plaintiff repeatedly failed to take steps necessary to effect service, and therefore there was no abuse of discretion in the district court's decision to dismiss the case. Note: The panel's original published decision was amended and superseded and republished as 688 F.3d 771 (D.C. Cir. 2012), but no significant changes were made to the majority's or dissent's substantive legal conclusions.
Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack	681 F.3d 483	2012	Authored dissent	Civil Rights Law; Labor & Employment Law	*Majority (Rogers, J.), reversed and remanded*: In a Fourth Amendment challenge by a labor union to a policy expanding random drug testing to incumbent U.S. Forest Service employees who worked with at-risk youth in residential Job Corps Civilian Conservation Centers, U.S. government did not demonstrate sufficient "special needs" that would

Case Name	Citation	Year	Role	Subject	Holding
					render the requirement of individualized suspicion of drug use impractical. *Dissenting (Kavanaugh, J.)*: Applying the fact-specific balancing test set forth in relevant Fourth Amendment precedent, the government's interest in ensuring a drug-free work place outweighed the infringement on individual privacy associated with the drug testing program.
Hall v. Sebelius	No. 11-5076, 2012 U.S. App. LEXIS 10832 (May 30, 2012) (denying panel rehearing)	2012	Authored concurrence	Healthcare Law; Pensions & Benefits Law	*Majority (per curiam)*, *petition for panel rehearing denied*. *Concurring in the denial of panel rehearing (Henderson, J.)*: Although the plaintiffs' petition for panel rehearing was without merit, the plaintiffs' confusion regarding the court's holding arose from the court's failure to address the central issue in the case: whether the Social Security Administration is authorized to penalize an individual who declines Medicare, Part A coverage by requiring him to forfeit and repay Social Security benefits. *Concurring in the denial of panel rehearing (Kavanaugh, J.)*: Although no one is forced to accept Medicare Part A benefits, the court was powerless to review the practices of plaintiffs' private health insurance providers who curtailed plaintiffs' private coverage because the plaintiffs were eligible for Medicare, Part A.
Heller v. Dist. of Columbia	670 F.3d 1244	2011	Authored dissent	Firearms Law	*Majority (Ginsburg, J.)*, *affirmed in part, vacated in part, and remanded*: District of Columbia possessed statutory authority under the D.C. Home Rule Act to regulate firearms. The basic requirement to register handguns had a long history in American law and therefore did not impinge upon Second Amendment rights. Other challenged D.C. firearm registration laws were novel, impacted Second Amendment rights, and were therefore subject to intermediate scrutiny. The record was not complete as to whether the District of Columbia's novel firearm registration requirements survived intermediate scrutiny, and the District's bans on "assault weapons" and the possession of magazines capable of holding more than ten rounds of ammunition survived intermediate scrutiny.

Case Name	Citation	Year	Role	Subject	Holding
					Dissenting (Kavanaugh, J.): Courts should assess gun bans and regulations based on the Constitution's text, history, and tradition rather than by a balancing test, such as strict or intermediate scrutiny. The District of Columbia's requirement for registration of all lawfully possessed guns and its ban on most semi-automatic rifles violated the Second Amendment.
Belize Soc. Dev. Ltd. v. Gov't of Belize	668 F.3d 724	2012	Authored dissent	Contracts Law; International Law	*Majority (Rogers, J.), remanded*: In a petition to confirm and enforce a foreign arbitration award against the Government of Belize, the district court exceeded the proper exercise of its statutory authority under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards by entering an order staying the proceedings pending the outcome of related litigation in Belize, and, although the stay was not a final, appealable order, the plaintiff satisfied standards for mandamus relief. *Dissenting (Kavanaugh, J.)*: The plaintiff did not satisfy the standards for the "extraordinary" remedy of mandamus because the district court's stay order was only temporary and originally was unopposed.
Seven-Sky v. Holder	661 F.3d 1, *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)	2011	Authored dissent	Healthcare Law	*Majority (Silberman, J.), affirmed*: Congress possessed the power to enact the "individual mandate" provision in the Patient Protection and Affordable Care Act (ACA) pursuant to its Commerce Clause powers, and the Anti-Injunction Act did not deprive the court of jurisdiction to review the individual mandate's constitutionality prior to enforcement because the Anti-Injunction Act's reference to "any tax" did not include the ACA's "penalty" imposed for failure to comply with the individual mandate. *Concurring (Edwards, J.)*: While Congress's authority to legislate under the Commerce Clause is not without limits, the power to regulate interstate markets does not threaten to eliminate the line between national regulations and local regulations. *Dissenting as to jurisdiction (Kavanaugh, J.)*: The Anti-Injunction Act deprived the court of jurisdiction prior to enforcement of the individual

