

D I A L O G U E

The Impact of Justice Kennedy and the Effect of His Retirement

Summary

Justice Anthony Kennedy's retirement in July has the potential to significantly affect the field of environmental law for years to come. The Supreme Court's 2019 docket includes cases that cover a litany of environmental issues, and his replacement will play a key role. For the past three decades, Justice Kennedy was a crucial swing vote on a variety of issues, including the 5-4 decision in *Massachusetts v. EPA* and 4-1-4 decision in *Rapanos v. United States*. These examples illustrate the changes that could lie ahead. On July 18, 2018, ELI held an expert panel exploring Justice Kennedy's influence on environmental law, what his departure could mean for the future, and the nomination of Judge Brett Kavanaugh to the Court. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Caitlin McCarthy (moderator) is Director of the Associates Program at the Environmental Law Institute.

John C. Cruden is a Principal at Beveridge & Diamond PC, President of the American College of Environmental Lawyers, and formerly Assistant Attorney General for the U.S. Department of Justice's Environment and Natural Resources Division.¹

John Elwood is an Appellate Partner at Vinson & Elkins LLP and lecturer at the University of Virginia School of Law.

Richard Lazarus is the Howard and Katherine Aibel Professor of Law at Harvard University Law School.

Caitlin McCarthy: Justice Anthony Kennedy's retirement, and President Donald Trump's nomination of Judge Brett Kavanaugh to replace Justice Kennedy, is an issue at the forefront of and affecting the future of environmental law. I would like to introduce our outstanding panel.

John C. Cruden is a Principal of Beveridge & Diamond, where he provides strategic counsel on high-stakes environmental and natural resources litigation, civil or criminal enforcement, and compliance. Previously, John served as Assistant Attorney General for the Environment and Natural Resources Division of the U.S. Department of Justice (DOJ), where he had formerly been a Deputy Assistant Attorney General and the Environmental Enforcement Section Chief. In addition to years of leadership at the D.C. Bar and the American Bar Association, John currently serves as President of the American College of Environmental Lawyers. He was also formerly President of the Environmental Law Institute.

John Elwood is a partner at Vinson & Elkins. He has argued nine cases before the U.S. Supreme Court and cases before most federal courts of appeals. He has particular experience in environmental law, the False Claims Act,² administrative law, government contracting, and federal criminal law. Before going into private practice, John served in senior-level positions in DOJ. As the Senior Deputy in the Office of Legal Counsel, he advised the White House and federal agencies on a range of constitutional, statutory, and regulatory issues. John also previously clerked for Justice Kennedy.

Richard Lazarus is the Howard and Katherine Aibel Professor of Law at Harvard University, where he teaches environmental law, natural resources law, Supreme Court advocacy, and torts. Richard has represented the United States, state and local governments, and environmental groups at the Supreme Court in 40 cases, and has presented oral arguments in 14 of those cases. His primary areas of legal scholarship are environmental and natural resources law, with particular emphasis on constitutional law and the Supreme Court. He is the author of a variety of outstanding environmental law books and articles.

Thank you all for being with us today. For the past three decades, Justice Kennedy has been a crucial swing vote on a variety of environmental law issues, including *Massachusetts v. Environmental Protection Agency*³ and *Rapanos v.*

1. *Editor's Note:* Mr. Cruden here is speaking solely in his individual capacity, and his views should not be attributed in any way to other entities.

2. 31 U.S.C. §§3729 to 3733.

3. 549 U.S. 497, 37 ELR 20075 (2007).

United States.⁴ Can you speak to these issues and Justice Kennedy's impact on environmental law?

John C. Cruden: It's interesting that we've all been watching Justice Kennedy for such a long time. When I was at DOJ, we tailored entire arguments in an effort to get his vote. I was also at DOJ when he was nominated by President Ronald Reagan. People forget that there were two failed nominees before he was unanimously confirmed. This was the Robert Bork era, highlighted by a very controversial set of confirmation hearings, and then later the Chief Justice of the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, Doug Ginsburg, was also briefly considered.

So, when Justice Kennedy was nominated, he was considered a breath of fresh air. He did not have disqualifying baggage. When I was at DOJ, I was a special counsel to Assistant Attorney General Richard Wheeler who had clerked for Justice Kennedy at the U.S. Court of Appeals for the Ninth Circuit and suggested him as a person to consider. Ed Meese, who was then Attorney General, liked him and that led to his confirmation.

I do not consider Justice Kennedy a great environmentalist like I would Justice William O. Douglas, but clearly, looking over his tenure, it's hard to imagine a justice who's had more impact on environmental issues than he has. Two extraordinarily important cases stand out. I can't imagine any more significant concurring opinion in the history of the Court than his concurring opinion in *Rapanos*, which we're still trying to figure out and has spawned numerous litigation. And it's very fair to say that, but for him and his vote in *Massachusetts*, we would not be having the discussions that we are having today about the future of greenhouse gas (GHG) emissions and how we limit them. Therefore, his role in environmental matters is absolutely significant.

Richard Lazarus: Justice Kennedy wasn't just a swing vote, he was *the* vote. He joined the Court in February 1988. He was in the majority in every single environmental case decided by the Court, except for one: he dissented in a Clean Air Act (CAA)⁵ case, *Alaska Dep't of Environmental Conservation v. Environmental Protection Agency*.⁶ The way that Justice Kennedy went, the Court went—obviously they weren't all 5-4s, but a bunch of them were 5-4s. Since he has been such a touchstone in area after area in environmental law for the past 30 years, no matter who replaces him, his departure is enormously significant in CAA cases, and in Clean Water Act (CWA)⁷ cases.

One other area I'll mention in terms of Justice Kennedy's impact is regulatory takings issues. When Justice Kennedy joined the Court in 1988, Justice Antonin Scalia was pushing a very aggressive agenda for ratcheting up

regulatory takings oversight of environmental protection laws. Justice Kennedy provided the wall that bounded how far that agenda went, leading up to a case argued before the Court a year ago, *Murr v. Wisconsin*,⁸ where Justice Kennedy wrote the opinion of the Court 5-3. It would have been 5-4, except that Justice Scalia had passed away. So, there is a whole host of areas where his departure puts a lot up for grabs.

John Elwood: Those are some very interesting observations. I'd forgotten about that takings case from just last year where his vote really did matter. But you know, it's true that Justice Kennedy cast really important votes on a few occasions—*Massachusetts*, *Rapanos*, and the case that Richard mentioned. I'm reminded looking over his record that he really was a conservative. There are areas where things that matter particularly to him, including federalism and states' rights, really butted heads with the U.S. Environmental Protection Agency's (EPA's) agenda.

He was on board for *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*,⁹ which was one of the first decisions that kind of trimmed back the "waters of the United States." Another takings case where he sided with the property owners was *Palazzolo v. Rhode Island*,¹⁰ where he said, as the deciding vote in a 5-4 case, that you could still have a takings claim even if the wetlands regulations were imposed before you bought the property.

