

Brett Kavanaugh Could Extend Trump's Environmental Legacy by Decades

Robinson Meyer Oct 9, 2018 theAtlantic

The law is magic, and perhaps nowhere is this more obvious than in environmental law. Through the consent of the people and the government's monopoly on violence, the mere words of American environmental law have reshaped matter, exerted mastery over nature, and granted an incredible gift—*extra years of healthy life*—to unknown and unknowing souls. In the past half century, these laws have doused the fires of the Cuyahoga, vanished the smogs of the San Fernando Valley, and prevented lead from destroying the brains of New York's children. Individual statutes are no less miraculous: By the government's own accounting, the 1990 Clean Air Act has prevented 160,000 American adults from dying before their time.

On Saturday, the United States received a new arbiter of those laws, as the Senate confirmed Judge Brett Kavanaugh as the 114th justice of the Supreme Court. His appointment will likely rank as President Donald Trump's most effective, longest-lasting, and most profound contribution to environmental law—which is no small feat, as the president has spent most of his time in office trying to dismantle the entire edifice.

Any justice Trump chose to take over from Justice Anthony Kennedy—or any justice who disturbed the court's center-right lean—would wield tremendous power over the EPA and its companion agencies. On environmental questions, as on much else, Kennedy held the swing vote: The Court only ruled on *one* environmental case during Kennedy's three-decade tenure, in which he did not vote in the majority. Earlier this decade, when Obama-era EPA lawyers wrote new rules about water pollution, they borrowed ideas directly from Kennedy's jurisprudence, for they knew they would eventually have to win him over in argument.

Kavanaugh, a veteran of Republican party politics, will not prove as persuadable, and the Court's swing vote now likely belongs to Chief Justice John Roberts. But Kavanaugh will also enter the Court as a formidable voice on environmental law: Alone among recent justices, he ruled on dozens of cases involving the environment as a federal judge on the D.C. Circuit Court of Appeals. He favors an extremely strict reading of the laws that empower the EPA. Since these laws—including the Clean Air Act—were not written with climate change in mind, it's possible he believes the agency has almost *no* ability to fight climate change without further action from Congress.

That said, he accepts that some version of climate change is real. “The earth is warming. Humans are contributing,” he told a federal courtroom two years ago. And he has historically shown some respect for environmental litigants, even if he almost never rules for them. As Richard Lazarus, a professor of environmental law at Harvard, told me in July: “He's not like a [Justice] Scalia—or, to some extent, a [Justice] Alito—where you read their opinions and find there's an antipathy, a hostility, to environmental law.”

It's unclear whether this respect will continue. Every environmental nonprofit that regularly argues cases in front of the Court—including Earthjustice, the Sierra Club, and the Center for Biological Diversity—openly opposed Kavanaugh's nomination.

During his testimony to the Senate, Kavanaugh decried the sexual-assault allegation against him as “a calculated and orchestrated political hit” ginned up with “millions of dollars in money from outside left-wing opposition groups.” Does he consider the country's environmental nonprofits to rank among those groups? If so, how will he handle clients whom they represent?

In a *Wall Street Journal* editorial in which he explained but did not apologize for his behavior, Kavanaugh offered no real answers. “I have ruled ... sometimes for environmentalists and sometimes for coal miners,” he said. “I do not decide cases based on personal or policy preferences.”

Donald Trump has spent considerable time in office attacking the edifice of environmental law. His administration has frozen climate-change rules, dismissed high-ranking science advisers, and moved to ban the EPA from using medical and public-health research when crafting new environmental protections. Yet many of these rules can be replaced or repealed themselves. Long after Trump has left the White House, Kavanaugh will remain on the Court. He will be Trump’s longest-lasting contribution to American environmental policy.

That contribution will begin soon. Ann Carlson, a professor of environmental law at UCLA, worries about a case that the Court will likely hear in the next few years: whether the Trump administration can revoke California’s ability to set its own car-pollution rules.

“Trump has been open in his disdain for California and Governor Jerry Brown, and Governor Brown has been open in his anger about the U.S withdrawal from the Paris Agreement,” she told me in an email last month. “If Kavanaugh were to provide the fifth vote to allow the Trump Administration to revoke the waiver, it’s hard not to wonder if his vote would be motivated in part by helping the President carry out his vengeance against California.”

“Even if an openly partisan judge like Kavanaugh was not motivated by a desire to give the President victories, I worry that the perception may be that he is,” she added. “The public’s view of the Court’s independence is already somewhat precarious given the number of 5-4 votes in highly charged cases, split along ideological lines.”

She later became one of more than 2,400 law professors who opposed Kavanaugh’s nomination in an editorial in *The New York Times*. “He did not display the impartiality and judicial temperament requisite to sit on the highest court of our land,” they wrote. Yet that’s where he now sits.