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Judge Kavanaugh and Technology Issues

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Judge Brett Kavanaugh is poised to serve on the Supreme Court during what future historians and litigators may see as a formative period in the area of law and technology. As he himself recognized in his Senate confirmation hearing, technology is changing the legal terrain, and "10 years from now...the question of technology is going to be of central importance" to a range of constitutional issues.[1] Already, serious questions of law and policy are being posed: Can the government restrict how private firms like Facebook and Twitter police the speech of their users? How will Fourth Amendment protections and privacy rights fare in an age of low-cost surveillance?

The significance of these questions—and the profound ability of the Supreme Court to shape not only the law, but *society*, through its opinions—makes it particularly important that justices be selected who are committed to upholding the Constitution. Judge Kavanaugh has repeatedly demonstrated himself to be such a judge. In his 12 years on the U.S. Court of Appeals for the DC Circuit, he has authored more than 300 opinions. He has consistently revealed himself to be an originalist and a textualist, a noted critic of the seemingly boundless and often statutorily unmoored authority of the administrative state, and a firm believer in the limited role of judges as impartial "umpires" who decide what the law *is*, not what they believe it *should be*.

Few of Judge Kavanaugh's cases have dealt specifically with technology issues, but he has nevertheless been involved in some of the most significant cases yet to emerge. An overview of four technology-related cases—involving net neutrality, agency efforts to regulate small drones, National Security Agency bulk data collection, and warrantless Global Positioning System (GPS) tracking—make it abundantly clear that Judge Kavanaugh does not treat novel technology issues as fresh opportunities to legislate from the bench. He looks to the Constitution, the law, and to precedent when formulating his legal opinions—precisely the approach judges ought to take.

Judicial Deference to Administrative Agencies

In the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court ruled that courts must defer to federal agencies' interpretations of ambiguous statutes so long as those interpretations are reasonable.[2] Because Congress frequently enacts laws that are short on specifics, *Chevron* deference has afforded administrative agencies tremendous leeway in defining the scope of their own regulatory power—sometimes far beyond what Congress originally contemplated. As Judge Kavanaugh succinctly stated in a recent *Harvard Law Review* article, "In many ways, Chevron is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[3]

Members of Congress and several Supreme Court justices have questioned the wisdom of empowering the executive to both write and enforce the law[4]—

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concerns shared by Judge Kavanaugh. As a circuit court judge, he has deferred to administrative agencies when Congress' delegation of authority was reasonably clear in the underlying statute. However, he has adhered to the strict separation of powers when Congress did not delegate such authority—or when an agency exceeded the statutory limits placed upon it.

He has expressed skepticism regarding the claims of administrative agencies to have "found" sweeping new regulatory powers within existing statutes. Novel technological challenges are potentially fertile grounds for agencies to make sweeping claims to new regulatory power without clear direction from Congress. Two cases show how Judge Kavanaugh has approached the question of whether agencies should be given deference to expand their power in such circumstances.

Net Neutrality: *U.S. Telecom Association v. Federal Communications Commission*

In 1996, Congress amended the 1934 Communications Act to, among other things, codify a light-touch regulatory approach to the then-emerging Internet: "It is the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or state regulation*."[5] The Act drew a distinction between lightly regulated "information services" and more heavily regulated "telecommunications services."

For decades, the Federal Communications Commission (FCC) classified broadband Internet as an information service, but in 2015 it reversed course and issued the Open Internet Order,[6] reclassifying broadband Internet[7] as a telecommunications service subject to utility-style common carrier regulations. The purpose of the order was to enact a policy commonly referred to as "net neutrality," or "the principle that the owners of broadband networks... should treat all communications travelling over their networks alike."[8]

The FCC's order represented a fundamental shift in government policy, which prompted a lawsuit challenging the reclassification of ISPs as common carriers. A three-judge panel of the DC Circuit ruled 2–1 in favor of the net-neutrality regulation, and the full DC Circuit declined to review that decision. Kavanaugh wrote a lengthy dissent explaining why the full court should have revisited this issue and found that the net-neutrality order was "unlawful."[9]

