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A Pattern of Ruling Against Mother Nature: Wildlife Species Cases Decided by Justice Kavanaugh on the DC Circuit

By William J. Snape, III*

I. Introduction

Brett Kavanaugh was sworn in as the 114th individual to serve on the United States Supreme Court on October 6, 2018, following perhaps the most acrimonious Senate debate and vote in history. [1] Before this nomination to be an associate justice, Justice Kavanaugh served on the United States Court of Appeals for the D.C. Circuit for twelve years.[2] Although many progressive and citizen interest groups have expressed concern or objection over the nomination – including environmental groups concerned about a wide range of issues from climate change and toxic pollutants to safe drinking water and scientific integrity – no systematic analysis of his D.C. Circuit decisions has been done for wildlife conservation.[3] The federal laws of wildlife protection – including endangered species, migratory bird, and marine mammal statutes – raise important and poignant questions about the human relationship with the natural world, and about the rule of law generally. Because wildlife is generally not owned by any human until lawfully taken into possession, society's treatment of wildlife reveals not only our shared values outside the modern market system, but also our compassion for other sentient beings.[4]

During his dozen years on the federal bench, Justice Kavanaugh has been a part of eighteen wildlife species decisions and has ruled against wildlife 17.25 times,[5] this is a ninety-six (96) percent record against wildlife. By comparison, D.C. Circuit Judge David Sentelle, a former Chief Judge and conservative jurist, possesses a 57-43 "against wildlife" score.[6] Judge Merrick Garland, a former Chief Judge and moderate jurist, possesses a 46-54 "against wildlife" score.[7] In sum, Justice Kavanaugh's ninety-six percent anti-wildlife record is significantly higher than comparable conservative and moderate scores of fifty-seven percent anti-wildlife (Sentelle) and forty-six percent anti-wildlife (Garland) records.

These numbers, along with Justice Kavanaugh's own words through his written decisions, demonstrate a tangible and significant bias against wildlife conservation. Whenever a vested economic interest runs up against a wildlife conflict, Justice Kavanaugh almost always rules against the public interest in wildlife protection.

II. Methodology

All D.C. Circuit cases mentioning the word "species," "marine mammal," "wildlife," or "migratory bird" were identified, using the names of Judges Kavanaugh, Sentelle, and Garland as an additional filter.[8] Several cases identified possessed more than one of the searched terms. Many other identified cases had one or more terms, but possessed no cause of action or sought relief pertaining to actual wildlife protection in any way; these cases were excluded from this study.[9] All of the wildlife cases involving Justice Kavanaugh are listed and discussed in this paper.[10] The methodology was a conservative approach because where wildlife conservation was a background issue and the decision was based on a procedural matter unrelated to federal wildlife law, the case was excluded from the analysis. Similarly, Justice Kavanaugh cases primarily dealing with public health or general environmental issues were also excluded from this study. The wildlife cases (and their dispositions) decided by Judge Sentelle and Judge Garland are included in the Appendices of this article. Justice Kavanaugh's ninety-six percent anti-wildlife record is significantly higher than comparable conservative and moderate scores of fifty-seven percent anti-wildlife (Sentelle) and forty-six percent anti-wildlife (Garland) records.

III. Analysis

Federal wildlife law is mostly a statutory or treaty-based phenomenon implemented by federal agency rules and policies.[11] Traditionally, states hold their primary jurisdiction over wildlife in trust for their citizens.[12] Utilizing primarily the commerce, tax, treaty, and/or federal lands clauses of the U.S. Constitution, Congress has been participating in wildlife conservation efforts in the United States since the 1900 Lacey Act.[13]

Today, a bevy of federal statutes – ranging from the Endangered Species Act[14] and Marine Mammal Protection Act[15] to the Migratory Bird Treaty Act[16] and the Magnuson-Stevens Fisheries Conservation Act,[17] not to mention the National Environmental Policy Act (NEPA)[18] and public lands laws[19] provide protections to thousands of different fish and wildlife species. While the Environmental Protection Agency (EPA) figures into some of these federal wildlife decisions, most of the decisions are by other "environmental" agencies including the Department of the Interior, Interior's Fish and Wildlife Service (FWS) and Bureau of Land Management (BLM), the Department of Commerce, Commerce's National Marine Fisheries Service (NMFS), the Army Corps of Engineers, the Forest Service under

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the Department of Agriculture, the Department of State, and others.

