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Making Sense of Kavanaugh's Extensive Environmental Record

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During his 12-year term on the U.S. Court of Appeals for the D.C. Circuit, Circuit Judge Brett Kavanaugh had the opportunity to address most of the federal environmental laws in the United States and influenced several important Supreme Court decisions (see, for example, *Michigan v. EPA*, 135 S.Ct. 2699 (2015)). His nomination by the President to the U.S. Supreme Court this summer generated dozens of articles on Kavanaugh's environmental record, many of which concluded that he could be expected to favor deregulation over environmental protection. The astoundingly partisan and adversarial hearing process for Kavanaugh overshadowed further debate about his environmental record. We revisit that debate to further clarify what environmental law practitioners and stakeholders might expect from the high court's newest justice.

Historically, the most consistent aspect of now-Justice Kavanuagh's record regarding environmental (and other administrative law) matters has been his insistence that agencies never stray from a strict reading of the statute at hand, even when a strict reading leads to undesirable results. We consider whether he has applied this approach evenly and conclude that he has not.

Kavanagh's Environmental Record by the Numbers

By our informal analysis of court decisions from 2007 to present, Kavanagh participated in at least 42 substantive environmental decisions while on the D.C. Circuit (more than 70 if you include dispositions reached on procedural grounds). That provides an unusually strong opportunity to understand his perspective on environmental law. He sided with government-agency defendants approximately 65 percent of the time. Where he sided against government-agency defendants, he was far more likely to side with industry petitioners than environmental advocates.

Overall, we found:

- He did or would have ruled in favor of industry petitioners (in whole or in part) in 11 cases
- He ruled in favor of environmental petitioners (in whole or in part) in two cases
- He ruled in favor of government-agency defendants against corporate petitioners in nine cases
- He did or would have ruled in favor of government-agency defendants against environmental petitioners in 16 cases
- Four cases do not fall neatly into the above categories

In other words, he agreed with industry and other anti-regulation challengers more than half the time, but with environmental advocate challengers in only two out of 18 cases. Those statistics certainly suggest a propensity to favor industry petitioners over environmental petitioners, and to afford government regulators less deference when challenged by business interests than when challenged by environmental groups. His treatment of environmental advocates—whether as petitioners or intervening defendants—is probably more hostile than average

for a federal judge. That apparent hostility towards the EPA and environmental advocates stems in large part from his view that they too often push regulations beyond the scope of what Congress intended in an environmental statute. And, since a very divided Congress has failed to advance any significant environmental legislation in 30 years, the problem of out-of-date environmental statutes arises a lot these days.

A Textualist, Except When He's Not

Justice Kavanaugh's philosophy towards reviewing challenges to agency decisions is often described as "textualist"—a desire to force federal regulators to limit their regulations, permits and other decisions to the strict boundaries imposed by Congress in the applicable environmental statute. Textualism is not Kavanaugh's own theory, of course, but the defining manifesto of the Federalist Society, whose mission can be summed up as follows: "[I]t is emphatically the province and duty of the judiciary to say what the law is, not what it should be." About Us, Federalist Soc'y, https://fedsoc.org/about-us. He has restated that philosophy dozens of times in his opinions and used it to strike down or oppose a wide variety of agency regulations and actions. The reality, however, is that his application of that approach has been inconsistent.

For example, Kavanaugh authored a D.C. Circuit decision vacating an EPA rule and implementation plan designed to control emissions in 27 upwind states from causing air quality problems in downwind states in a lengthy decision that that the Supreme Court ultimately determined was unsupported by the plain terms of the Clean Air Act. In *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (D.C. Cir. 2014), the Supreme Court overruled the D.C. Circuit and concluded that then-Judge Kavanaugh's decision had impermissibly added a "proportionality" requirement to the statute's broad mandate to regulate upwind sources causing pollution in downwind states. The court also found that the D.C. Circuit entirely disregarded the Act's clear mandate that when either (a) a state has failed to submit a state implementation plan or (b) the EPA has rejected the plan, the EPA must come up with a federal plan within two years. Instead, Kavanaugh argued that despite the EPA's prior inadequacy finding and the states' failure to timely challenge that finding, the EPA should have given states a *second opportunity* to come up with acceptable implementation plans. The court rejected that argument, holding that the D.C. Circuit had no authority to "alter[ ] the schedule Congress provided."

Similarly, in *Coalition for Responsible Regulation v. EPA*, 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012), then-Judge Kavanaugh dissented from the majority's decision to deny petitions for rehearing en banc in a major Clean Air Act case. Kavanaugh argued there that the EPA should have interpreted the phrase "any air pollutant" to exclude greenhouse gases even though he effectively conceded that the phrase was susceptible to more than one interpretation and the EPA had a longstanding practice of interpreting the term to mean "any" not just "certain" air pollutants.

EME Homer and *Coalition for Responsible Regulation* are just two of several examples of cases where Kavanaugh was willing to ignore his own admonitions that the judiciary's role is to interpret—and not to write—the law. See, e.g., *Texas v. EPA*, 726 F.3d 180, 199 (D.C. Cir. 2013) (Kavanaugh, J. dissenting) (dissenting from majority view that that EPA did not need to give states three years to reform their state implementation plans to address greenhouse gas emissions because Clean Air Act does not include any such requirement).

To be clear, we do not suggest that Justice Kavanaugh will always or even often stray from his textualist tendencies to rule in favor of industry. His lengthy record on the D.C. Circuit includes rulings under the Clean Air Act, the Clean Water Act, the Endangered Species Act, the National Forest Management Act, and other statutes that are both consistent with his philosophy of statutory construction and adverse to entities seeking weaker regulation. See, e.g., *ATK Launch Sys. v. EPA*, 669 F.3d 330 (D.C. Cir. 2012) (denying municipal and industry challenge to EPA rule designating areas near Salt Lake City, Utah as nonattainment); *Am. Trucking Ass'ns v. EPA*, 600 F.3d 624 (D.C. Cir. 2010) (denying trade association challenge to EPA approval of California rule for mobile emissions associated with refrigerated trucks). However, to the extent the EPA or other agencies have attempted to use statutory ambiguity to tackle modern-day environmental challenges with outdated environmental statutes in new and creative ways, Justice Kavanaugh could be expected to reject such efforts as outside the scope of agency authority. We will be watching to see whether he brings a similar skepticism to bear on efforts by the current administration to push the limits of the current statutory framework.

Respect for Science

While some have argued that Kavanaugh's rulings are grounded in politics rather than law and science, the evidence does not always support that view. He has shown a willingness to defer to experts and be thoughtful about the facts. In *National Ass'n of Manufacturers v. EPA*, for example, he upheld the EPA's amendment of the National Ambient Air Quality Standards to cover smaller particulate matter—a key contributor to asthma. 750 F.3d 921 (D.C. Cir. 2014). He observed that the "EPA selected the 12.0 [micrograms per cubic meter of air] because it is somewhat below the lowest long-term mean concentration shown by certain key epidemiologic studies to cause adverse health effects." Moreover "under [the APA's] arbitrary and capricious standard, we exercise great deference [to agencies] when we evaluate claims about competing bodies of scientific evidence." He has also publicly acknowledged that climate change is real, dangerous, and caused by human activities. Thus, while Judge Kavanaugh has sometimes expressed disdain for federal agencies, he appears to have more respect for experts, scientists, and data. For environmentalists alarmed by the current administration's policies, that might be a good thing.

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