Kavanaugh argued that the FCC did not have statutory authority to issue the rule. He acknowledged that the Communications Act is ambiguous about whether internet service providers (ISPs) are lightly regulated "information services" or heavily regulated "telecommunications services." Were this an ordinary agency rule, he stated, *Chevron* would apply.[10] But net neutrality is not an "ordinary" rule, belonging instead to "a narrow class of cases involv-

1. *Sen Leahy Questions Kavanaugh on Surveillance*, C-SPAN, Sep. 7, 2018, https://www.c-span.org/video/?c4748064/sen-leahy-questions-kavanaugh-surveillance.
2. 467 U.S. 837 (1984).
3. Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. Law. R. 2118, 2150 (2016).
4. *See*, Elizabeth Slattery, Doomed Deference Doctrines: Why the Days of Chevron, Seminole Rock, and Auer Deference May Be Numbered, Heritage Foundation Legal Memorandum No. 221 (Dec. 14, 2017), https://www.heritage.org/sites/default/files/2017-12/LM-221.pdf.
5. 47 U.S.C. § 230(b)(2) (emphasis added).
6. Federal Communications Commission, *FCC Releases Open Internet Report and Order on Remand*, FCC-15-24 (Mar. 12, 2015), https://www.fcc.gov/document/fcc-releases-open-internet-order.
7. Broadband is high-quality, high-speed internet, defined by the FCC as delivering download speeds of 25 Mbps and upload speeds of 3 Mbps. *See*, FCC, *2018 Broadband Deployment Report* (Feb. 2, 2018), https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report. Title II of the Communications Act of 1934 governs common-carrier regulation by the FCC and was the foundation of the FCC's 2015 net-neutrality rule.
8. James Gattuso, *Net Neutrality Rules: Still a Threat to Internet Freedom*, Heritage Foundation Backgrounder No. 2882 (Feb. 12, 2014), https://www.heritage.org/government-regulation/report/net-neutrality-rules-still-threat-internet-freedom. These regulations required internet service providers to treat all lawful content equally, preventing them varying prices or services, blocking content, or throttling (slowing or limiting) data speeds.
9. United States Telecom Assoc. v. Federal Communications Commission, 855 F.3d 381, 417 (2017). The FCC did eventually reverse course, restoring its original interpretation of ISPs as information services, but the new Restoring Internet Freedom Order was not adopted until the lawsuit challenging reclassification had concluded. Federal Communications Commission, *Restoring Internet Freedom*, FCC-17-166 (Jan. 4, 2018), https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order.
10. *Id.* at 419.

ing major agency rules of great economic and political significance."[11]

For these "major rules," the Supreme Court "has articulated a countervailing canon that constrains the Executive and helps to maintain the Constitution's separation of powers."[12] Rather than statutory ambiguity allowing virtually any regulatory action under *Chevron* for "major rules," that ambiguity "*prevents* an agency" from acting, as courts will presume that Congress did not intend to delegate major lawmaking powers to an agency in an ambiguous fashion.[13] Kavanaugh argued that skepticism is also warranted when an agency claims new sweeping authority under a "long-extant statute," as the FCC did in this case by relying on the decades-old Communications Act.[14]

The FCC claimed that a prior Supreme Court case, *National Cable & Telecommunications Association v. Brand X Internet Services*,[15] supported its authority. There, the Court defended the FCC's discretion to classify the Internet as an "information service" against a suit intended to force reclassification as a common carrier. *Brand X* did not apply, Kavanaugh responded, because the Court had not considered "the question presented in this case: namely, whether Congress has *clearly* authorized common-carrier regulation of Internet service providers."[16] Kavanaugh pointed out that Congress has debated net-neutrality legislation for years—but passed no bills. Though the FCC may have felt net neutrality to be "wise" policy, the Constitution does not permit "the Executive Branch to take matters into its own hands."[17] Doing so would violate the Constitution's principle of the separation of powers.

