

Kavanaugh may limit environmental protections if confirmed to Supreme Court | Opinion

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Supreme Court nominee Judge Brett Kavanaugh, who visited the Capitol Hill offices of Senate Judiciary Committee member Sen. Ted Cruz on July 17, has offered opinions that favor polluting industries over environmental interests and have narrowly construed the authority of EPA. (Chip Somodevilla/Getty Images)

By **Joel A. Mintz**

JULY 24, 2018, 2:30 PM

Recent events have underscored the vital importance of effective environmental regulation for Floridians. Blue green algae — apparently caused by releases of contaminated water from Lake Okeechobee — has blanketed significant portions of our state's east and west coasts, causing major economic losses and posing a threat to the health of coastal residents. Pro-active regulation and enforcement of environmental laws could (and should) have prevented these abysmal consequences.

In fact, lawsuits play a critical role in shaping the laws that guide government regulation of the environment; and the **U.S. Supreme Court**— which has lately been almost evenly divided in important environmental cases — often has the last word on the government's crucial ability to protect public health and the environment from the perils of pollution.

President Trump's controversial nomination of Judge **Brett Kavanaugh** to replace centrist Justice **Anthony Kennedy** on the nation's highest court is thus a matter of crucial importance for the future of environmental pollution control. Unfortunately, a preliminary review of Kavanaugh's judicial writings and votes provides little basis for optimism regarding the positions he will take in environmental cases if his nomination to join the Court is confirmed.

Kavanaugh has served for 12 years as a judge on the D.C. Circuit, an intermediate federal court that handles numerous appeals from challenges to the actions of EPA and other federal agencies with environmental responsibilities. With only a small number of exceptions, his opinions have narrowly construed the authority of EPA and favored polluting industries over environmental interests. A few examples will suffice.

Kavanaugh voted to strike down EPA's Clean Air Interstate Rule, which regulates cross-state air pollution from power plants, only to be reversed by the U.S. Supreme Court — with conservative Justices Kennedy and Roberts joining the Court's majority opinion. To his credit, Kavanaugh appears to accept the scientifically supported connection between human-generated greenhouse gas emissions and climate change. Nonetheless, he has refused to recognize EPA's legal authority to address this grave, ever-growing, and paramount environmental problem.

Thus, Kavanaugh wrote the majority opinion in a 2017 decision that struck down EPA's regulation of hydrofluorocarbons, a powerful greenhouse gas, and he expressed skepticism regarding EPA's efforts to curb greenhouse gas emissions during oral arguments in a 2016 challenge to the agency's Clean Power Plan. He dissented from an opinion that upheld EPA's decision to veto a state-proposed permit for an immense, environmentally damaging new strip mine in West Virginia. And all that was long after the Supreme Court ruled that it was EPA's obligation to regulate greenhouse gas emissions.

Kavanaugh's past record in environmental cases presents a true contrast with the views of Anthony Kennedy, the Associate Justice whose seat he would fill. While far from the most environmentally friendly justice on the Court, Kennedy authored or signed onto opinions that reflected a sensitivity to the practical importance of vigorous environmental regulation — a recognition that is substantially absent from Kavanaugh's D.C. Circuit writings. Instead, Kavanaugh's environmental opinions are more in line with those of the late Justice **Antonin Scalia** and the justices who comprise the current "conservative wing" of the Supreme Court.

Like Scalia, Kavanaugh claims to adhere to a "textualist" approach to statutory analysis — the view that it is rarely necessary to look beyond the "plain meaning" of the language of statutes and the Constitution. But as with Scalia and other textualists, the "plain meaning" seems always to agree with Kavanaugh's pro-industry slant. Kavanaugh also strongly favors a narrow cost-benefit analysis of new regulations — insisting that the monetized benefits of a rule exceed the costs. The problem, of course, is that some benefits — saving a few hundred lives, preventing thousands of asthma attacks, and so on — aren't so readily given to green eyeshade analysis, and they start with the presumption that polluting industries have a right to impose all manner of health burdens on the rest of us.

Moreover, Kavanaugh has taken a narrow view of the doctrine of “standing to sue” — the eligibility of parties to bring lawsuits to enforce environmental laws — an interpretation that tends to preclude public interest organizations from using the courts to protect our health and the environment.

Justices sometimes evolve during long judicial careers, and predicting how any judge will vote on particular cases is a somewhat speculative enterprise. Nonetheless, at least to the extent that Judge Kavanaugh’s prior record in environmental cases provides a guide, he appears likely to join with four other justices to form a Supreme Court majority that takes a dim and narrow view of regulations designed to protect our air, water and land, and all who breathe, drink, and tread the earth.

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