In more recent years, he continued to be kind of troubled. He wrote a separate opinion in the *Army Corps of Engineers v. Hawkes Co.*¹¹ case just a couple of years ago. He talked about the vagueness of the CWA and about how it might even have due process problems, because it is so vague or so ambiguous as construed by the government. So, he did have important votes for environmentalists along the way, but he definitely was a conservative and you can sort of see that.

One statistic I find interesting and significant: this is Justice Neil Gorsuch's first full term and the person he agreed with most was Justice Kennedy, 86% of the time. It's a reminder that Justice Kennedy is a conservative, although this was a very conservative term for Justice Kennedy. This was a year in which he didn't swing to the left really at all.

Richard Lazarus: John alluded to that. Justice Kennedy was certainly no Justice William Douglas. I mean, he was a conservative. He believed very strongly in property rights as well. He believed very strongly in federalism. He believed very strongly in separation-of-powers issues and the rest. So, there's no question that in most of those cases, he came to the case a little skeptical and concerned about possible overreaching by EPA. But there were these significant cases

4. 547 U.S. 715, 36 ELR 20116 (2006).

5. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

6. 540 U.S. 461, 34 ELR 20012 (2004).

7. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

8. 137 S. Ct. 1933, 47 ELR 20082 (2017).

9. 531 U.S. 159, 31 ELR 20382 (2001).

10. 533 U.S. 606, 32 ELR 20516 (2001).

11. 136 S. Ct. 1807, 46 ELR 20102 (2016).

where he would bend, one way or the other. Whichever way he bent, that's where the Court often went.

But on questions of regulatory takings, he was very sensitive to the idea that government needed to go further sometimes to regulate what he called fragile ecosystems. In Article III standing, typified by *Massachusetts* and his breaking from Justice Scalia in *Lujan v. Defenders of Wildlife*¹² and not joining the plurality opinion in that case, Justice Kennedy showed there, too, a little more sensitivity to the need for environmental citizen suits. And in *Rapanos*, he broke from Justice Scalia as well on the possible need for the government to go further in defining navigable waters than just traditional waterways. So, he was a very conservative judge, but maybe because he came from California, he had a sensitivity to the need for government to protect fragile ecosystems and it manifested itself every once in a while.

John C. Cruden: It is fascinating that he did come from judging on the Ninth Circuit. As we know over the last few years, that has been a circuit that has more certs granted than any other one; and had been overturned more than any other circuit. There are so many interesting things about Justice Kennedy. His role was so significant that very often we thought of it as the "Justice Kennedy Court." Statistically, I think he was in the majority more than 90% of the time, and the last term, 97% of the time. If you look back to who he was paired off with, his numbers are very high when Chief Justice William Rehnquist was on the Court. Justices Kennedy and Rehnquist tended to vote the same way.

But I do have to observe two or three things. After Justice Sandra Day O'Connor left, Justice Kennedy became the swing vote more often than not. Justice O'Connor had a habit of asking the very first question during argument. Sometimes, you could figure out how that case was going to go by the question that she asked. That was not true of Justice Kennedy. He did not ask the first question and, when he did, you could not figure out exactly where he was going to come out. He was quite outspoken about the use of international tribunal activity and said publicly that there were places that would be appropriate to use. Many people, Justice Scalia included, disagreed and yet Justice Kennedy remained clear on that issue.

Caitlin McCarthy: Building off of what Richard said, John Cruden and John Elwood, on what case do you think Justice Kennedy had the most lasting impact, if you had to choose just one?

John C. Cruden: Think about the two cases that I mentioned, both *Rapanos* and *Massachusetts*. They would have come out differently without him. Think instead of *Massachusetts*, its 5-4 decision being written by Chief Justice John G. Roberts saying EPA had no authority to regulate GHG emissions or that states lacked standing. That would

have been an extraordinary setback. Justice Kennedy was in the majority and there's very little doubt in my mind that Justice John Paul Stevens' majority opinion was written to make sure that Justice Kennedy's views, particularly on standing, were considered. So, I think that has to be a legacy item.

And I will say the same thing about *Rapanos*. *Rapanos* is a very fractured opinion, which has spawned numerous litigation and does still to this day. But if Justice Kennedy had not written that concurring opinion where he pronounced the relatively new concept of "significant nexus," Justice Scalia's opinion would have narrowed the breadth of the CWA to significantly less than what we think of it as today. So, without question, I would put those two as his legacy in environmental cases.

Richard Lazarus: I would add one slight amendment, but agree completely. My slight amendment was that they wouldn't have reached the merits of *Massachusetts*. The Court would have dismissed it for lack of standing. And so we wouldn't actually have a ruling on the authority question and that would have been a very significant decision because then we would have closed the door to federal courts probably for most of the climate change cases.

John Elwood: I agree completely on the cases to pick, the ones that are most consequential. Richard does raise a good point about the whole standing issue that they might not have gotten to. I would just add that if we had a merits ruling in the opposite direction in *Massachusetts*, I wouldn't have been surprised if President Barack Obama had used up all of his legislative capital on overruling that rather than on the Affordable Care Act,¹³ because I think he would have thought that that was a more pressing issue. So, we might have had a controversial legislative change in that. But I think Richard is right, there's a decent chance they would have not even gotten to it. And the standing issue there is very important.

I have to admit that I haven't kept up on how *Rapanos* has played out in the lower courts. But one thing that interests me every couple of years is the so-called *Marks* rule¹⁴ about the application of plurality opinions. I went back today to something I wrote in the wake of *National Federation of Independent Business v. Sebelius*,¹⁵ about whether you can combine separate opinions with dissenters. That case certainly seemed to look like you can do that. So, I'm curious whether you could combine Justice Kennedy's concurrence with the four dissenters in *Rapanos* to come up with what the rule is until we have our next case from the Supreme Court.

John C. Cruden: After the *Rapanos* decision came out, I was a career Deputy Assistant Attorney General at DOJ. I testified before the U.S. Senate Environment and Public

13. 42 U.S.C. §§18001 et seq.

14. *Marks v. United States*, 430 U.S. 188 (1977).

15. 567 U.S. 519 (2012).

12. 504 U.S. 555, 22 ELR 20913 (1992).

Works Committee, taking the position for DOJ that we thought we could use either the Scalia plurality decision or the Kennedy decision to assert CWA jurisdiction. There was an interesting exchange I had with Sen. Jim Inhofe (R-Okla.), where we both counted numbers—counted to four, counted to five, counted to nine. My position being that if you used the dissent and you added Justice Kennedy to it, we had five votes on that issue. He obviously did not agree with me, but most courts have in fact accepted that you could use either the Scalia or the Kennedy test. And, of course, the Kennedy test has formed the basis for the Obama Clean Water Rule,¹⁶ which is currently under challenge in litigation as EPA works to rescind and revise it.