Kavanaugh next turned to the detrimental impact of common-carrier restrictions on the First Amendment rights of ISPs to "exercise editorial discretion and choose what content to carry and not to carry."[18] Kavanaugh examined the history of the First Amendment, noting that at the time of the Founding, the First Amendment protected the discretion of "publishers, newspapers, and pamphleteers."[19] There was no recognized government power to, for example, compel newspapers "to publish letters or commentary from all citizens" or require book publishers to "accept and promote all books on equal terms."[20]

In two recent Supreme Court cases, *Turner Broadcasting I*[21] and *II*,[22] these same editorial protections were extended to cable operators, since they "engage in and transmit speech."[23] Kavanaugh saw no material distinction between a cable operator and an ISP, and found arguments to the contrary unpersuasive: "Deciding whether and how to transmit ESPN and deciding whether and how to transmit ESPN.com are not meaningfully different for First Amendment purposes."[24] The FCC disagreed, and claimed that the First Amendment does not protect ISPs' editorial discretion because most have, thus far, not chosen to exercise it. Kavanaugh's responded that the "FCC's 'use it or lose it' theory is wholly foreign to the First Amendment."[25]

11. *Id. See also,* Alden Abbott, *Why a "Major Questions" Exception to Chevron Deference Is Inappropriate—and No Substitute for Regulatory Reform*, Heritage Foundation Legal Memorandum No. 216 (Sep. 29, 2017), https://www.heritage.org/courts/report/why-major-questions-exception-chevron-deference-inappropriate-and-no-substitute.
12. *Id.*
13. *Id.*
14. Quoting Justice Scalia in *Utility Air Regulatory Group v. EPA*, 573 U.S. ___ (2014).
15. 545 U.S. 967 (2005).
16. *U.S. Telecom Assoc.*, at 426.
17. *Id.*
18. *Id.* at 426–427.
19. *Id.* at 427.
20. *Id.*
21. Turner Broadcast System, Inc. v. FCC, 512 U.S. 622 (1994).
22. Turner Broadcast System, Inc. v. FCC, 520 U.S. 180 (1997).
23. *U.S. Telecom Assoc.*, at 427.
24. *Id.* at 428.
25. *Id.* at 429.

Net-neutrality proponents have heavily critiqued Judge Kavanaugh for his dissent in this case, branding him "very bad" for a "free and open internet"[26] and accusing him of siding with corporations over consumers.[27] Setting aside their obvious confusion of government control with "free and open" exchange, these attacks completely ignore Kavanaugh's final argument: Under Supreme Court precedents, the FCC *could* impose common-carrier restrictions that abridge an ISP's First Amendment rights, provided that the FCC could demonstrate that a regulated ISP possesses a monopoly over a "relevant geographic market."[28] As Kavanaugh noted, the FCC did not even attempt to conduct such an analysis.

Drones: *Taylor v. Huerta*

In late 2015, the Federal Aviation Administration (FAA) issued a rule requiring that recreational owners of Unmanned Aircraft Systems, known colloquially as drones or model aircraft, weighing more than 0.55 pounds register with the government and agree to abide by agency operating guidelines.[29] The FAA issued the rule under the "good cause" exemption of the Administrative Procedure Act, claiming that drones posed an immediate threat to aviation safety.[30] As a result, the rule went into effect in only two months and carried with it significant civil and criminal penalties, including up to $277,500 in fines and three years' imprisonment.[31] One drone owner, John Taylor, filed suit alleging that the FAA had exceeded its legal authority by issuing a new regulation despite a statutory prohibition stating plainly that the FAA "may not promulgate any rule or regulation regarding a model aircraft."[32]

Kavanaugh, writing for a unanimous three-judge panel, was brief and straightforward: "Taylor is right,"[33] and however important a rule may be, a judge cannot look beyond the text of the law to authorize agency actions. Judges "must follow the statute as written."[34]

At oral argument, the FAA claimed that its recreational drone owners' registry was not, in fact, a new rule. The agency posited it had always had the authority to regulate model aircraft but had merely exercised discretion in opting not to. Kavanaugh rejected that reasoning outright. Careful study of the history of the FAA's treatment of drones made it abundantly clear that, at least since 1981, the agency made compliance with its rules entirely voluntary for hobbyists. By the time that approach was altered in 2015, Congress had long since codified the agency's historical approach to regulation. As Kavanaugh wrote in the court's opinion,

> In short, the 2012 FAA Modernization and Reform Act provides that the FAA 'may not promulgate any rule or regulation regarding a model aircraft,' yet the FAA's 2015 Registration Rule is a 'rule or regulation regarding a model aircraft.' Statutory interpretation does not get much simpler. The Registration Rule is unlawful as applied to model aircraft.[35]