Examining Justice Kavanaugh's wildlife cases on the D.C. Circuit is instructive for at least two reasons. First, these cases involve a variety and diversity of parties and legal issues that affect many other sectors of society. Second, the entire concept of wildlife conservation is frequently one where a vested and specific economic interest is somehow pitted against the public's interest in wildlife protection generally. All U.S. wildlife statutes possess mechanisms to address and ameliorate these conflicts, but because only a human being can currently possess legal standing to sue in U.S. courts, humans seeking to protect wildlife species often must literally challenge other human economic development. In other words, the "public interest" is frequently the central beneficiary of wildlife conservation because wildlife, by definition, is owned by no one in particular, but held in trust under the law for all people.[20]

Justice Brett Kavanaugh holds well-recognized skepticism in other areas of environmental law such as Clean Air Act protection and global warming regulation.[21] The question accordingly arises whether Justice Kavanaugh possesses other objective biases.[22] In this study, all of Justice Kavanaugh's D.C. Circuit decisions involving animal and plant species were analyzed, as discussed in the Methodology.[23] An examination of wildlife law is also relevant and timely because the Supreme Court has recently shown renewed interest in the Endangered Species Act (ESA) by deciding an ESA case this term, *Weyerhaeuser Company v. U.S. Fish and Wildlife Service*.[24] In this 8-0 decision, which Justice Kavanaugh did not participate in because he had not yet been confirmed, the Court held that the Secretary of Interior's decision not to exclude portions of critical habitat under the ESA was reviewable agency action by a federal court.[25] The Supreme Court remanded to the Fifth Circuit to determine whether the FWS decision not to exclude any dusky gopher frog critical habitat on about 1500 acres owned by Weyerhaeuser, was arbitrary and capricious in light of the economic analysis performed by FWS consultants, as well as the entire administrative record including the agency expert's scientific assessment of the biological suitability of the lands in question.[26] It is quite plausible that this case could again find its way back to the Supreme Court after the Fifth Circuit makes its factual determination of the new legal framework articulated by Chief Justice Roberts in this unanimous decision.

Justice Kennedy was often the swing vote on the United States Supreme Court in favor of environmental and wildlife protection under the Clean Water Act, Clean Air Act, ESA, and other laws.[27] Justice Kavanaugh, however, does appear to have a statistically proven bias against wildlife species during litigation. Of the eighteen (18) wildlife species cases that he has actively participated on during his twelve-year tenure on the D.C. Circuit, he has ruled against wildlife species over seventeen times (17.25 to be exact, because two decisions possessed "split" species outcomes). Thus, wildlife species lose approximately ninety-six percent of the time when before Justice Kavanaugh. In addition, when Justice Kavanaugh issues written decisions on wildlife species himself, they are always strongly and stridently on the side against wildlife and species protection.

Whenever wildlife is up against either a corporation or the Republican Party, Justice Kavanaugh seemingly goes out of his way to defeat wildlife.[28] For example, in *American Bird Conservancy v. Federal Communications Commission*,[29] Justice Kavanaugh, in dissent, misstated the conservation plaintiff's injuries.[30] In *Carpenter Industrial Council v. Zinke*,[31] Justice Kavanaugh granted standing to the timber industry to challenge threatened spotted owl critical habitat on federal public lands.[32] He explained that even if the industry only lost one dollar as a result of the critical habitat designation, it would still constitute an "injury-in-fact for standing purposes.[33] In *Otay Mesa, LP v. Department of the Interior*,[34] Justice Kavanaugh, in an ESA critical habitat case, held FWS biologists to a very high level of scientific certainty.[35] In *Mingo Logan v. Environmental Protection Agency*,[36] Justice Kavanaugh, in dissent, sought to overturn EPA's decision to address massive water pollution from mountaintop removal for coal extraction.[37] *West Virginia v. U.S. Environmental Protection Agency*,[38] was one of a series of decisions and currently active cases where Justice Kavanaugh expressed hostility toward regulating greenhouse gases that kill wildlife and humans alike.[39] In *Fund for Animals v. Kempthorne*,[40] Justice Kavanaugh dismissed the importance of four migratory bird treaties in a separate and unnecessary concurrence.[41]

These wildlife species-related decisions, including Justice Kavanaugh's frequently aggressive opinions, are discussed and analyzed more fully below, in chronological order. Cumulatively, Justice Kavanaugh's ninety-six percent record against wildlife represents a noticeable bias.[42]

IV. JUSTICE KAVANAUGH'S DEMONSTRATED ANTI-WILDLIFE BIAS IN D.C. CIRCUIT CASES

Fund for Animals v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006) (two opinions by Justice Kavanaugh).