Richard Lazarus: It's actually quite remarkable, EPA's Clean Water Rule treats Justice Kennedy's concurring opinion like it's statutory text. I mean, the whole rulemaking is focusing on Justice Kennedy's opinion and EPA's rulemaking used the words he used. EPA was really throwing all its regulations in the Kennedy basket, and wholly apart from the fact that EPA is obviously reconsidering that rule, with Justice Kennedy's departure from the Court, its validity would've been up in the air anyway.

John C. Cruden: I do want to contrast the consideration of Justice Kennedy, who without question is a distinguished Justice, with our last loss on the Supreme Court, which was Justice Scalia. Justice Scalia, we would all agree, had a very distinctive judicial theory. He pioneered the originalist theory. He developed and supported *Chevron*¹⁷ while deciding a lot of cases at *Chevron* step one. And he was replaced, of course, by Justice Gorsuch and that really hasn't changed the complexion of the Court that much. The change after Justice Kennedy's retirement is way more significant. This is because he has been the deciding vote in so many cases, and if Judge Kavanaugh is confirmed, then he will become very significant. That's why this nomination is more significant than the replacement of Justice Scalia.

John Elwood: I think perhaps in some areas it may matter more than here. I think that the area where you have the most daylight between Justice Kennedy and a would-be Justice Kavanaugh is probably in standing because Justice Kennedy is not a standing hawk. By all accounts, Judge Kavanaugh is a standing hawk. He never would have joined *Massachusetts*, its discussion of standing, and I think that would be significant. In a lot of other areas, I don't think there is probably going to be that much difference between them.

I also view Judge Kavanaugh as somebody in the Justice Scalia mold. He's going to be a very muscular *Chevron* step one person, where he wrings out every ounce of meaning from the statutory text and everything surrounding it. He's very unlikely to find a statute ambiguous. I suspect that he would've probably voted with the dissenters in *Massa-*

chusetts on the merits by looking at how the CAA treats pollutants, in saying carbon dioxide doesn't fit with various other pollutants with threshold triggers and stuff like that.

But in a lot of other areas, I suspect Kavanaugh and Justice Kennedy would be cut from the same bolt of cloth. Particularly Justice Kennedy later in *Hawkes*, being wary about notice to landowners and things like that, I think that they're probably very similar. In other areas of the law, I think outside of the environmental sphere, there would probably be more of a difference.

Richard Lazarus: I think there's no question that there is more of a difference in other areas and probably the focus is more on those other areas. But I think the *Rapanos* case and the Clean Air Interstate Rule, in *Environmental Protection Agency v. EME Homer City Generation*,¹⁸ do show a very important value. In *Rapanos*, Justice Kennedy has a more pragmatic approach to things, his sense that you really did need to have a strong national presence in the water pollution area. Notwithstanding that he had very serious concerns about EPA possibly overreaching and notice issues, nonetheless he decided they needed a different test and a test that could reach far beyond Justice Scalia's, as long as notice is provided and they did thorough rulemaking.

EME Homer, the case about the Clean Air Interstate Rule, was one of the most significant rulemakings done by EPA in decades. The theory of that case was struck down by the D.C. Circuit when the Bush Administration tried it.¹⁹ The Obama Administration came back with pretty much the same theory, which was struck down again by the D.C. Circuit in an opinion written by Judge Kavanaugh,²⁰ true to his principles. Kavanaugh says if you're going to try to do something, it may be really good policy, may be really pragmatic, may be economically efficient, but I've got to see the language in the statute that says you really have the right to do this. And I just don't see it. You're putting too much in that case into the word "significant" for EPA to sort of be able to do this admittedly really creative interesting pragmatic approach.

The Supreme Court with Justice Kennedy had no problem endorsing the Rule and tweaking the language a little bit on behalf of EPA. Because they thought this really was a good solution. Even the Chief Justice joined that opinion. But Kavanaugh was more of a stickler. With his separation-of-powers concerns, I think there's missing the pragmatism that you saw in Justice O'Connor at the Court and you saw to more of an extent in Justice Kennedy than we see in Kavanaugh. And that we even have seen sometimes more in the Chief Justice in several contexts than we have evidence of so far in Judge Kavanaugh.

John C. Cruden: I have a question for John on this. I think the *EME Homer* case is really a good case to distin-

18. 134 S. Ct. 1584, 44 ELR 20094 (2014).

19. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam).

20. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 12 (D.C. Cir. 2012).

16. 80 Fed. Reg. 37053 (June 29, 2016).

17. *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 14 ELR 20507 (1984).

guish between the jurisprudence of Kavanaugh writing for the majority in the D.C. Circuit and then what happens when it comes to the Supreme Court and it's reversed 7-2. That's a really good example of how they are different but, John, you were there close to Justice Kennedy. How would you describe his judicial philosophy?

John Elwood: He definitely is a pragmatist. There are certain things that he cared a great deal about, like treating the states as really equal sovereigns and things like that. But he is fundamentally a pragmatist and he does sort of think there are certain things you've just got to get done. I think that that is kind of behind *Massachusetts*, that he probably figured the statutory text was "close enough for government work" and that this is something that needed to happen.

He is a practical guy. As much as he does sympathize with landowners who may find themselves in landlocked areas facing EPA or the U.S. Army Corps of Engineers, he also thought that they needed to get GHG regulation done. I think he is more sympathetic to the idea that areas that aren't a conventional stream or waterway nevertheless do affect the health of the aquatic environment. So, I do think you're right in that regard, he is fundamentally a very pragmatic guy.

John C. Cruden: I also assert that we should consider the impact on environmental litigation for his recusals. There have been at least several recusals that resulted in positive environmental cases. For example, *Borden Ranch Partnership v. Army Corps of Engineers*,²¹ a very significant wetlands case coming out of the Ninth Circuit. He recused himself and the final vote was 4-4; therefore that pro-environmental decision was upheld. And then just this term, there was a big case involving the state of Washington, tribes, and culverts—very pro-environmental litigation brought by DOJ. Once again, he recused himself. The decision was 4-4, so the underlying decision was upheld. He's had a significant impact on a couple of cases by recusing himself.

Richard Lazarus: John, you've got to do more justice to the *Borden Ranch* case. It's one involving whether "deep ripping" and farming activities were covered by the CWA. In that case, the Ninth Circuit ruled against the landowner. When the Court granted cert, one of the parties involved was very delighted. He started talking publicly about how he was a close friend of Justice Kennedy. He knew Justice Kennedy and this was the greatest news. Obviously, the justices know lots of people and they don't recuse themselves just because they know people.

But maybe so much noise was made that Justice Kennedy then recused himself from the case. So, it might've easily been a 5-4 and the landowner would've won the case given Justice Kennedy's real concern about the impact of these statutes on landowners. And it was instead 4-4 affirmed by the divided Court. But to show that bygones

are bygones, I did notice a couple of years ago that the same disappointed landowner was at a big Ninth Circuit event where they unveiled the portrait of Justice Kennedy. He was there with Justice Kennedy's family celebrating his friend, even though Justice Kennedy's recusal cost him a Supreme Court win.