26. Matt Binder, *Brett Kavanaugh, Trump's SCOTUS Pick, Is Very Bad For Net Neutrality*, Mashable, Jul. 10, 2018, https://mashable.com/2018/07/10/brett-kavanaugh-net-neutrality/#PAWTJbNH3mqz.
27. Chad Marlow, *Brett Kavanaugh Chose Corporations Over the Public in a Major Net Neutrality Fight*, ACLU, Aug. 17, 2018, https://www.aclu.org/blog/free-speech/internet-speech/brett-kavanaugh-chose-corporations-over-public-major-net-neutrality.
28. *U.S. Telecom Assoc.*, at 431, applying the precedent set in the *Turner Broadcasting* cases. Such an order would also have to satisfy the requirements of intermediate scrutiny—namely, that the restrictions advance a governmental interest, are content-neutral, not intended to suppress speech, and are minimally restrictive.
29. Fed. Aviation Admin., Registration and Marking Requirements for Small Unmanned Aircraft, Interim final rule (Dec. 14, 2015), available at https://www.faa.gov/news/updates/media/20151213_IFR.pdf. *See*, Jason Snead and John-Michael Seibler, *Purposeless Regulation: The FAA Drone Registry*, Heritage Foundation Issue Brief No. 4514 (Feb. 2, 2016), https://www.heritage.org/government-regulation/report/purposeless-regulation-the-faa-drone-registry?_ga=2.113760579.551458509.1535398775-1223972340.1524062867#_ftn3.
30. 5 U.S.C. 553(b)(3)(B)
31. Snead and Seibler, *supra* note *29*.
32. Section 336 of the 2012 FAA Modernization and Reform Act, Pub. L. 112-95. For a discussion of the *Taylor* lawsuit and Judge Kavanaugh's opinion, *see*, Jason Snead and John-Michael Seibler, *Federal Drone Registry Declared Unlawful*, Daily Signal, May 19, 2017, https://www.dailysignal.com/2017/05/19/federal-drone-registry-declared-unlawful/.
33. Taylor v. Huerta, No. 15-1495 (D.C. Cir. 2017), at 3.
34. *Id.*
35. *Id.* at 7.

As to the second point, Kavanaugh pointed out that "[a]viation safety is obviously an important goal, and the Registration Rule may help further that goal to some degree."[36] But the remedy here was legislative, not judicial: "Congress is of course always free to repeal or amend" its laws.[37] Neither judges nor agencies can rewrite them on the fly.

It is worth noting that Congress later did that, granting the FAA clear statutory authority to require registration, showing that Kavanaugh's faith in the constitutional order is not misplaced. The legislative branch is still capable of acting when prudent—and holding agencies to the text of statutes will not be the end of responsive government.

Privacy and the Fourth Amendment

The rise of digital technology raises potentially profound concerns about privacy. Americans generate an increasing amount of data detailing their personal habits, movements, interests, and preferences, with whom they communicate, and even what they say and do inside their own homes through interactions with digital assistants like Amazon's Alexa or Google Home. It is natural to wonder how the Fourth Amendment's protections against "unreasonable searches and seizures" of "persons, houses, papers, and effects" will be affected by this explosion in personal data, its potential availability to law enforcement and national security agencies, and the development of ever-cheaper and more readily available surveillance technologies.[38]

Privacy advocates attack Judge Kavanaugh as an opponent of privacy rights and an advocate for broad-based government surveillance based largely on two of his prior cases, one addressing National Security Agency (NSA) surveillance and another reviewing warrantless GPS tracking.[39] A close examination of each reveals these criticisms miss the mark—and speak more to their desire for activist judges than committed originalists like Kavanaugh.

Klayman v. Obama. Following the September 11, 2001, terrorist attacks, the NSA began a bulk metadata collection program under Section 215 of the USA PATRIOT Act as a part of its ongoing efforts to detect and prevent future terrorist attacks.[40] The program gathered telephony metadata about millions of telephone calls, including Americans', but was limited to the numbers dialed and duration of the calls, not the content or substance of calls. The Section 215 program was classified, naturally, until it was unlawfully revealed by Edward Snowden in 2013. In 2015, after much debate, Congress passed the USA FREEDOM Act, substantially reforming the government's ability to analyze telephone metadata.[41]

Before that happened, the program was challenged on constitutional grounds by conservative activist Larry Klayman, who argued that the bulk collection of telephone metadata constituted an unlawful search in violation of the 4th Amendment to the Constitution.[42] The district court ruled for Klayman, but a three-judge panel of the DC Circuit granted a stay, putting the lower court opinion on hold.[43] Klayman filed an appeal for review before the full court, but it was unanimously rejected.[44]

Judge Kavanaugh authored a short concurrence denying a request for a rehearing *en banc*, in which

36. *Id*. at 8.

