



SCOTUS Nominee Brett Kavanaugh's Paper Trail & Potential Influence on U.S. Healthcare Laws

The future of healthcare policy could be significantly affected by the appointment of President Donald Trump's nominee, Judge Brett M. Kavanaugh, to the Supreme Court of the United States (SCOTUS). SCOTUS has been highly influential in U.S. healthcare policy in the past, and going forward, it has the power to drastically change the healthcare system, perhaps most severely by declaring laws or past executive action to be unlawful or unconstitutional.

On July 9, 2018, President Trump nominated Judge Kavanaugh to replace retiring Justice Anthony Kennedy, who often served as the swing vote of the 9-justice SCOTUS during his 30 years on the bench.¹

In the wake of Judge Kavanaugh's appointment, reviewing his past opinions, especially as relates to the myriad laws and regulations that govern the U.S. healthcare system, may provide insight into how SCOTUS, with Judge Kavanaugh on the bench, may rule in future cases.

Judge Kavanaugh, in his current position as U.S. Circuit Judge of the U.S. Court of Appeals for the District of Columbia (to which he was appointed by President George W. Bush in 2006²), has rendered an opinion in a case specifically concerning the *Patient Protection and Affordable Care Act* (ACA). In 2011, Judge Kavanaugh was selected at random to rule on whether the ACA was constitutional before any of its provisions were imposed.³ Judge Kavanaugh faced a career-altering decision, which decision would likely put him at odds with either the Republican Party, who nominated him to the D.C. circuit back in 2006, or the American people and their elected representatives, who shared generally positive views of efforts to increase health insurance coverage.⁴ He managed to avoid discussing or ruling on the merits of the case; when the other two judges on the D.C. Circuit upheld the ACA, Kavanaugh dissented, stating that the suit should have been dismissed for lack of standing until after the tax penalty in the *Individual Mandate* took effect.⁵ Specifically, Kavanaugh argued that he could not rule on the case because doing so would not adhere to the text of the *Anti-Injunction Act* of 1867, acting as a statutory bar on jurisdiction: "*The Anti-Injunction Act, when applicable, bars any suit seeking relief that would necessarily preclude the assessment or collection of taxes under the Internal Revenue Code, regardless of the plaintiff's professed motivation for the suit.*"⁶ It was originally held that regulatory taxes are covered by the

Anti-Injunction Act (i.e., the suit is not barred) "*as long as they raise some revenue*"; but the majority opinion suggested that the ACA tax penalties were not designed to *raise revenue* for the Government, and thus may not qualify as taxes under the *Anti-Injunction Act* (thus barring the suit).⁷ In essence, Kavanaugh argued that the court could not rule on the case because the *Anti-Injunction Act* did not allow courts to rule on the legality of a tax before it had been imposed.⁸ Of note, Judge Kavanaugh's "*raise revenue*" argument subsequently became the Obama Administration's legality argument in defending the law, and was ultimately the reasoning used by Chief Justice Roberts in upholding the ACA as a constitutional exercise of Congress's power to tax.⁹

In June 2018 (just days before his nomination), Judge Kavanaugh ruled against the *U.S. Department of Health and Human Services* (HHS) in a case brought by hospitals claiming that Medicare has been using flawed data since 1983, to which claim HHS responded that factual determinations made so many years ago cannot be challenged.¹⁰ Judge Kavanaugh rejected this argument and wrote, "*[i]t would seem to be the very definition of arbitrary and capricious for H.H.S. to knowingly use false facts when calculating hospital reimbursements...[s]aving money is a laudable goal, but not one that may be pursued by using phony facts to shift costs onto the backs of hospitals.*"¹¹ The court stated that when an agency's interpretation is plainly erroneous or inconsistent with the regulation, the court will not defer; this opinion is consistent with Judge Kavanaugh's ostensible skepticism of the *Chevron* doctrine (regarding the level of judicial deference given to agency decisions),¹² as indicated by his decisions.¹³