John C. Cruden: Richard, I have to ask you a question because you have more experience arguing before the Supreme Court than most people I know, and you successfully argued the last takings case. How was it before the Court dealing with the various questions of Justice Kennedy?

Richard Lazarus: It was interesting. Justice Kennedy was not the justice I would go into argument thinking about or worrying about. If he asked a question, when I finished answering his question, I would pause and I would look at him because I would basically try to invite with my eyes, I'd be saying, "Justice Kennedy, are you satisfied? Justice Kennedy, anything else you want to ask me? I'm here for you."

While if I got asked yet another barrage of questions from Justice Scalia, when I was done, I'd never look at him. I'd always look someplace else because I was not inviting a follow-up question with Justice Scalia, who actually was a lot of fun to argue in front of. I basically wanted to say most times, not always, I won cases with him being the decisive vote, but sometimes I just wanted to say, "Justice Scalia, thank you very much. I understand your questions. I will cede your vote. Let me now deal with the other eight."

With Justice Kennedy, I wanted to pay attention to what he said. But he was not as active a presence at argument as many of the others on the bench. When I argued that case last year, in March, the most striking thing to me was that it was the first time I argued a case without Justice Scalia. It felt profoundly different in that room not having Justice Scalia there. In terms of the outcome, no doubt it helped me, but you miss his voice at argument.

John Elwood: There is an interesting statistic that Paul Clement, a big Supreme Court advocate, actually said more words this year than Justice Kennedy did, even though he only got eight arguments and Justice Kennedy was there for every one of the Court's arguments. But it really is true when Justice Kennedy asked you a question, he's not somebody who tried stuff on for size. To me, at least, he was asking a question. This is the thing that really mattered to him the most and you see it in the cases I've argued. He wrote a separate concurrence in a case I did that embodied concerns that he at least gave me a chance to address, and I'm grateful to him for that. The worst question is the one you don't get.

For me, not to get off-topic, Justice Scalia was a very, very challenging guy. And the thing that I always hated the worst is when he was trying to get me to defend a rule or adopt a rule that would then make me lose all of the other

21. 537 U.S. 99 (2002).

votes on the court. And so you'd have to do something to sort of say, that's very good, that's very interesting, but let's go with this rule over here instead.

Caitlin McCarthy: Let's pivot to Judge Kavanaugh. To start us off, we know Judge Kavanaugh has a judicial history of ruling on the administrative law on the scope of EPA's authority. What do you think his impact would be moving forward if he is confirmed?

John C. Cruden: I think that Judge Kavanaugh is coming to us out of the Justice Gorsuch model. He's relatively young. He's thoughtful. He has a long history of opinions, so he has a track record that can be fully evaluated. We've watched Justice Gorsuch come into the Supreme Court and have an impact immediately. I believe that this Administration looked for somebody like him. To those of us in Washington, D.C., Kavanaugh has been a force for a long time. We know him socially. We know him on the court. Most of us have thought he has been in the on-deck-battling circle for a long time. It is of course interesting that he comes off the same court as Merrick Garland. Garland, who was nominated by President Obama, and is supremely qualified, never really got a vote. Now, we're going back to that same court to pick up Kavanaugh.

I think Kavanaugh is more conservative than Justice Kennedy because I've watched him on numerous occasions in court. He is very thoughtful. He is very well-prepared. He is also very courteous to people litigating, but he is right there in the originalist view. I predict he will judge environmental cases based on their legislative underpinnings. He will give very little room, I think, to allow actions beyond where he sees the statutory authority. He has taken such positions in the D.C. Circuit and several of his dissents caught the attention of the Supreme Court. I think he is rigorous, but I do not see him as somebody who is going to be advancing environmental issues beyond the narrow statutory confines that authorize the action.

Richard Lazarus: Just a few thoughts to add—Kavanaugh is charming, interesting, fun, generous, and kind. This is a really decent person and he's been an excellent judge. That's apart from whether he votes in ways I like or dislike. This is a classy person and someone I think people could tremendously admire. He's conservative, but he is very different from Justice Scalia. Justice Scalia brought to environmental law a sort of hostility and sarcasm and a mocking attitude, even evident before he got on the Supreme Court. He had a real innate skepticism of environmental law and the role he was playing in the advocacy of it and that affected a lot of what he did.

That's not true with Kavanaugh. Kavanaugh doesn't come with that kind of attitude. We have a track record for him unlike anyone we've ever had in environmental law because he's been on the D.C. Circuit and, miraculously, they do this random panel thing and it always turns up Kavanaugh. It's phenomenal. All the CAA cases, there he

is again. It's a running joke at how he was always on these random panels.

But we have a track record that we've alluded to. Kavanaugh has a very deep sense of separation of powers. It makes him inherently very suspicious of broad assertions of regulatory authority by any agency, and that includes EPA. If he doesn't see that the U.S. Congress has thought hard about the issue, he's going to not be willing to find that the agency had that authority. In environmental law, that's a deal-breaker because Congress has been out of the environmental law making business since 1990 for the CAA, since 1987 for the CWA, and since 1973 for the Endangered Species Act (ESA).²² They haven't kept up with issues and values and technology and priorities. That means the Agency, whether it's a Republican or a Democratic administration, is trying to work with language that doesn't often fit the problem because it's decades old. So, if you've got judges who are willing to be a little more pragmatic and willing to give the Agency a little more leeway, then they can work with it.

If you have a judge who says that if it's EPA or any other agencies, they want to have Congress speaking to those issues more directly, then that means EPA loses every time they're trying to assert broad regulatory authority. Not because the judge is anti-environmental, but because he is unwilling to find that Congress has delegated EPA the necessary law making authority absent the kind of evidence of specific congressional intent that is almost always lacking. I've no reason to think Kavanaugh is being hypocritical about this, but the end result is quite clear. We have lots of evidence in many cases of where he's going to go every single time. He said it out loud, in the Clean Power Plan oral argument.

If you look beyond that, beyond the really big sweeping CAA cases, he's had a lot of opinions. You can see cases where environmental groups won. You can see cases where industry lost. You can see cases where EPA won, but they're second-order cases. They're cases where the record is good enough for where they're standing in the case. They're more fact-specific cases. On the big sweeping cases, we know where he stands.

John Elwood: I think that's completely right, and I agree with that. I'll just say that it is true on separation-of-powers grounds, he is a real hawk for these issues. The so-called major rules doctrine, this idea that big-ticket items are not things that Congress meant to leave to the agencies, that's something we haven't seen much of from the Supreme Court. But Judge Kavanaugh definitely has picked up on that and he's very interested in that, but it's kind of a further elaboration on the point that's already been made.