Case Name	Citation	Year	Role	Subject	Holding
					mandate because the plaintiffs' constitutional challenge, if successful, would prevent the IRS from assessing or collecting tax penalties from citizens who do not have health insurance as required by the individual mandate. Note: The decision was subsequently abrogated by the Supreme Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
Ne. Hosp. Corp. v. Sebelius	657 F.3d 1	2011	Authored opinion concurring in the judgment	Administrative Law; Healthcare Law	*Majority (Griffith, J.), affirmed*: Although the relevant federal statute did not unambiguously foreclose the HHS Secretary's interpretation of the proper methodology for calculating certain Medicare reimbursement rates, the change in methodology altered the past legal consequences of past actions and, therefore, violated the rule against retroactive rulemaking. *Concurring in the judgment (Kavanaugh, J.)*: The HHS Secretary's interpretation did not comport with the plain language of the Medicare statute.
Stephens v. U.S. Airways Grp., Inc.	644 F.3d 437	2011	Authored opinion concurring in the judgment	Pensions & Benefits Law	*Majority (Brown, J.), affirmed in part and reversed in part:* Retired pilots at U.S. Airways were entitled to receive interest earned on their retirement accounts during the 45-day period between their retirement and receipt of the lump-sum payment of their account under ERISA because the 45-day period was not a "reasonable delay" as that term is used in IRS regulations, but the pilots were not entitled to receive their attorney's fees incurred in the litigation. *Concurring in the judgment (Kavanaugh, J.)*: The pilots were entitled to interest on the full 45-day period regardless of whether the delay was reasonable because the IRS regulation authorizing reasonable administrative delays does not impact the ERISA requirement at issue. *Dissenting in part (Henderson, J.)*: The plaintiff-pilots failed to carry their burden to demonstrate that the 45-day delay was unreasonable and, therefore, were not entitled to interest under ERISA and applicable IRS regulations.

Case Name	Citation	Year	Role	Subject	Holding
Doe v. Exxon Mobil Corp.	654 F.3d 11, *vacated by* 527 F. App'x 7 (D.C. Cir. 2013)	2011	Authored opinion dissenting in part	Federal Courts & Civil Procedure; International Law; Torts	*Majority (Rogers, J.), affirmed in part, reversed in part, and remanded*: Aiding and abetting is well established under the Alien Tort Statute (ATS), and neither the text, history, nor purpose of the ATS supported corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations. The Torture Victim Protection Act did not apply to the tort claims alleged by the eleven Indonesian plaintiffs against Exxon. Nevertheless, those plaintiffs had prudential standing to bring their non-federal claims of assault, battery, and negligence against the company, subject to Indonesian law. *Dissenting in part (Kavanaugh, J.)*: The plaintiffs' ATS claims should have been dismissed either because: (1) the ATS does not apply to conduct that occurred in foreign nations; (2) the ATS does not apply to claims against corporations; (3) allowing plaintiffs' claims of torture and extrajudicial killings to have gone forward would have been incongruous with the TVPA; or (4) the Executive Branch made clear that such ATS claims would harm the United States' relationship with Indonesia, justifying dismissal pursuant to *Sosa v. Alvarez–Machain*, 542 U.S. 692 (2004). r Note: The panel vacated its judgment in 527 F. App'x 7 (D.C. Cir. 2013) in light of intervening changes in governing law resulting from the Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013) concerning the extraterritorial reach of the ATS.
Cohen v. United States	650 F.3d 717 (en banc)	2011	Authored dissent	Administrative Law; Tax Law	*Majority (Brown, J.), reversed and remanded:* The Anti-Injunction Act (AIA) did not bar a putative class action by taxpayers seeking to challenge the procedure established by the IRS to refund excise taxes erroneously collected for long-distance telephone service. Nor did the Declaratory Judgment Act raise a bar to the suit because that Act's exception for any suit "with respect to Federal taxes" was coterminous with the AIA. No adequate remedy at law existed and so equitable relief was available under the APA. And the suit was not unripe because it was a "pre-enforcement" action.

Case Name	Citation	Year	Role	Subject	Holding
					Dissenting (Kavanaugh, J.): The APA barred the taxpayers' suit because they had an adequate alternative judicial remedy through tax refund suits. Alternatively, the ripeness doctrine required plaintiffs to file refund claims with the IRS before bringing suit to challenge the refund procedure.
In re Aiken Cty.	645 F.3d 428	2011	Authored concurrence	Administrative Law; Energy & Utilities Law	*Majority (Sentelle, C.J.), petitions dismissed*: Petitions seeking review of and relief from two "determinations" made by the Department of Energy (DOE) to (1) withdraw its application to the Nuclear Regulatory Commission (NRC) for a license to construct a permanent nuclear waste repository at Yucca Mountain and (2) abandon development of that repository were neither ripe for review nor justiciable by the court. *Concurring (Brown, J.)*: The NRC arguably abdicated its statutory responsibility under the Nuclear Waste Policy Act by failing to act on the DOE's application for a license. *Concurring (Kavanaugh, J.)*: It was unusual that an independent agency—the NRC—had the final word within the executive branch on this issue and not the President. As a result, this case provided "a dramatic illustration of the continuing significance and implications of" *Humphrey's Executor v. United States,* 295 U.S. 602 (1935). Even though *Humphrey's Executor* remains "an entrenched Supreme Court precedent, protected by stare decisis," "the fact that courts do and must accept *Humphrey's Executor* d[id] not require ignoring the issues of accountability, liberty, and government effectiveness raised by independent agencies."
Rattigan v. Holder	643 F.3d 975, *reh'g granted, judgment vacated by* No. 10-5014, 2011 U.S. App. LEXIS	2011	Authored dissent	Labor & Employment Law; National Security	*Majority (Tatel, J.), judgment vacated and remanded*: An FBI agent's retaliation claim under Title VII was justiciable despite arising from a security clearance investigation that would otherwise have been unreviewable under *Department of Navy v. Egan*, 484 U.S. 518 (1988), because *Egan*'s unreviewability holding reached only security-clearance decisions made by agency employees who initiate investigations or grant, deny, or revoke clearances.