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38. U.S. Const. Amend. IV.

39. *See*, Derek Hawkins, *The Cybersecurity 202: Privacy Advocates Blast Kavanaugh for Government Surveillance Support*, Wash. Post, Jul. 11, 2018, https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/07/11/the-cybersecurity-202-privacy-advocates-blast-kavanaugh-for-government-surveillance-support/5b44d94f1b326b3348adde16/?utm_term=.a96d9c2fcb8d; Susan Landau, *Brett Kavanaugh's Failure to Acknowledge the Changes in Communications Technology: The Implications for Privacy*, Lawfare, Aug. 3, 2018, https://www.lawfareblog.com/brett-kavanaughs-failure-acknowledge-changes-communications-technology-implications-privacy.

40. *See,* Paul Rosenzweig, Charles Stimson, Steven Bucci, James Carafano, and John Malcolm, *Section 215 of the PATRIOT Act and Metadata Collection: Responsible Options for the Way Forward*, Heritage Foundation Backgrounder No. 3018, (May 29, 2015), https://www.heritage.org/defense/report/section-215-the-patriot-act-and-metadata-collection-responsible-options-the-way.

41. Pub. L. 114-23.

42. Klayman v. Obama, 805 F. 3D 1148 (2015).

43. Obama v. Klayman, 800 F.3d 559 (2015).

44. For a lengthier discussion of Judge Kavanaugh's Fourth Amendment jurisprudence, including the *Klayman* case, *see*, Orin Kerr, *Judge Kavanaugh on the Fourth Amendment,* SCOTUSBlog, Jul. 20, 2018, www.scotusblog.com/2018/07/judge-kavanaugh-on-the-fourth-amendment/.

he opined that the metadata program was consistent with the Fourth Amendment. Kavanaugh wrote that the Court's ruling in *Smith v. Maryland* is "binding on lower courts."[45] *Smith*, Kavanaugh wrote, established that the "Government's collection of telephony metadata from a third party such as a telecommunications service provider is not considered a search" for Fourth Amendment purposes. Kavanaugh argued that the "third party doctrine" clearly applied in the *Klayman* case.[46]

Even if that were not the so, he wrote, "the Fourth Amendment does not bar all searches and seizures...only *unreasonable*" ones.[47] And here, the government had demonstrated "a sufficient 'special need'—that is, a need beyond the normal need for law enforcement—that outweighs the intrusion on individual liberty."[48] Kavanaugh analogized the program to other comparatively minor intrusions on privacy in furtherance of a substantial public safety interest, such as airport security screenings, and pointed out that "preventing terrorist attacks on the United States" clearly "fits comfortably within the Supreme Court precedents applying the special needs doctrine."[49]

Some critics of the Section 215 program have suggested that Kavanaugh's two-page concurrence indicates that he will be a strong voice on the Supreme Court in favor of aggressive forms of mass surveillance or that he will defer to the executive branch in national security cases. Not so. What *Klayman* demonstrates is that Kavanaugh faithfully applies law and precedent where and when required, regardless of what his personal feelings may be. Case in point: At his hearing, when asked whether he could have authored this same concurrence under the new precedent that was recently articulated by the Supreme Court in *Carpenter v. United States*,[50] calling into question the continuing validity of the third-party doctrine, Kavanaugh, who earlier called *Carpenter* a "game-changer," responded, "I don't see how I could have."[51]

United States v. Jones. Antoine Jones was arrested in 2005 on drug possession charges after police attached a GPS tracking device to an automobile and used it to monitor his movements for a month. Though police obtained a warrant, they installed and utilized the device after the warrant had expired. The legal issue was whether this warrantless tracking violated the Fourth Amendment's protection against unreasonable searches and seizures. A three-judge panel of the DC Circuit ruled that it did.[52]