This theme is also apparent in the 2017 case, *Americans for Clean Energy v. Environmental Protection Agency (EPA)*, where Kavanaugh held that the EPA exceeded its authority because its interpretation of "*supply*" was too broad within the relevant provision, and did not defer to the EPA's interpretation of the provision.¹⁴ In a second 2017 case, *Allina Health Services v. Price*, Kavanaugh held that the HHS calculation of *disproportionate share* (DSH) payments under Medicare was procedurally and substantively invalid because they did not provide an opportunity for notice and comment, which the *text* of the Medicare Act *expressly requires*.¹⁵ Kavanaugh also found HHS's argument, that the *Administrative Procedural Act* (APA) interpretative-rule exception

exempts them from notice-and-comment requirements, to be unpersuasive.¹⁶

Another Kavanaugh opinion dealing with an HHS statutory interpretation was in the 2011 case, *University of Texas M.D. Anderson Cancer Center v. Sebelius*, in which Kavanaugh held that the HHS interpretation of the term “reasonable cost” in calculating outpatient reimbursement under Medicare was reasonable, and thus unambiguous.¹⁷ Although Judge Kavanaugh sided with the agency interpretation in this case (in contrast to the other three cases), the main takeaway from his four opinions is that he has textualist, originalist, and formalistic tendencies, all of which are common characteristics of a conservative judge. Kavanaugh’s opinions are often narrow in the sense that they are decided by applying uncontroversial constitutional principles to the facts; he cites statutory text throughout his opinions and relies strongly on constitutional

principles and doctrines, such as procedural and substantive due process.¹⁸

Justice Neil Gorsuch, another President Trump nominee who replaced the deceased Justice Scalia in 2017, has also written powerfully about the *Chevron* doctrine, suggesting that it may violate the constitutional separation-of powers doctrine; with two Supreme Court Justices having this view, agencies may generally experience tighter restrictions on their federal regulatory powers.¹⁹

Judge Kavanaugh, whose confirmation hearing is expected to be set for fall 2018, has the potential to significantly influence future decisions of SCOTUS. The paper trail left by his previous opinions as U.S. Circuit Judge, which sheds some light as to how he could rule in future cases before SCOTUS – particularly those that relate to federal healthcare laws, may serve as a double-edged sword in his (likely to be contentious) judicial nomination, as the 2018 midterm elections heat up.

- 1 “Trump nominates Brett Kavanaugh to replace the retiring Justice Anthony Kennedy on the Supreme Court” By Ellen Cranley, Business Insider, July 9, 2018, <http://www.businessinsider.com/trump-nominates-brett-kavanaugh-supreme-court-justice-anthony-kennedy-2018-7> (Accessed 7/18/18). Of note, Judge Kavanaugh is a former clerk of Justice Kennedy’s.
- 2 “Influential Judge, Loyal Friend, Conservative Warrior — and D.C. Insider” By Scott Shane, Steve Eder, Rebecca R. Ruiz, Adam Liptak, Charlie Savage and Ben Protess, New York Times, July 14, 2018, <https://www.nytimes.com/2018/07/14/us/politics/judge-brett-kavanaugh.html> (Accessed 7/24/18).
- 3 “The Artful Dodge That Saved Kavanaugh From Supreme Court Doom” By Sahil Kapur, Bloomberg, July 16, 2018, <https://www.bloomberg.com/news/articles/2018-07-16/the-artful-dodge-that-saved-kavanaugh-from-supreme-court-doom> (Accessed 7/18/18).
- 4 *Ibid.*
- 5 *Ibid.*
- 6 “Seven-Sky v. Holder” 661 F.3d 1, 44 (U.S. App. D.C., 2011).
- 7 *Ibid.*
- 8 “Everyone is panicking about what Trump’s selection of Brett Kavanaugh means for the future of Obamacare” By Bob Bryan, Business Insider, July 10, 2018, <http://www.businessinsider.com/brett-kavanaugh-nomination-impact-on-obamacare-healthcare-2018-7> (Accessed 7/20/18).
- 9 *Ibid.*
- 10 “Hospitals Challenge Medicare Payments, With Help from Judge Kavanaugh” By Robert Pear, NY Times, July 16, 2018, <https://www.nytimes.com/2018/07/16/us/politics/medicare-lawsuit-brett-kavanaugh.html> (Accessed 7/19/18).