Case Name	Citation	Year	Role	Subject	Holding
	18852 (Sept. 13, 2011)				*Dissenting (Kavanaugh, J.)*: The majority's "slicing and dicing of the security clearance process into reviewable and unreviewable portions" had no basis in *Egan*, and failed to "reflect the essential role that the reporting of security risks plays in the maintenance of national security." Because the plaintiff's suit required the jury to second-guess the FBI's security clearance decision, it should have been dismissed under *Egan*. Note: The D.C. Circuit granted the appellant's petition for panel rehearing at No. 10-5014, 2011 U.S. App. LEXIS 18852 (Sept. 13, 2011) (D.C. Cir. Sept. 13, 2011). The panel's subsequent opinion at 689 F.3d 764 (D.C. Cir. 2012) is discussed above.
Roth v. Dep't of Justice	642 F.3d 1161	2011	Authored opinion concurring in part and dissenting in part	Privacy & Records	*Majority (Tatel, J.), affirmed in part, reversed in part, and remanded*: Under *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004), the public had an interest in knowing whether the FBI was withholding information that could corroborate a death-row inmate's claim of innocence, and that interest outweighed any privacy interests that the three individuals named in the relevant FBI files may have had in not having the FBI disclose whether the agency had information that would have linked them to the inmate's crimes. *Concurring in part and dissenting in part (Kavanaugh, J.)*: FOIA ordinarily is not a proper tool for the public to obtain private information from law enforcement files relating to a criminal prosecution when disclosure would infringe the privacy interests of third parties. Although the inmate claimed that the requested documents would have shown that the federal government impermissibly withheld exculpatory information relevant to his state criminal trial, any claim was adequately addressed in the inmate's criminal and habeas proceedings and did not suffice to override the privacy interests of the individuals named in the law enforcement files.
Mahoney v. Doe	642 F.3d 1112	2011	Authored concurrence	Freedom of Religion; Freedom of Speech	*Majority (Brown, J.), affirmed*: A D.C. statute prohibiting a demonstrator from chalking the street in front of the White House did not violate the First Amendment, facially or as applied, because the statute was a content-neutral regulation that was narrowly tailored to achieve the government's significant interest in controlling the street's appearance and left open alternative channels of communication. Nor did the

Case Name	Citation	Year	Role	Subject	Holding
					statute substantially burden the demonstrator's expression of his religious views in violation of the Religious Freedom Restoration Act. *Concurring (Kavanaugh, J.)*: The government applied a restriction on defacement in a content- and viewpoint-neutral way, leaving the plaintiffs with "no serious First Amendment objection."
Koretoff v. Vilsack	No. 09-5286, 2010 U.S. App. LEXIS 25409 (Dec. 13, 2010)	2010	Authored concurrence	Administrative Law; Food & Drug Law	*Majority (per curiam), petition for panel rehearing denied.* *Concurring in denial of panel rehearing (Henderson, J.):* The government simply repeated the same unavailing argument that producers are generally precluded from bringing an action under the Agricultural Marketing Agreement Act (AMAA) subject to an exception for a producer litigating a "definite" and "personal" right. *Concurring in denial of panel rehearing (Kavanaugh, J.)*: The producers had standing because the challenged marketing orders directly thwarted the producers' ability to sell their products and thus significantly affected their livelihoods. It would have been especially odd to find that the AMAA, which was enacted to protect farmers, precluded them from challenging unlawful agency orders that directly affected their ability to sell their products.
United States v. Jones	625 F.3d 766 (denying rehearing en banc)	2010	Authored dissent	Criminal Law & Procedure	*Majority (per curiam), petition for rehearing en banc denied.* *Concurring in denial of rehearing en banc (Ginsburg, Tatel, and Griffith, JJ.):* The panel did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have sufficed to render lawful the use of a global positioning system (GPS) device to track the public movements of a suspect for approximately four weeks. Nor did the panel's decision call into question common and important police practices, such as visual or photographic surveillance of public places. *Dissenting from denial of rehearing en banc (Sentelle, C.J.)*: The panel's conclusion that the warrantless use of a GPS device constituted an unreasonable search under the Fourth Amendment was inconsistent