In Justice Kavanaugh's first wildlife case on the D.C. Circuit, he made his anti-wildlife sentiment immediately known.[43] He took the unusual step of writing both the opinion of the court, as well as an unnecessary concurring opinion, which no other judge joined.[44] In his concurrence, he addressed his view that the Migratory Bird Treaties[45] are not self-executing, and thus deserve no credence in interpreting the Migratory Bird Treaty Act (MBTA) itself.[46] This position completely ignored the many treaties that have shaped U.S. wildlife statutes.[47] It is also a position that revealed Justice Kavanaugh's many conflicting views on executive power and privilege.[48] In this case, an animal welfare group and property owners challenged the FWS decision not to list the mute swan as protected under the MBTA in response to a plan by the Maryland Department of Natural Resources to kill a portion of the state's adult mute swans.[49] The MBTA was passed in 1918 pursuant to the first Migratory Bird Treaty of 1916 with the United Kingdom and Canada, and the statute explicitly makes it "unlawful to hunt or kill migratory

birds included in the terms of the conventions."[50] Congress amended the MBTA in 2004 so that it "applies only to migratory bird species that are native to the United States" or its territories.[51] The plaintiffs argued here that the MBTA still includes protection for the mute swan because: (1) the statute still reads that it is "unlawful . . . [to] hunt . . . [or] kill . . . any migratory bird . . . that is included in the terms of the conventions," and the "sense of Congress" provision within the amended statute stated that, "it is the sense of Congress that the language of the section is consistent with the intent and language of the [four] bilateral treaties implemented by this section," and (2) the statute must therefore be deemed ambiguous and not interpreted to abrogate a treaty.[52] Justice Kavanaugh ruled against wildlife by holding that the MBTA excluded mute swans despite the wording of the four migratory bird treaties to the contrary.[53]

Justice Kavanaugh Decision in *Fund for Animals*: Against Wildlife Species

Oceana v. Gutierrez, 488 F. 3d 1020 (D.C. Cir. 2007).

Justice Kavanaugh was part of a majority decision that rejected an ESA consultation challenge to the Department of Commerce's approval of longline fishing in the Atlantic Ocean and Gulf of Mexico of swordfish and tuna.[54] Despite undisputed scientific evidence that longline fishing is killing too many endangered leatherback turtles, Justice Kavanaugh and his panel decided for the Bush Commerce Department.[55] As the majority conceded at the end of their opinion "since the [Reasonable and Prudent Alternative] already includes hook and gear removal requirements, 'the only remaining way to achieve further reductions in leatherback mortality in the pelagic longline fishery would be through closures that reduce fishing effort in areas of high leatherback bycatch.'"[56] Although the federal agency had the authority to issue such closures, it declined to do so here and many endangered sea turtles consequently died.[57]

Justice Kavanaugh Decision in *Oceana, Inc.*: Against Wildlife Species

American Bird Conservancy v. Federal Communications Commission, 516 F.3d 1027 (D.C. Cir. 2008) (Dissenting Opinion by Justice Kavanaugh).

The majority opinion ruled that the Federal Communications Commission (FCC) violated both NEPA and Section 7 of the ESA because of cell tower approvals in the Gulf Coast region that harmed many bird species.[58] Justice Kavanaugh dissented, calling the lawsuit by conservation groups "unripe."[59] The two majority judges stated in response to Justice Kavanaugh:

> Our dissenting colleague's assertion that this case is unripe . . . rests on the mistaken assumption that the Commission has set about reconsidering Petitioner's precise requests through its nationwide inquiry into the migratory bird issue. However . . . [the Commission] nowhere indicates [it is] reconsidering the Gulf Coast petition calling for a programmatic Environmental Impact Statement under NEPA, formal consultation under the ESA, or notice of pending tower registration applications.[60]

In addition, not even the FCC made Justice Kavanaugh's extreme argument, as the majority noted: "[n]either point is lost on the Commission: not only does its brief not invoke the ripeness doctrine, but while the Commission explicitly deferred consideration of Petitioners' MBTA claim to the nationwide proceeding, it denied and dismissed Petitioners' ESA and NEPA claims."[61]

Justice Kavanaugh Decision in *American Bird Conservancy*: Against Wildlife Species

North Carolina Fisheries Association v. Gutierrez, 550 F.3d 16 (D.C. Cir. 2008).

