

Kavanaugh's Ascent Is Enormously Significant for Environmental Law

Justice Brett Kavanaugh. What does his joining the High Court mean for environmental law? How will he differ from Justice Anthony Kennedy, for whom he clerked and now replaces?

Normally, any such comparative inquiry would be hopelessly speculative even when, as here, the new justice has previously served as a federal appellate judge. Most judges, as was true for Neil Gorsuch on the Tenth Circuit, have decided very few environmental law cases.

Kavanaugh, however, is a rare counter-example. The docket of the D.C. Circuit, on which Kavanaugh served for 13 years, includes a heavy dose of environmental law. And, although the three-judge panels for those environmental law cases were decided by random draw, Kavanaugh participated and otherwise wrote in a disproportionately high number, especially Clean Air Act cases. Moreover, because the Supreme Court (including Kennedy) reviewed several of those

cases, Kavanaugh's appellate court record offers a solid basis for gleaning both how he is likely to vote as a justice and how his votes might (or might not) differ from Kennedy's.

Here's what environmental lawyers can fairly expect from Justice Kavanaugh. First, he will be a reliable vote against broad readings of EPA's statutory authority to enact pollution-control regulations. This will be true when the agency is challenged by environmentalists for embracing narrow interpretations of its authority. And it will be true when industry challenges EPA for adopting broad interpretations.

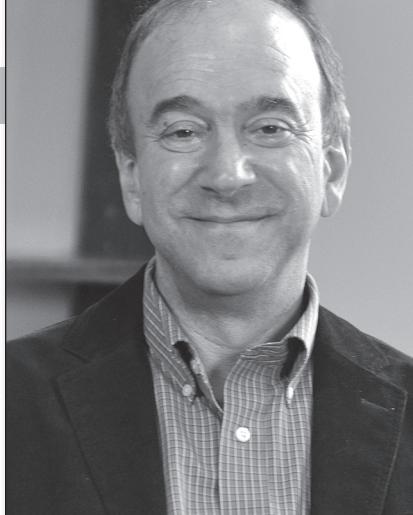
In both respects, Kavanaugh will likely mirror the votes of Justice Antonin Scalia when he was on the Court. The difference will be style rather than substance. Kavanaugh will lack Scalia's bite and bark.

We know his record on issues decided during his 13 years on the D.C. Circuit

Kavanaugh's votes on EPA's regulatory reach will be markedly different from Kennedy's. While the retired jurist sided with Scalia in many cases, he also departed from him in several significant environmental law cases in which Kavanaugh, had he been on the Court at the time, would have voted differently. Unlike Kennedy, a Justice Kavanaugh would have denied Justice John Paul Stevens the majority he had for the Court's ruling that the Clean Air Act authorizes EPA to regulate greenhouse gases (*Massachusetts v. EPA*), he would have provided Scalia with the majority he lacked for his narrow reading of the geographic reach of the Clean Water Act (*Rapanos v. United States*), and he would clearly have struck down EPA's interstate air pollution regulation (*EPA v. EME Homer Generation LP*), given that the justices, including Kennedy, reversed Kavanaugh's opinion for the D.C. Circuit on that issue.

For that same reason, many of EPA's most ambitious regulatory programs adopted during the Obama administration, such as the Waters of the United States Rule, would likely be roughly received with Kavanaugh rather than Kennedy on the Court. The only saving grace for EPA's Clean Power Plan, should its legality ever somehow reach the justices, is that Kavanaugh would be recused, given his participation in the D.C. Circuit case.

Kavanaugh's record further suggests a readiness to invoke constitutional law as a basis for limiting the reach of federal environmental law. Most notably, he has frequently invoked constitutional separation-of-powers principles in repudiating broad readings of EPA regulatory authority. According to Kavanaugh, those principles support judicial rejection of congressional delegation of agency authority to address "major is-



Richard Lazarus is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University. He can be reached at lazarus@law.harvard.edu.

sues" absent clear and specific evidence of such legislative intent.

By contrast, Kavanaugh's views on the Article III standing of environmental citizen suit plaintiffs are not without some ambiguity. His record is less one-sided. But it seems safe to assume that he will be less receptive to such suits than Kennedy. What is unclear is whether he will replicate Scalia's consistent hostility to citizen standing.

The same is true for Congress's authority under the Commerce Clause to enact environmental laws. Kavanaugh seems poised to be less sympathetic than Kennedy to a broad reading and there is too little known to speculate whether he will embrace Scalia's narrow view of Congress's constitutional reach.

One area of environmental law, however, for which we have no data is Kavanaugh's views on the regulatory-taking issue. Kennedy was the decisive vote and, over Scalia's dissent, frequently voted to reject takings challenges to governmental restrictions on development in environmentally sensitive lands. Kavanaugh had no takings cases on the D.C. Circuit (with those cases redirected to the Federal Circuit). If a true originalist like Robert Bork, he will give little credence to regulatory takings claims. But if more of a selective originalist like Scalia, Kennedy's departure may signal a major shift in the Court's takings precedent as well.

One thing is clear. Justice Kavanaugh's confirmation is enormously significant for environmental law.

We know his record.