The opinion, written by Judge Douglas Ginsburg, developed a novel "mosaic theory" to hold that GPS monitoring of a citizen's movements would not initially be a search, since individuals have no reasonable expectation of privacy in their movements in public spaces, but that it can *become* a search if it takes place for too long a period of time.[53] As explained by Judge Ginsburg, "a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil."[54]

Judge Kavanaugh disagreed with that assessment, and joined a dissent written by then-Chief Judge David Sentelle, arguing that the full DC Circuit should take up the case.[55] Sentelle's opinion noted that the mosaic theory conflicted with precedent

45. *Klayman*, 805 F. 3d at 1149.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Carpenter v. United States, 585 U.S. ___ (2017). The case determined that a warrant is required to access the cell-site location information generated by a cell phone as it is carried by an individual over a period of time, in effect providing a means of long-term indirect tracking.
51. C-SPAN, *supra* note 1.
52. United States v. Maynard, 615 F.3d 544 (2010).
53. *See*, Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. Law R. 311 (2012); Orin Kerr, D.C. Circuit Introduces "Mosaic Theory" Of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search, Volokh Conspiracy, Aug. 6, 2010, http://www.volokh.com/2010/08/06/d-c-circuit-introduces-mosaic-theory-of-fourth-amendment-holds-gps-monitoring-a-fourth-amendment-search/.
54. *Maynard*, 615 F.3d at 558.
55. United States v. Jones, 625 F.3d 766, 767 (2010).

from both the Supreme Court and other circuits.[56] But Kavanaugh went further, writing separately that he did not "think the Government necessarily would prevail in this case."[57]

Kavanaugh argued that the defendant's constitutional rights may have been violated even without courts inventing novel theories of Fourth Amendment protection. If the warrantless installation of the GPS tracker constituted a trespass into a "constitutionally protected area," the defendant would be entitled to Fourth Amendment protections under the Supreme Court case *Silverman v. United States*.[58] Kavanaugh raised the "key" question whether that precedent applied in this case, noting that he did not know the answer because "fuller deliberation" was required.[59]

On appeal, Kavanaugh's argument caught the eye of the Supreme Court. Writing for the majority in *United States v. Jones*, Justice Antonin Scalia adopted this property-based rationale to limit the use of GPS tracking devices in *United States v. Jones*.[60]

Conclusion

As Heritage Legal Fellow Elizabeth Slattery has previously noted, Judge Brett Kavanaugh's record makes it clear that he will be a "fair, impartial and principled justice."[61] The above cases only bolster that conclusion—and demonstrate Judge Kavanaugh's commitment to the rule of law, to the Constitution, and to the crucial but limited role of the judiciary. Given the limitations placed upon lower court judges to adhere to prior precedent, it is impossible to state matter-of-factly that each of the cases addressed here reliably indicates how a future Justice Kavanaugh would vote should these issues arise in the Supreme Court.

What can be stated with certainty, however, is that, when technological questions of great import come before him, Judge Kavanaugh does not treat the novel challenges of the digital age as fresh opportunities to engage in judicial activism, rewrite laws he sees as outdated, or reinterpret the Constitution according to his own beliefs. Rather, he seeks to dutifully and fairly resolve the cases and controversies before him, looking to the Constitution and the law rather than his own personal preferences.

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56. 460 U.S. 276 (1983). Looking to a prior case, *United States v. Knotts*, Sentelle pointed out that the Supreme Court had endorsed the use of a beeper transmitter to track the movements of a vehicle on public roads, holding that a person has "no reasonable expectation of privacy in his movements from one place to another." An "invasion [of privacy] does not occur unless there is such a reasonable expectation" and at any rate it is impossible to "discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented surveillance and a purely visual surveillance of substantial length." *Jones*, 625 F.3d at 769.
57. *Id.* at 770.
58. 365 U.S. 505, 512 (1961).
59. *Jones*, 625 F.3d at 771.
60. United States v. Jones, 132 S. Ct. 945 (2012).
61. Elizabeth Slattery, *Was Kavanaugh Best Choice Trump Could Have Made?*, Daily Signal, Jul. 16, 2018, https://www.heritage.org/courts/commentary/was-kavanaugh-best-choice-trump-could-have-made.