Fishermen won a federal district court decision under the Magnuson-Stevens Fishery Conservation and Management Act for the NMFS's failure to promulgate a rebuilding plan for certain fish species following a determination that such species were "overfished."[62] After the district court approved a remedy unsatisfactory to the plaintiff fishermen, the D.C. Circuit heard the appeal.[63] Justice Kavanaugh and his panel rejected the requested remedy by the fishermen, opining that while it "does seem rather peculiar – perhaps even a bit fishy – that the Service promulgated Amendment 15A without accompanying regulations . . . we lack jurisdiction at this stage in the proceedings."[64] The court dismissed the case on jurisdictional grounds, despite the plaintiff fishermen's strong claims on the merits.

Justice Kavanaugh Decision *North Carolina Fisheries Association*: Against Wildlife Species

Eastern Niagara Public Power Alliance v. Federal Energy Regulatory Commission, 558 F.3d 564 (D.C. Cir. 2009) (Opinion by Justice Kavanaugh).

Justice Kavanaugh decided against several communities in western New York who were challenging a 2007 Federal Energy Regulatory Commission (FERC) licensing decision that approved the New York Power Authority's (NYPA) fifty-year relicensing application to operate the Niagara Power Project, a hydroelectric facility about five miles downriver from Niagara Falls.[65] The Federal Power Act directs FERC to issue licenses for the "construction, operation, and maintenance of hydroelectric projects on certain U.S. waters," and in ruling on the licensing applications for hydroelectric facilities, FERC must consider an array of criteria.[66] Some of these criteria include energy conservation, the protection of fish and wildlife, recreational opportunities, and environmental quality. Additionally, for relicensing applications, factors include the project's safety, efficiency, reliability, and its effects on the communities it serves.[67] In arguing against FERC, the plaintiffs made several arguments, including: (1) that a fifty-year license was too long and not consistent with agency practice regarding the terms of licenses; and (2) that FERC, as a condition of granting the license, should have required the state power agency to mitigate certain adverse environmental impacts allegedly caused by the project, particularly

shoreline erosion.[68] Justice Kavanaugh ruled against wildlife by holding that the fifty-year license to operate the Niagara Power Project was "reasonable" despite the real negative impacts the New York citizens had identified with the FERC project.[69]

Justice Kavanaugh Decision *Eastern Niagara Public Power Alliance*: Against Wildlife Species

Otay Mesa, LP v. U.S. Department of the Interior, 646 F.3d 914 (D.C. Cir. 2011) (Opinion by Justice Kavanaugh).[70]

Justice Kavanaugh wrote the decision upholding the ESA challenge by the real estate industry, which sought rejection of the FWS designation of critical habitat for the San Diego fairy shrimp.[71] Although the federal district court judge in this case found, based on expert biologist testimony, that the "FWS was reasonable in its consideration that San Diego fairy shrimp found in a hospitable location in 2001 would have also occupied the same location in 1997[,]"[72] Justice Kavanaugh was unimpressed with federal scientific expertise.[73] Justice Kavanaugh overturned the district court's factual assessment, finding that the FWS needed to continue looking for the rare habitat of a highly endangered species.[74] The court remanded the case to the Agency.[75]

Justice Kavanaugh Decision in *Otay Mesa, LP*: Against Wildlife Species

Sierra Club v. Van Antwerp, 661 F.3d 1147 (D.C. Cir. 2012).

In this case, Justice Kavanaugh was on a panel that ruled almost entirely on behalf of the U.S. Army Corps of Engineers and the decision to issue a permit authorizing the discharge of dredge and fill material into specified wetlands – including waters of the United States – outside rapidly developing Tampa, Florida.[76] Although the district court had found the Corps to be in violation of the Clean Water Act, Justice Kavanaugh's panel reversed almost in its entirety.[77] Conservationists argued that the project adversely impacted the wood stork and the indigo snake.[78] The panel and Justice Kavanaugh rejected further protections for the wood stork.[79] For the indigo snake, despite unrebutted expert testimony from the FWS biologist about negative impacts to the snake, the court stated "we do not reach the issue of whether formal [ESA Section 7] consultation is required, but the Corps must make some determination on the issue of habitat fragmentation, both for ESA and NEPA purposes."[80] Thus, Justice Kavanaugh ruled against the wood stork and though he ruled in favor of the indigo snake, he did not order a biological opinion for the species, as he was authorized to do, and that could have helped the snake the most.[81]

Justice Kavanaugh Decision in *Sierra Club*: Three-Quarters Against Wildlife/One-Quarter for Wildlife Species[82]

Friends of the Blackwater v. Salazar, 691 F.3d 428 (D.C. Cir. 2012).