- 11 *Ibid.*
- 12 The *Chevron* Doctrine comes from the landmark decision in *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, which established rules for judicial review of agency interpretation of statutes; in brief, it requires judges to defer to agency interpretations of ambiguous statutes so long as they are *reasonable* (not *arbitrary and capricious*).
- 13 “Brett Kavanaugh’s track record” Politico, July 9, 2018, <https://www.politico.com/story/2018/07/09/brett-kavanaugh-track-record-675294> (Accessed 7/19/18); “The (other) attack on Chevron deference” By Allison Frankel, Thomas Reuters, December 8, 2017, <https://www.reuters.com/article/frankel-chevron-otc/the-attack-on-chevron-deference-idUSKBN1E22SM> (Accessed 7/19/18).
- 14 “Americans for Clean Energy v. Environmental Protection Agency” 864 F.3d 691, 703 (U.S. App. D.C., 2017).
- 15 “Allina Health Services v. Price” 863 F.3d 937, 944 (U.S. App. D.C., 2017).
- 16 *Ibid.*
- 17 “University of Texas M.D. Anderson Cancer Center v. Sebelius” 650 F.3d 685, 687-91 (U.S. App. D.C., 2011); “Coalition for Mercury-Free Drugs v. Sebelius” 671 F.3d 1275, 1278-9 (U.S. App. D.C., 2012); “Allina Health Services v. Price” 863 F.3d 937, 944 (U.S. App. D.C., 2017).
- 18 “University of Texas M.D. Anderson Cancer Center v. Sebelius” 650 F.3d 685, 691 (U.S. App. D.C., 2011);
- 19 “The (other) attack on Chevron deference” By Allison Frankel, Thomas Reuters, December 8, 2017, <https://www.reuters.com/article/frankel-chevron-otc/the-attack-on-chevron-deference-idUSKBN1E22SM> (Accessed 7/19/18).



(800)FYI - VALU

*Providing Solutions
in the Era of
Healthcare Reform*

Founded in 1993, HCC is a nationally recognized healthcare economic financial consulting firm

- [HCC Home](#)
- [Firm Profile](#)
- [HCC Services](#)
- [HCC Experts](#)
- [Clients & Projects](#)
- [HCC News](#)
- [Upcoming Events](#)
- [Contact Us](#)
- [Email Us](#)

HCC Services

- [Valuation Consulting](#)
- [Commercial Reasonableness Opinions](#)
- [Commercial Payer Reimbursement Benchmarking](#)
- [Litigation Support & Expert Witness](#)
- [Financial Feasibility Analysis & Modeling](#)
- [Intermediary Services](#)
- [Certificate of Need](#)
- [ACO Value Metrics & Capital Formation](#)
- [Strategic Consulting](#)
- [Industry Research Services](#)



Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of "[The Adviser's Guide to Healthcare – 2nd Edition](#)" [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant's Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies*; *Business Appraisal Practice*; and, *NACVA QuickRead*. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); American Health Lawyers Associate (AHLA); the American Bar Association (ABA); the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



John R. Chwarzinski, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski's areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis. Mr. Chwarzinski is the co-author of peer-reviewed and industry articles published in *Business Valuation Review* and *NACVA QuickRead*, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo. Mr. Chwarzinski holds a Master's Degree in Economics from the University of Missouri – St. Louis, as well as, a Master's Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.



Jessica L. Bailey-Wheaton, Esq., is Vice President and General Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey-Wheaton is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the *Journal of Health Law & Policy*.



Daniel J. Chen, MSF, is a Senior Financial Analyst at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he develops fair market value and commercial reasonableness opinions related to healthcare enterprises, assets, and services. In addition, Mr. Chen prepares, reviews and analyzes forecasted and pro forma financial statements to determine the most probable future net economic benefit related to healthcare enterprises, assets, and services, and applies utilization demand and reimbursement trends to project professional medical revenue streams, as well as ancillary services and technical component (ASTC) revenue streams. Mr. Chen has a Master of Science in Finance from Washington University St. Louis.