I think if he is confirmed, he will have quite a legacy just because he's very thoughtful and because of the opinions he does, whether I agree with him or not. I thought his dissenting opinion in *Free Enterprise Fund v. Public Company*

22. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

*Accounting Oversight Board*²³ about financial regulation was very interesting, and also his *Consumer Financial Protection Bureau* opinion.²⁴ Whether you agree with him or not, he's thinking very deeply on these subjects. He also has a very broad intellect. I don't understand why he spends his spare time reading things like David Barron's book²⁵ on war powers when I read much fluffier stuff. I don't know how he can relax with that and then he wrote up a book review on that.²⁶ I admire that kind of intellectual curiosity and willingness to do that sort of thing.

John C. Cruden: What I know is that he is a recognized expert on administrative law, including the Administrative Procedure Act (APA).²⁷ You see that knowledge in his opinions, in his comments, and in his pronouncements on standing, mootness, ripeness, and similar issues, which frequently come before the D.C. Circuit. He understands and often focuses on those issues, which is relevant because a number of the current justices on the Supreme Court came out of the D.C. Circuit and they also understand these key issues.

However, we're talking narrowly right now about environmental issues. Obviously, the rest of the world considering Kavanaugh as a replacement of Justice Kennedy is going to be talking about very different issues. They're going to be talking about gay marriage, privacy, and abortion issues, as well as, executive authority, First Amendment, and labor issues. His track record is going to get scrutinized significantly. So, some of the issues that we are talking about that are very significant to us as environmental lawyers will probably be second place compared to some of those other demanding social issues.

Caitlin McCarthy: Richard, some in the media are wondering whether Chief Justice Roberts will become the swing vote with Kavanaugh on the bench. What are your thoughts about that for the environmental arena?

Richard Lazarus: First of all, at least with the Chief Justice, I would really hesitate to use the word "swing." I think he'll be the controlling vote in a lot of cases. I doubt if he's doing a lot of swinging. With Justice Kennedy, the reason people thought he swung is he would sort of sometimes be on the left, sometimes on the right, and when he was the controlling vote, he swung for the fences. I mean he often wrote this really far-reaching opinion.

Chief Justice Roberts is very different. Chief Justice Roberts will be the controlling vote, the center, but he swings narrow. He'll be more of an incrementalist. He won't be what Justice Kennedy was. When Justice Ken-

nedy was the middle, he swung for these grandiose visions and theories. Chief Justice Roberts will be much less so with the controlling vote. He'll be narrow.

I think of Kavanaugh, compared to the Chief Justice, as being more conservative and a little less pragmatic. The Chief Justice is very conservative. He comes by it honestly, he always has been. The issues might change in front of the Court, but he's not going to change. But Kavanaugh will be more conservative than the Chief Justice. My guess is that Kavanaugh's introduction to the Court for the Chief Justice will be a very positive thing for this reason, and that is collegiality. Any chief justice has to care tremendously about how they all get along with each other.

Kavanaugh is a gift to all eight justices from that perspective, the way Justice Elena Kagan has been a gift to the Court. She's been an enormously effective justice as a member of a deliberating body, tremendously admired by everybody. They don't have to vote always together. They have to listen to each other and debate and respect each other on the bench and in deliberations. And Justice Kagan has been very successful on the Court in that sense and I don't think it was a happenstance, it's obviously political, but Kavanaugh gave a shout-out to Justice Kagan when he accepted the nomination. I think he and Justice Kagan will work well together. He and the Chief Justice will work together.

I think one of the unfortunate things is that at least in his first year-plus, Justice Gorsuch has not done well in that respect. I thought he had a terrible beginning to the Court when he arrived in April 2017. He appeared arrogant, condescending, and off-putting. It was a really surprising thing in great contrast to Justice Kagan's sort of effortless entry. Justice Sonia Sotomayor had a more difficult, friction-oriented entry to the Court. I think with Kavanaugh, the Chief Justice will have someone who likes his style of running the Court, very friendly and collaborative.

I think there has been a tendency in recent years with either Justices Gorsuch, Alito, or Clarence Thomas veering more off to the right, not just in their opinions, but in being more insular, less willing to engage with others. You had Justice Ruth Bader Ginsburg and Justice Sotomayor being more insular to the left. You add Justice Kagan and Kavanaugh with the Chief Justice, and a little bit of Justice Stephen Breyer, I think it's a more collaborative, civil Court. That's a good thing for the country to have a Court that is trying to act that way. I would have liked Judge Garland on the Court. I'm very disappointed by that, but I think an introduction of someone like Kavanaugh will make it a more civil, collaborative body.

John C. Cruden: Richard, I have one question for you in that regard. When I was still at DOJ, I brought Justice Kagan back to speak to our division, this was during that time period when Justice Scalia had passed and there was not a ninth justice. She made a point publicly of complimenting just how good the Chief Justice was in organizing and running a court that was split 4-4. It was not lost

23. 561 U.S. 477 (2010).

24. PHH Corp. v. Consumer Financial Protection Bureau, No. 1115-1177 (D.C. Cir. Oct. 11, 2016).

25. DAVID BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS (2016).

26. Brett Kavanaugh, *Congress and the President in Wartime*, LAWFARE (Nov. 29, 2017, 3:00 PM), <https://www.lawfareblog.com/congress-and-president-wartime>.

27. 5 U.S.C. §§500-559.

on any of us that she obviously had a high opinion of the Chief Justice's management ability. While I don't see him as a swing vote, it seems to me that Chief Justice Roberts is the most concerned about the history of the Court, most concerned about the perception of the Court, and more likely to consider legacy issues than any other justice on the Court. Am I wrong?

Richard Lazarus: I think that's right, but there is the balance you have to put on it. He knows that's the role of the chief justice as did Chief Justice Rehnquist before. Most chief justices knew they had that extra stewardship responsibility. But the mistake people make is they tend to think that any vote against the position they like will undermine the institutional integrity of the Court, that somehow the institutional integrity of the Court is at stake.

So, I think he does care rightly as the Chief Justice should. But people are a little too quick to think that means that anything he does has to be in their favor. Because if he doesn't vote in their favor, somehow that means the court is no longer in the arc of history or whatever. I think there's an exaggeration in that respect.

John C. Cruden: I asked that question because, watching Justice Gorsuch start, he appears to be linking more with Justices Alito and Thomas. It would not surprise me, if in fact Kavanaugh is to be confirmed, that he would link more with the Chief Justice.

Richard Lazarus: They know each other well. They served on the D.C. Circuit. The Chief Justice has hired a lot of Kavanaugh clerks. They have very similar personalities in many respects. They will get along well. As, I think, the Chief Justice and Justice Kagan have gotten along extremely well. It's a very positive professional relationship in that respect. I think Kavanaugh would be welcomed in that regard with both Justice Kagan and the Chief Justice.

Caitlin McCarthy: So, talking about this balance, John Elwood, do you think that the Court with Kavanaugh will be likely to scale back on the *Chevron* defense?