Case Name	Citation	Year	Role	Subject	Holding
					with every other federal circuit to have considered the question, as well as Supreme Court precedent. *Dissenting from denial of rehearing en banc (Kavanaugh, J.)*: The en banc court should have reconsidered the panel's novel aggregation approach to Fourth Amendment searches, as well as whether the police, by touching and manipulating the outside of the defendant's car to install the GPS tracking device, physically encroached "within a constitutionally protected area."
Al-Bihani v. Obama	619 F.3d 1(denying rehearing en banc)	2010	Authored concurrence	International Law; National Security	*Majority (per curiam), petition for rehearing en banc denied.* *Concurring in the denial of rehearing en banc (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ.)*: There was no need for the en banc court to determine the role of international law-of-war principles in interpreting the AUMF because that question was unnecessary to the disposition of the case on the merits. *Concurring in the denial of rehearing en banc (Brown, J.)*: The other concurrences denying rehearing en banc served only to muddy the earlier panel decision's clear holding that international law as a whole does not limit the AUMF's grant of war powers. *Concurring in the denial of rehearing en banc (Kavanaugh, J.)*: The petition raised two fundamental questions—(1) whether international-law norms are automatically a part of domestic U.S. law, and (2) if not, whether the 2001 AUMF incorporates international-law principles as judicially enforceable limits on the President's wartime authority under the AUMF. The answer to both questions was no. The decision in the first instance whether to incorporate international-law norms into domestic U.S. law belongs to the political branches, and Congress did not incorporate any such norms in enacting the AUMF. The appellant's request that the court incorporate them on its own would therefore have "contravene[d] bedrock tenets of judicial restraint and separation of powers." *Concurring in the denial of rehearing en banc (Williams, J.)*: The only serious claim in the petition for rehearing was that the panel improperly failed to consider the impact of international law on the President's authority under the AUMF; but as the appellant's detention was otherwise plainly

Case Name	Citation	Year	Role	Subject	Holding
					lawful there was no need to address this issue in general terms. Although Judge Kavanaugh expressed legitimate concerns about "using gauzy notions of international law to rein in the executive's conduct of military options," the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), implicitly sanctioned the use of international law as an interpretive tool, and in *Boudmediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court also made clear that Article III courts have a duty to monitor and to a degree supervise the battlefield conduct of the U.S. military.
Howmet Corp. v. EPA	614 F.3d 544	2010	Authored dissent	Administrative Law; Environmental Law	*Majority (Brown, J.), affirmed*: The word "purpose" as used in the hazardous waste regulations' definition of "spent material" under the Resource Conservation and Recovery Act (RCRA) was ambiguous, and the EPA provided a reasonable interpretation of that term, entitling it to substantial deference. The EPA also provided sufficient notice of its interpretation, as required by due process. *Dissenting (Kavanaugh, J.)*: The EPA's interpretation was flatly inconsistent with the text of its 1985 regulations and contravened an explicit statement in those regulations' preamble, creating de facto a new regulation in the guise of interpreting another. In a later case the court may have to consider whether the EPA's expansion of its regulatory authority transgressed RCRA's limits.
United States v. Moore	612 F.3d 698	2010	Authored concurrence	Criminal Law & Procedure	*Majority (Ginsburg, J.)*, *affirmed*: There was sufficient evidence to support the defendant's conviction under 18 U.S.C. § 1001 for making materially false statements about a matter within the jurisdiction of the United States Postal Service by signing a false name on a postal delivery form. *Concurring (Kavanaugh, J)*: In light of *Bryan v. United States*, 524 U.S. 184 (1998), the court should reconsider in a later case the appropriate mens rea requirements and defenses to prosecutions under 18 U.S.C. § 1001, including whether the government must prove that the defendant knew his conduct was unlawful.

Case Name	Citation	Year	Role	Subject	Holding
El-Shifa Pharm. Indus. Co. v. United States	607 F.3d 836 (en banc)	2010	Authored opinion concurring in the judgment	Federal Courts & Civil Procedure; National Security	*Majority (Griffith, J.), affirmed*: The political question doctrine barred review of a Sudanese pharmaceutical plant owner's claims for compensation under the Federal Tort Claims Act following a military strike on its plant and statements by officials linking plaintiffs to Osama bin Laden. Deciding whether the strike order was "mistaken or not justified" had to be resolved by the political branches, and the veracity of the allegedly defamatory remarks was "inextricably intertwined" with the underlying decision to strike. *Concurring in the judgment (Ginsburg, J.)*: In its opinion the majority expanded the political question doctrine by reading into several earlier cases a new political decision doctrine that departed sharply from the inquiry called for by *Baker v. Carr*, 369 U.S. 186 (1962). *Concurring in the judgment (Kavanaugh, J.)*: Although the plaintiff raised a federal defamation claim against the United States, no such cause of action was available. Nor was there a customary international law norm recognized under the Alien Tort Statute that would have justified compensation to the plaintiff for the allegedly mistaken bombing of its facility. However, the political question doctrine does not apply when the underlying claim is premised on a congressionally enacted statute intruding upon the Executive's exclusive and preclusive constitutional authority.
Newdow v. Roberts	603 F.3d 1002	2010	Authored opinion concurring in the judgment	Freedom of Religion	*Majority (Brown, J.), affirmed*: The plaintiffs' challenge to prayers offered at the 2009 presidential inauguration as well as the inclusion of the phrase "So help me God" in the presidential oath was moot, since the inauguration had already occurred, and the plaintiffs lacked standing to seek declaratory and injunctive relief because declaratory relief would not have redressed the plaintiffs' alleged injury and injunctive relief was unavailable against the defendants. *Concurring in the judgment (Kavanaugh, J.)*: The plaintiffs had standing to challenge the presidential oath and inaugural prayers because they pled a sufficiently concrete and particularized injury under the Establishment Clause that could be traced to the defendants and redressed by an