John Elwood: I think he'll think hard about it. I'm not sure the votes are there yet because, as I say, I view him as a very muscular *Chevron* step one guy. I'm not sure if he's a "reconsider *Chevron*" guy yet, but I note the fact that Justice Kennedy, on his way out the door, wrote a concurring opinion in *Pereira v. Sessions*,²⁸ where he said that basically the foundations of *Chevron* have to be reconsidered and basically what it means and how far it should go. I think that if Kavanaugh weren't thinking about that before, he is now.

But I'm still not sure that there are other votes there for that. You have Justices Thomas and Gorsuch and maybe now Kavanaugh, but I'm not sure where the Chief Justice is on that and I'm not sure where Justice Alito is on that.

28. 585 U.S. ____ (2018).

That remains to be seen. I do think however that anybody who could be making an *Auer*²⁹ challenge and isn't, is committing professional malpractice because *Auer* is kind of teetering. And while it may continue to hang on, at least there's a pretty decent chance that it could get overruled in the next term or two. I think that if it dies, Justice Kavanaugh's knife will be one of the knives in its back.

John C. Cruden: We used to joke when I was at DOJ that most people for their screensaver had a photo of their kids, but we had *Chevron* because we knew we would cite it a couple of times during that day. I have written about the groundswell of people who find holes in the *Chevron* process. And I quoted Mark Twain as saying, "The rumors of my death are greatly exaggerated." I agree with you, John. The votes are simply not there. *Chevron* is attractive in the eye of the beholder, meaning that those people who are using *Chevron* would like it a lot. But I also agree that if you look at the tertiary areas of *Auer* deference and *Skidmore*³⁰ deference and all of those things, that is, again, extremely likely to be looked at. When I wrote my law review article,³¹ I cited Justice Scalia extensively in support of *Chevron*.

Richard Lazarus: I'll be interested to see what happens. I keep expecting the *Chevron* arguments to be sort of like the federalism arguments. That is, it depends on who's in power. The opposition to *Chevron* emerged as a conservative argument when the Democrats and the Obama Administration were in power, so it was an argument that challenged the broad reaches of regulatory authority. The same way that federalism is used by conservatives if they think states are doing less and by liberals if they think states are doing more. I keep thinking *Chevron* will switch back now that the Trump Administration is in power. I haven't seen that happen yet, but I'm wondering whether there are going to be fair-weather *Chevron* opponents the way we've seen fair-weather federalists as well.

John C. Cruden: Clearly, things are happening in *Chevron*. It is well-documented that Justice Gorsuch wrote a concurring opinion when he was on the U.S. Court of Appeals for the Tenth Circuit, challenging *Chevron*.³² Justice Kennedy, in parting words, also wrote a solo concurrence, raising separation-of-powers issues with regard to *Chevron*, a sort of a farewell gift to Justice Gorsuch.³³ Justice Gorsuch on the court has also raised questions about the application of *Chevron* in specific instances.³⁴ I expect more to come.

29. *Auer v. Robbins*, 519 U.S. 452 (1996).

30. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

31. John C. Cruden & Matthew R. Oakes, *The Enduring Nature of the Chevron Doctrine*, 40 HARV. L. REV. 189 (2016). This article is based on John C. Cruden's annual Harvard Leventhal Lecture.

32. *Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016).

33. *Pereira v. Sessions*, 585 U.S. ____ (2018) (Kennedy, J., concurring).

34. *Scenic Am. Inc. v. U.S. Dep't of Transp.*, 583 U.S. ____ (2017) (Gorsuch, J., dissenting from denial of writ of certiorari).

John Elwood: In a related vein, John Manning, a former Justice Scalia clerk, is one of the guys who got Justice Scalia interested in overruling *Auer*, which is, after all, one of Justice Scalia's own cases. But I think perhaps what we might see with *Chevron* is kind of continued erosion, like we've seen with *Christopher v. SmithKline Beecham*³⁵ and other things where they just cabin it more. I don't think it will ever quite achieve the status of the *Lemon*³⁶ test where it is only trotted out for particular things.

But I wouldn't be surprised if there's continued erosion and more exceptions carved out of it and if there's a more muscular *Chevron* step one reading so they never even get to *Chevron* deference in step two, but it's never overruled. I'm not sure what really the practical alternative to *Chevron* is at a certain point when you think about that pre-*Chevron* D.C. Circuit. I'm not sure that the Chief Justice would want to go back to that.

John C. Cruden: I agree with you, John. Having said that, I will admit that though Justice Scalia was a very firm supporter of *Chevron*, he was also one of the justices mostly likely to find a *Chevron* step one when applying the familiar tests. So, keeping *Chevron* still provides a lot of flexibility to justices.

Richard Lazarus: Another area we haven't talked about that I think we're going to see maybe come up sooner rather than later is the whole question of Congress' Commerce Clause authority in the environmental protection area. Ever since the Supreme Court decided *Lopez*³⁷ in the mid-1990s, everyone thought there were two vulnerable areas in federal environmental law. One is wetlands regulation with CWA §404. The other is ESA §9 and its "take" prohibitions applied to species that have very small geographic habitats, especially on private property. The lower courts have upheld the ESA in application every single time. Four or five circuits have done it. But every single time, there have been a lot of dissents as well.

And there seems to be a divide. A conservative judge like Judge J. Harvie Wilkinson on the U.S. Court of Appeals for the Fourth Circuit upholds it. He perceives the pragmatic need for the ESA, for this federal presence. He thinks that it meets the Commerce Clause test. But a different kind of conservative judge, not now on the bench, Judge Michael Luttig, writes very aggressively that the ESA as applied to the protection of red wolves exceeds Congress' power under the Commerce Clause.

My working assumption was the ESA would survive that kind of challenge in the Supreme Court as long as there were those more pragmatic conservative judges on the Court, like Justice O'Connor and Justice Kennedy. With Justice Kennedy leaving the Court, I think the ESA §9 as applied to species that have very small geographic spaces, and how they travel as applied to private property,

may be more vulnerable than it's ever been for a cert grant and opinion that narrows the Act.

Of course, the first Monday of October, they've got an ESA case before them, the *Weyerhaeuser* case.³⁸ It involves the application of critical habitat to private land. The constitutional issue was not at the forefront, but it's back there because a justice could say we're going to construe the statute narrowly to avoid the constitutional issue. This is for John Elwood, do you have any sense of where Kavanaugh would be on those issues?

John Elwood: No, I've got to say I don't. You know, it's kind of funny, he was just out of law school essentially when *Lopez* was happening. That was very much a current issue at the time. It has fallen a little bit by the wayside, but I don't have a sense of where he views that—whether he would view that more pragmatically or whether he would be more of a hawk along the lines of Justice Scalia. But I think that's a very good observation. It's been quiet for a while, but I don't think it will remain so always.

John C. Cruden: I think Richard has a very good point, particularly in the context of the ESA and the whole Commerce Clause challenge. Every few years, there has been a case coming up to the Supreme Court that raises those issues. They have not granted cert, which is some indication that either there was not the necessary four votes, or they are looking for a better case.

But with the change of the Court, I could easily see an ESA case being taken. The *Weyerhaeuser* case that's getting argued in October is not a Commerce Clause case. However, it does raise the complicated intersection between the preservation of species and individual property rights. How far can you go in protecting a species by going onto land that was not previously a habitat for that particular species? I think the opponents have picked a particularly good factual case. And a new justice like Kavanaugh could really make a difference.

Richard Lazarus: Anything that early in the term, if they hear the case first Monday, they go to conference on Wednesday. Let's just say they divide 4-4 in that conference on October 3. At that point, they would sit on it. I don't think they'd affirm the ruling through a divided court the following Monday. They'd think we're about to get a new justice, and they would set it for a reargument once they have a new justice. If they didn't have a new justice by the end of the whole term, they then would probably affirm by a divided Court.

All these cases underscore what a difference Judge Garland would have made. Garland on the D.C. Circuit had voted to uphold the ESA in the *Rancho Viejo* case.³⁹ He had voted in some cases in which he made quite clear he thought the federal statute was constitutional. I don't think

35. 567 U.S. 142 (2012).

36. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

37. *United States v. Lopez*, 514 U.S. 549 (1995).

38. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

39. *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003).

there's much doubt where he would have been on a case like *Rapanos*. I don't think there's much doubt where he would have been on the case about the Clean Power Plan as well.

So, a lot has shifted with the Republicans' successful effort. Whether you don't like it, like me, or you like it, like others, it was a successful effort. Whether it was appropriate or not, it was a successful effort to keep Judge Garland off the Court, a huge impact for environmental law and a host of other areas, and that's what we're still living with.

Caitlin McCarthy: We have a question for John Cruden. What cases under the CAA could potentially come up to the Supreme Court that we haven't seen, where Judge Kavanaugh would opine with an eye on the statutory text?

John C. Cruden: There's a lot of important CAA litigation going on, some of which may eventually make it to the Supreme Court. EPA rescinding and redoing some of their regulations, and trying to extend others. They're also doing some controversial guidance documents. I fully expect that some of those will mature and be future Supreme Court cases. The one CAA case we're all watching is the *Juliana* case in Oregon,⁴⁰ the children's case challenging GHG limitations. That is actually going to trial, DOJ having sought mandamus before the Ninth Circuit, which was not granted. And any future action to rescind or replace the Clean Power Plan has Supreme Court potential. Any of those cases are potentially going to the Supreme Court.

If Judge Kavanaugh is confirmed, since he has now been involved in a number of those CAA cases, including some that could be considered, I imagine he would recuse himself from those cases.

John Elwood: In that regard, one of the cases that's going to be pending in one of the Court's first conferences is a Kavanaugh case, *Mexichem Fluor v. Environmental Protection Agency*,⁴¹ which is about whether hydrofluorocarbons could be regulated under CAA §612. I'd wonder if they're not going to find that very appealing if they already know it's going to be an eight-member Court in that case.

Caitlin McCarthy: Related to that, John Cruden, what about specifically the example of interstate transport of ozone-forming pollution that, so far, EPA hasn't addressed under the CAA?

John C. Cruden: EPA has petitions under CAA §126 to take action. This section gives a state authority to petition EPA to set emission standards in other states that significantly impact national ambient air quality standard compliance. It's always been difficult for EPA to do that. It very much creates winners and losers. Some of those issues have come up before the D.C. Circuit. I

do not recall whether Kavanaugh participated in any of those arguments, but, clearly, EPA action under CAA good-neighbor provisions could be ripe for review in the Supreme Court at some stage.

Caitlin McCarthy: Richard, you've spoken highly of Judge Kavanaugh. What difficulties do you think he'll face in his confirmation?

Richard Lazarus: I'm thinking how he was as a judge. I'm not going to suggest I have no concerns about how he might have voted in environmental cases. But that's a different question than what I think of him as a jurist and certainly as a person.

In the confirmation process, in a normal world, a liberal progressive senator would vote in favor of Judge Kavanaugh, the same way in a normal world a conservative Republican senator would have voted for Judge Garland. That's the kind of world we should live in and we long lived in. We don't live in that world anymore. It's a post-Garland world and it's a Trump world where there is so much anger about how people feel Garland was treated, and there is so much opposition to this president. Anything he touches has a taint for many people in the political process in Washington, D.C.

Unfortunately, while the debate about Kavanaugh is going to veer into directions that will be uncivil and unnecessary, I think that it's going to be a very heated debate. I hope that people who oppose Kavanaugh do it because they oppose the president and that they make that quite clear. It's about the president of the United States and not about Kavanaugh per se. But I expect it will be on what he thinks about *Roe v. Wade*,⁴² what he thinks about gay marriage. Those are the more politically salient issues for most Americans. I think environmental law may actually take a little bit more of a front row than it has in the past.

John C. Cruden: It is highly relevant that the voting structure for confirming Supreme Court justices has changed in the sense that you no longer need the 60-vote majority. If that was still in effect, it would be significantly more difficult for any nominee to be confirmed. But now that it's a simple majority, with the Senate led by Republicans, that changes everything very significantly because now he just needs a majority vote. That makes it more likely he will be confirmed.

Richard Lazarus: It underscores the political mistake everyone knew Sen. Chuck Schumer (D-N.Y.) was making when he blew apart the filibuster, pushed the filibuster issue on Gorsuch. Everyone knew that Gorsuch was going to go through. In that case for Gorsuch versus Scalia, it was a political mistake. To do it was obvious at the time. Senator Schumer bent to the political base that wanted him to prove his bona fides, and as a result, the filibuster doesn't exist now.

40. *Juliana v. United States*, No. 6:15-cv-01517 (Or. June 21, 2018).

41. *Mexichem Fluor v. Environmental Protection Agency*, No. 15-1328, 47 ELR 20097 (D.C. Cir. Aug. 8, 2017).

42. 410 U.S. 113 (1973).

It's not so clear that on this one the Republicans could have eliminated the filibuster because the red-state Democrats could have basically voted their way without causing the person to be confirmed. And Republican senators like Susan Collins (Me.) or Lisa Murkowski (Alaska) could have said things like "I'm all in favor of the president's nominee, but the traditions of the Senate are so important that we need to keep the filibuster." I think it was a significant mistake made by Senator Schumer, and may well be dispositive here in what happens.

Caitlin McCarthy: Jumping backwards a little bit, John Elwood, I have two more questions for you more specifically about Justice Kennedy. The first is whether you can discuss Justice Kennedy's vote and significance in the 5-4 decision where he joined the conservative Justices in *SWANCC*.