Case Name	Citation	Year	Role	Subject	Holding
					injunction. The Establishment Clause allowed the use of "so help me God" in concluding the official presidential oath as well as the court's invocation, "God save the United States and this honorable Court."
Cablevision Sys. Corp. v. FCC	597 F.3d 1306	2010	Authored dissent	Administrative Law; Freedom of Speech	*Majority (Sentelle, C.J.), petition for review denied*: The FCC reasonably exercised its discretion to interpret a sunset provision in the Cable Act of 1992 to mean that the statutory prohibition against exclusive contracts between cable operators and cable affiliated programming networks "continued to be necessary" within the meaning of the Act "if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected." Substantial evidence also supported the FCC's decision to extend the statutory prohibition against exclusive contracts for five years. *Dissenting (Kavanaugh, J.)*: The FCC's exclusivity rule was no longer necessary to further competition and, therefore, no longer met intermediate scrutiny as required of a content-neutral restriction on editorial and speech rights. The rule therefore violated the First Amendment and, as a result, the Cable Act as well.
Cohen v. United States	578 F.3d 1, *reh'g granted in part, vacated in part*, 599 F.3d 652 (D.C. Cir. 2010)	2009	Authored opinion dissenting in part	Administrative Law; Tax Law	*Majority (Brown, J.,) affirmed in part, reversed in part, and remanded:* In a case where the IRS had concededly collected erroneous excise taxes, refund process announced by IRS was final agency action subject to judicial review under the APA. *Dissenting in part (Kavanaugh, J.):* Plaintiffs failed to bring refund claims with the IRS before filing suit, leaving their claims barred by statutory exhaustion requirement and unripe for review. Note: Rehearing en banc granted in part, opinion vacated in part by *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011), discussed above.

Case Name	Citation	Year	Role	Subject	Holding
Davis v. Pension Ben. Guar. Corp.	571 F.3d 1288	2009	Authored concurrence	Federal Courts & Civil Procedure; Labor & Employment Law	*Majority (Brown, J.), affirmed:* District Court properly denied motion for preliminary injunction against Pension Benefit Guaranty Corporation in suit brought by retired airlines pilots, as pilots failed to show likelihood of success on their ERISA claims or any irreparable harm justifying preliminary relief. *Concurring (Kavanaugh, J.):* District court properly denied motion for preliminary injunction for reasons stated in majority opinion, however, the D.C. Circuit's "sliding scale" approach to the preliminary injunction analysis was likely no longer viable after the Supreme Court's decision in *Winter v. NRDC*, 555 U.S. 7 (2008).
Soundexchange, Inc. v. Librarian of Cong.	571 F.3d 1220	2009	Authored concurrence	Administrative Law; Intellectual Property Law	*Majority (Ginsburg, J.), affirmed in part, reversed in part, and remanded:* Royalty rate set by Copyright Royalty Judges that satellite radio services must pay for the use of sound recordings was reasonable given the substantial deference courts owe to the agency under the Copyright Act. *Concurring (Kavanaugh, J.)*: Although members of the Copyright Royalty Board exercise expansive executive authority and are not nominated by the President and confirmed by the Senate, this potential constitutional issue was not raised and the court was not required to address it.
In re Grand Jury Subpoenas	571 F.3d 1200	2009	Authored concurrence	Government Operations	*Majority (Ginsburg, J.), reversed:* Subpoena seeking to investigate certain statements made by congressman to Ethics Committee violated the Speech or Debate Clause. *Concurring (Kavanaugh, J.)*: D.C. Circuit precedents giving narrow interpretation to Speech or Debate Clause should be reconsidered by the en banc court and are inconsistent with the text of the clause and the Supreme Court's precedents.
SEC v. Fed. Labor Relations Auth.	568 F.3d 990	2009	Authored concurrence	Government Operations; Labor & Employment Law	*Majority (Brown, J.,) petition denied, cross-application for enforcement granted:* A Federal Labor Relations Authority (FLRA) order concluding that the SEC engaged in unfair labor practices when it unilaterally implemented a new payment system for SEC employees and ended automatic annual within-grade increases before completing the

Case Name	Citation	Year	Role	Subject	Holding
					bargaining process with the agency employees' union was not unreasonable. *Concurring (Kavanaugh, J.):* While jurisdiction over a dispute between two executive branch agencies is questionable under Article III of the Constitution, courts have jurisdiction over suits between independent agencies (like the SEC and FLRA) and executive agencies or between other independent agencies, so jurisdiction in this case was proper.
City of South Bend, Ind. v. Surface Transp. Bd.	566 F.3d 1166	2009	Authored concurrence	Administrative Law; Transportation Law	*Majority (Ginsburg, J.), petitions denied:* In denying application for adverse abandonment of two railroad lines, the Surface Transportation Board reasonably concluded that potential future demand for the railroad lines outweighed petitioners' interest in immediate abandonment. *Concurring (Kavanaugh, J.):* The case raised a question about whether third parties (like the plaintiffs) could bring abandonment petitions at all, and the Board's decision brushed up against the limits of arbitrary and capricious review.
Kiyemba v. Obama	561 F.3d 509	2009	Authored concurrence	National Security	*Majority (Ginsburg, J.), vacating order*: Nine detainees held at U.S. Naval Base at Guantanamo Bay whom the government no longer deemed enemy belligerents that sought an order barring their transfer to a country where they would be tortured or further detained were not entitled to habeas relief. Although the constitutional writ of habeas corpus enabled Guantanamo detainees to challenge the legality of their detention, the district court lacked the authority (absent the enactment of an authorizing statute) to bar the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. *Concurring (Kavanaugh, J.):* While Congress remains entitled to regulate the executive's transfer of detainees, in the absence of a statutory claim, the judiciary is required to defer to the executive's judgment on whether transfer to a foreign country is "likely to result in torture." The dissent's alternative theory that detention by a foreign nation is detention "on behalf of" the United States provides an unworkable, ill-defined standard in tension with Supreme Court precedent.

Case Name	Citation	Year	Role	Subject	Holding
					Concurring in part and dissenting in part (Griffith, J.): The court was not required to defer "absolutely" to the executive in this matter; habeas protection requires a meaningful opportunity to challenge detention "on behalf of the United States" even if that detention is by a foreign nation.
In re Sealed Case	551 F.3d 1047	2009	Authored opinion concurring in the judgment	Privacy & Records	*Majority (Tatel, J.), reversed:* Privacy Act definition of "agency" covered the Vermont Army National Guard. *Concurring in the judgment (Kavanaugh, J.):* At the motion to dismiss stage, there was insufficient evidence to establish whether or not the Vermont Army National Guard was a "federally recognized unit or organization of the Army National Guard."
FTC v. Whole Foods Mkt., Inc.	548 F.3d 1028, *amending and superseding* 533 F.3d 869 (D.C. Cir. 2008) *and denying petition for en banc rehearing*	2008	Authored dissent	Antitrust Law	*Opinion (Brown, J.), reversed and remanded:* Case was not moot in challenge to merger of two large supermarkets, notwithstanding that merger had largely been completed. The district court erred by considering only marginal consumers and instead should have considered the FTC's evidence on competition in the organic-store market, as well as the broader market of all supermarkets. *Concurring in the judgment (Tatel, J.):* The district court erred by not holding that the relevant product market was a separate market of organic food supermarkets. *Dissenting (Kavanaugh, J.):* FTC's case against the merger was from a bygone era of antitrust enforcement. Because the record failed to show that the merged entity could exercise meaningful market power, there was no sound basis on which to block the merger. *Concurring in the denial of rehearing en banc (Ginsburg, J.):* Rehearing en banc was unnecessary because, since there was no controlling opinion for the court, the panel ruling does not set precedent.

Case Name	Citation	Year	Role	Subject	Holding
					Note: The panel decision amended and superseded an earlier published decision in *FTC v. Whole Foods Mkt.*, Inc., 533 F.3d 869 (D.C. Cir. 2008), discussed below.
Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.	537 F.3d 667, *aff'd in part, rev'd in part*, 561 U.S. 477 (2010)	2008	Authored dissent	Government Operations; Securities Law	*Majority (Rogers, J.), affirmed:* The Public Company Accounting Oversight Board (Board) created under the Sarbanes-Oxley Act did not violate the Appointments Clause, because the Board's exercise of its powers under the Act were subject to comprehensive control by the SEC, rendering the Board members "inferior officers" within the meaning of the Clause. Further, the "for-cause" limitation on termination of Board members by the SEC did not violate separation-of-powers principles. *Dissenting (Kavanaugh, J.):* The Board's existence violated separation of powers principles because neither the President nor a presidential "alter ego" possessed any power to remove Board members. Further, the Board's members were not "inferior officers" because the Board was explicitly designed to be independent from the SEC, and the Board's "most critical functions" were performed without any input from the SEC. Note: The Supreme Court subsequently affirmed the D.C. Circuit's decision in part and reversed in part in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).
Sierra Club v. EPA	536 F.3d 673	2008	Authored dissent	Administrative Law; Environmental Law	*Majority (Griffith, J.), petition for review granted in part and denied in part, and order vacated:* EPA rule from 2006 violated plain meaning of the CAA by prohibiting state and local authorities from issuing certain permits for emissions that imposed additional monitoring requirements where the requirements failed to assure compliance with emission limits. *Dissenting (Kavanaugh, J.):* The statute gave the EPA authority to prohibit state and local authorities from implementing monitoring requirements inside the permitting process.