John Elwood: Well, to me, I think that would have been a no-brainer for Justice Kennedy. I wasn't there at the time. But that was right in his wheelhouse. Those were waters that were relatively divorced from traditional waterways. I think it also helped that that was an opinion by Chief Justice Rehnquist. It was easier to join his opinions because they didn't say very much. I think that was an 11-page opinion or something like that. It was very short and to the point. It was about interference with state prerogatives and it made noises about that as well.

Chief Justice Rehnquist was a very savvy man. He wrote his opinions so that they would get five votes largely. It was relatively rare that he would swing for the fences enough that he couldn't get a majority opinion. Unlike, for example, Justice Scalia in *Rapanos*, where he wrote it in his ideologically pure way and as a consequence couldn't get five votes. So, I thought that would have been a no-brainer for Justice Kennedy, and it was probably written pretty heavily to make sure it was something Justice Kennedy could join.

Also, this is not anything he told me, but it was something that I have inferred over the years: Justice Kennedy was a great admirer of Chief Justice Rehnquist, and I think that if he could possibly join the Chief Justice's opinion, he would. I think the Chief Justice returned the favor. If he assigned an opinion to you, even if he didn't agree with every word that was said in it, he would join it more often than not, and he was usually the first to join.

Caitlin McCarthy: Another question that's related to what you're saying about how Justice Kennedy approached his belief in federalism and states' rights, and how Kavanaugh will likely be in the same vein. One of our participants writes that it's impressive how Justice Kennedy's legacy on *Massachusetts* has led us to future regulation of GHG emissions. However, this ruling has also worked, and backfired, as the ground for court dismissal of the recent climate change cases brought forth by cities. Could you explain more on how this ruling may affect future climate change cases that attempt to make clearer stakes for adaptation?

John C. Cruden: I would say two things. First, of course, *Massachusetts* did not really do anything by itself, but gave EPA the authority to regulate GHG. They then implemented the decision with the endangerment finding that was done during the Obama Administration. The endangerment finding starts a series of dominoes absolutely requiring regulation in a number of areas. Those regulations we have seen for stationary sources and mobile sources were not optional.

Even today, although the Clean Power Plan was stayed by the Supreme Court,⁴³ one of Justice Scalia's last votes, the regulation still exists. It would have to be rescinded in accordance with APA notice and comment, and it would have to be replaced with something else because that's required. So, the legacy of *Massachusetts* combined with the endangerment finding now makes it mandatory to have GHG reductions that would not otherwise be true.

Richard Lazarus: There is some tension between broad exertions of authority under the CAA and the viability of common-law causes of action. Some judges have recently said that the CAA is more exclusive when it comes to what kinds of claims can be brought. I think that's the litigation referring to Judge William Alsup's recent opinion for the District Court for the Northern District of California.⁴⁴

I don't think that Kavanaugh joining the Court is going to change that tension at all. It would if the Court would overrule *Massachusetts* on a statutory question. I don't see that happening. Yes, if Judge Kavanaugh had been on the Court and they had reached the authority question, he might well have decided differently. This is not a Court that I think is going to overrule recent questions of statutory construction. That would very much surprise me.

They might revisit questions of constitutional law that we see. But revisiting questions of statutory construction that are fairly settled, which gives the Agency discretion on things, I don't think so. There is enough reform that the Trump Administration can do with EPA. They don't need to revisit *Massachusetts*. They don't need to revisit the endangerment determination. I think it will be a mistake to try it. I think if they do, they'll lose those cases in the courts rather than win them.

What would be interesting is the issues that will come up to the D.C. Circuit now and then, maybe the Supreme Court, which are the efforts by the Trump Administration to cut back on these programs done by the Obama Administration. To the extent that the question is whether EPA has authority to read statutes more narrowly rather than broadly, I think a Justice Kavanaugh would be open to the effort of EPA to narrow constructions. Because it doesn't implicate the separation-of-powers concerns.

43. *West Virginia v. Environmental Protection Agency*, No. 15A773 (U.S. 2016).

44. *City of Oakland v. BP P.L.C.* No. C 17-06011 WHA, 48 ELR 20105 (N.D. Cal. June 25, 2018). See <https://www.nytimes.com/interactive/2018/06/26/climate/document-judge-dismisses-climate-suit-against-oil-companies.html>.

But he's an administrative law guy. He's a D.C. Circuit guy. If they do it, then offer arbitrary reasons for why they're doing it, if they don't dot their i's and cross their t's, if they don't follow the APA and they try shortcuts, I think there's a very good chance that a Justice Kavanaugh would rule against them on those issues. I think he tends to be a pretty honest broker on those questions of procedural law. There, I don't think he's skewed one way or the other. I think he has on separation of powers because he does kind of lead to one kind of decision rather than another, upsetting broader assertions of authority, accepting narrow assertions of authority. On procedural compliance, I'm hopeful he'd be fairly even-handed on that.

Caitlin McCarthy: Are there any last thoughts from each of you on both Justice Kennedy's legacy on environmental law, and Judge Kavanaugh's potential for environmental law?

John C. Cruden: I would only say that there is no question in my mind that Justice Kennedy was a man of great integrity. He spent extraordinary time and serious thought as he deliberated and wrote. He was governed by what he thought was the right approach in every decision. I did not always agree with him, but I believe his legacy deserves great honor and great respect by all of us.

Richard Lazarus: I agree with all of that with regard to Justice Kennedy. With that said, someone who has served 30 years on the Court and the Ninth Circuit before, he's entitled to retire when he wants to retire. I'm sorry he retired when he did. I think that's unfortunate for the country. It may have been necessary for personal reasons. I think it's unfortunate he retired at a time when we have a president who is under criminal investigation by a special counsel, at a time when the country is so divided politically.

The partisanship of how someone voted in this case, in that case, whether he or she should be on the Supreme Court or not—it's almost like electing the Supreme Court justice. I think it's bad when judges are elected in state courts, and it's bad when they are elected in the Supreme Court. I hope the Court comes out of this okay. I'd rather have the Court off the political docket this year at this time. So, I'm very sorry that Justice Kennedy created the opening when he did.

John Elwood: I wanted to echo something that John Cruden said though, about Justice Kennedy taking each of these cases very seriously. Because I think he did take them very, very seriously. Many a time, I would arrive at the chambers, and he would have faxed something in overnight about some junky case, not even one you would remember now if I told you the name. He would have sent a fax in the middle of the night, like, "herewith the product of some late-night brooding." He really took all of these cases very seriously and tried very hard to reach the right answer in all of them, including all of these environmental cases. It was very important to him to reach the right result. That was actually something he said, I think inartfully, in his resignation letter to President Trump.

I fully expect Kavanaugh to do the same thing on the other end. You know they're both really decent people who really do try to do the right thing. But I agree with Richard that the process is a bit of a mess. I don't envy anybody who gets caught up in it. It's a great job on the tail end, but the job interview is a beast.

Caitlin McCarthy: To our outstanding panel, thank you all so much for your expert insights and fascinating discussion. We are grateful for your participation.