Case Name	Citation	Year	Role	Subject	Holding
Bryant v. Gates	532 F.3d 888	2008	Authored concurrence	Freedom of Speech	*Majority (Ginsburg, J.,) affirmed:* Department of Defense did not violate the First Amendment by refusing to publish advertisement in its Civilian Enterprise Newspapers. The newspapers were non-public forums and the restriction applied was reasonably designed to ensure that advertising furthers the mission of a military command or installation. *Concurring (Kavanaugh J.)*: The Civilian Enterprise Newspapers were not forums at all but rather were government speech, and as such, not subject to normal First Amendment analysis.
FTC v. Whole Foods Mkt., Inc.	533 F.3d 869, *amended and reissued by* 548 F.3d 1028	2008	Authored dissent	Antitrust Law	*Majority (Brown, J.), reversed and remanded:* The FTC's challenge to the merger of two corporations was not moot even though the merger had largely been completed. The district court reversibly erred by denying the Commission's request for a preliminary injunction blocking the merger based on its erroneous assumption that market definition must depend on marginal consumers. *Concurring (Tatel, J.):* The district court overlooked or mistakenly rejected certain evidence supporting the FTC's request. *Dissenting (Kavanaugh, J.):* The district court correctly rejected the FTC's attempt to block the merger because the FTC's theories of market definition misapplied antitrust law. Note: The panel subsequently amended and reissued the opinion in *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), discussed above.
United States v. Askew	529 F.3d 1119 (en banc)	2008	Authored dissent	Criminal Law & Procedure	*Majority (Edwards, J.), reversed and remanded:* A police officer conducted an impermissible search for evidence when unzipping a suspect's jacket without probable cause or a warrant. *Concurring (Griffith, J.):* Supreme Court precedent did not create an exception to the Fourth Amendment that would justify the search undertaken in this case.

Case Name	Citation	Year	Role	Subject	Holding
					Dissenting (Kavanaugh, J.): The search was not unconstitutional because (1) unzipping the jacket was an objectively reasonable protective step to ensure officer safety; and (2) police may permissibly maneuver a suspect's outer clothing when doing so would help facilitate the witness's identification. Note: The original panel decision at 482 F.3d 532 (D.C. Cir. 2007) is discussed above.
In re Sealed Case	527 F.3d 188	2008	Authored dissent	Criminal Law & Procedure	*Majority (Brown, J.), vacated and remanded:* The district court reversibly erred by imposing a criminal sentence twice as long as the recommended maximum without sufficiently explaining its reasons for doing so. *Dissenting (Kavanaugh, J.):* The district court adequately explained its reasons for imposing the challenged sentence.
Noble v. Sombrotto	525 F.3d 1230	2008	Authored opinion concurring in part and dissenting in part	Labor & Employment Law	*Majority (per curiam), affirmed in part, vacated in part, reversed in part, and remanded:* Although the district court erred by dismissing some of a union member's claims that the union and its officers had misused union funds in violation of the Labor Management Reporting & Disclosure Act, it did not err by dismissing others. *Concurring in part and dissenting in part (Kavanaugh, J.):* The district court correctly rejected all of the plaintiff's claims against the union and its officers. *Concurring in part and dissenting in part (Williams, J.):* The district court should not have dismissed the union member's claims relating to in-town expense allowances and Federal Insurance Contributions Act reimbursements.

Case Name	Citation	Year	Role	Subject	Holding
Am. Radio Relay League, Inc. v. FCC	524 F.3d 227	2008	Authored opinion concurring in part, concurring in the judgment in part, and dissenting in part	Administrative Law; Communications Law	*Majority (Rogers, J.), petition for review granted in part and remanded:* The FCC failed to satisfy the APA's notice-and-comment requirements when it promulgated a rule regulating the use of the radio spectrum. *Concurring (Tatel, J.):* The FCC's failure to comply with the APA undermined the court's ability to assess the regulation's validity. *Concurring in part, concurring in the judgment in part, and dissenting in part (Kavanaugh, J.):* Much of the majority opinion correctly applied binding precedent, but the majority misapplied applicable legal principles by concluding that the FCC had failed to sufficiently explain the reasoning underlying certain aspects of its regulation.
Am. Bird Conservancy, Inc. v. FCC	516 F.3d 1027	2008	Authored dissent	Administrative Law; Environmental Law	*Majority (per curiam), vacated in part and remanded:* The FCC erred by rejecting an environmental group's petition seeking to protect migratory birds from collisions with communications towers. *Dissenting (Kavanaugh, J.):* The court should have dismissed the case as unripe for judicial review.
Agri Processor Co., Inc. v. NLRB	514 F.3d 1	2008	Authored dissent	Labor & Employment Law	*Majority (Tatel, J.), petition for review denied, cross-petition for enforcement granted:* Not only does the NLRA protect employees who are unlawfully present aliens, but such aliens may also be placed in a bargaining unit with their U.S. citizen and lawfully present alien coworkers. *Concurring (Henderson, J.):* Although it is peculiar to hold that the NLRA protects certain aliens who cannot legally be employed, the court was required to follow Supreme Court precedent holding that the NLRA's statutory definition of "employee" includes unlawfully present aliens. *Dissenting (Kavanaugh, J.):* An unlawfully present alien cannot be an "employee" within the meaning of the NLRA because such an alien cannot be a lawful "employee" in the United States under federal law.

Case Name	Citation	Year	Role	Subject	Holding
Sims v. Johnson	505 F.3d 1301	2007	Authored dissent	Contracts Law	*Majority (Rogers, J.), vacated and remanded:* A remand was necessary to determine the terms of a compromise settlement concerning the payment of attorney's fees. *Dissenting (Kavanaugh, J.):* Remand was inappropriate because the appellee had already paid attorney's fees to the appellant in accordance with the compromise settlement's terms.
Valdes v. United States	475 F.3d 1319 (en banc)	2007	Authored concurrence	Criminal Law & Procedure	*Majority (Williams, J.), reversed:* The government failed to prove that a police detective unlawfully accepted a gratuity for or because of an official act. *Concurring (Kavanaugh, J.):* Although the jury could have found the detective guilty of bribery, it could not have found him guilty of accepting an illegal gratuity. *Dissenting (Henderson, J.):* The detective violated federal law by accepting money in exchange for performing a function of his office. *Dissenting (Garland, J.):* The detective unlawfully accepted money for or because of an official act.
Doe v. Exxon Mobil Corp.	473 F.3d 345	2007	Authored dissent	Federal Courts & Civil Procedure; Torts	*Majority (Sentelle, J.), appeal dismissed, mandamus petition denied:* The district court's denial of an American corporation's motion to dismiss a tort suit filed by foreign nationals on political question grounds was not immediately appealable, and the appellate court would not issue a writ of mandamus compelling the district court to dismiss the case. *Dissenting (Kavanaugh, J.):* Allowing the case to proceed would adversely affect the United States' foreign policy interests, so the appellate court should have issued a writ of mandamus and ordered the district court to dismiss the plaintiffs' complaint.

Case Name	Citation	Year	Role	Subject	Holding
Nuvio Corp. v. FCC	473 F.3d 302	2006	Authored concurrence	Administrative Law; Communications Law	*Majority (Griffith, J.), petition for review denied:* An FCC order requiring providers of Internet telephone services to promptly implement a means to transmit 911 calls to local emergency authorities was neither arbitrary nor capricious. *Concurring (Kavanaugh, J.):* The FCC's order would have been justified even if it were infeasible for Internet telephone providers to comply with the order before the deadline set by the FCC expired.
United States v. Henry	472 F.3d 910	2007	Authored concurrence	Criminal Law & Procedure	*Majority (per curiam), convictions affirmed, sentences vacated, and remanded for resentencing:* Two criminal defendants who were sentenced to life imprisonment for their participation in a heroin conspiracy were entitled to resentencing, but they were not entitled to reversal of their convictions. *Concurring (Henderson, J.):* No reason existed to remand for resentencing because there was no reason to believe the district judge would impose anything other than life imprisonment on remand. *Concurring (Kavanaugh, J.):* Although the majority's opinion correctly applied binding Supreme Court precedent, that precedent was potentially in tension with the constitutional principles announced in *United States v. Booker*, 543 U.S. 220 (2005).
Fund for Animals, Inc. v. Kempthorne	472 F.3d 872	2006	Authored both majority opinion and separate concurrence	Environmental Law; International Law	*Majority (Kavanaugh, J.), affirmed:* The Migratory Bird Treaty Reform Act did not protect the mute swan because that species was not native to the United States or its territories. *Concurring (Kavanaugh, J.):* The canon that courts should not construe an ambiguous statute to abrogate a treaty should not apply in cases involving non-self-executing treaties.

Case Name	Citation	Year	Role	Subject	Holding
Redman v. Graham	No. 05-7160, 2006 U.S. App. LEXIS 28147	2006	Authored dissent	Civil Rights Law	*Majority (per curiam), appeal dismissed in part, affirmed in part, and reversed in part:* The district court failed to articulate a proper basis on which to dismiss the plaintiff's civil rights claims against a law firm, but the court properly entered judgment in favor of other defendants the plaintiff had sued. *Dissenting in part (Kavanaugh, J.):* The district court properly dismissed the plaintiff's claims against the law firm because an attorney who represents a client in eviction proceedings generally cannot be held liable for his client's actions in that proceeding.

Appendix. Glossary of Common Abbreviations Used in Tables

- **APA** – Administrative Procedure Act
- **AUMF** – 2001 Authorization for Use of Military Force
- ***Chevron*** – Chevron, U.S.A, Inc. v. Nat'l Resources Def. Council 467 U.S. 837 (1984)
- **CAA** – Clean Air Act
- **CFPB** – Consumer Financial Protection Bureau
- **CIA** – Central Intelligence Agency
- **DHS** – Department of Homeland Security
- **Dodd-Frank Act** – Dodd-Frank Wall Street Reform and Consumer Protection Act
- **DOT** – Department of Transportation
- **EPA** – Environmental Protection Agency
- **ERISA** – Employee Retirement Income Security Act of 1974
- **FAA** – Federal Aviation Administration
- **FBI** – Federal Bureau of Investigation
- **FCC** – Federal Communications Commission
- **FERC** – Federal Energy Regulatory Commission
- **FOIA** – Freedom of Information Act
- **HHS** – Department of Health and Human Services
- **IRS** – Internal Revenue Service
- **NLRA** – National Labor Relations Act
- **NLRB** – National Labor Relations Board
- **Title VII** – Title VII of the Civil Rights Act of 1964

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