Justice Kavanaugh was part of a majority that overturned a federal district court decision in favor of the West Virginia Northern Flying Squirrel and its recovery plan.[83] Justice Kavanaugh interpreted the recovery plan as non-binding and allowed the delisting of this species despite the fact the requirements of the recovery plan were not met.[84] As Circuit Judge Rogers stated in dissent:

> [Justice Kavanaugh] defers to the Secretary's interpretation, contrary to the plain text of the Endangered Species Act . . . that [the squirrel] loses all protection even though the recovery criteria in its recovery plan have not been met and those criteria are revised . . . without required notice and prior consideration of public comments. But even assuming, as the court concludes, the ESA is ambiguous, the Secretary was arbitrary and capricious in delisting the squirrel based in material part on an analysis revising the recovery plant criteria that was not publicly noticed until the final delisting rule. . . .[85]

This decision not only was a loss for the squirrels, but it also was a loss of a significant rollback of the conservation force of ESA recovery plans.[86]

Justice Kavanaugh Decision in *Friends of the Blackwater*: Against Wildlife Species

Conservation Force v. Jewell, 733 F.3d 1200 (D.C. Cir. 2013).

Judge Merrick Garland wrote for the unanimous panel that included Justice Kavanaugh, and ruled against the plaintiffs (backed by the Sierra Club) who were challenging the FWS's protection, management and import permitting of the markhor, "an impressive subspecies of wild goat that inhabits an arid, mountainous region of Pakistan."[87] Despite repeated delays in responding to the plaintiffs by the Agency before the litigation was filed, the majority panel held that the cause of action to down-list the species was moot because the plaintiffs possessed no standing to challenge the FWS's considerable delays in processing permits.[88] This case was a split decision because, although the conservation action sought by the plaintiffs was questionable, the court did correctly opine on the processing delays by the Agency.[89]

Justice Kavanaugh Decision in *Conservation Force*: Half-Against Wildlife Species/Half-for Wildlife Species

Center for Biological Diversity v. U.S. Environmental Protection Agency, 749 F.3d 1079 (D.C. Cir. 2014).

The plaintiffs challenged the EPA's delays in issuing required new "secondary" national ambient air quality standards for oxides of nitrogen, oxides of sulphur, and other related compounds that contribute to acid rain.[90] The impacts from acid rain can be devastating to ecosystems, from harming water bodies of all kinds and sizes, to killing many plants and trees in certain forests.[91] The EPA had already admitted that the current secondary air standards were "not adequate to protect against the adverse impacts of aquatic acidification on sensitive ecosystems."[92] However, because the EPA convinced a panel, which included Justice Kavanaugh, that it was not yet "certain" it could promulgate a standard, Justice Kavanaugh and his fellow judges let the

EPA off the hook for a clear obligation of the Clean Air Act.[93] The court concluded: "[i]n other words, the fact that we have rejected certainty as an appropriate goal . . . does not mean that regulation is required (or permitted) no matter how much uncertainty the agency faces."[94] By allowing the EPA off the hook, Justice Kavanaugh once again ruled against needed protections for wildlife.

Justice Kavanaugh Decision in *Center for Biological Diversity*: Against Wildlife Species

Friends of Animals v. Ashe, 808 F.3d 900 (D.C. Cir. 2015) (Opinion by Justice Kavanaugh).

In March 2012, Friends of Animals petitioned the FWS to list ten species of sturgeon as endangered or threatened species under the ESA.[95] The ESA obligates the Agency to make an initial determination on the species petition within ninety days after receipt of the petition.[96] However, the FWS issued no determinations for any of the species petitioned.[97] On August 16, 2013, well beyond the ninety-day period, Friends of Animals sent the FWS written notice, as required by statute prior to filing a lawsuit, that the Agency had failed to make initial and final determinations for the ten species of sturgeon.[98] The federal government argued that Friends of Animals had failed to provide proper notice of the lawsuit.[99] Justice Kavanaugh wrote the majority opinion for the Court[100] and stated that,

> [t]he question here—whether Friends of Animals complied with the notice requirement of the Act—boils down to a very narrow and extraordinarily technical question regarding the timing of notice," and that "[because] Friends of Animals did not wait until after the issuance of the positive initial determinations to provide 60 days' notice of the allegedly overdue final determinations, its suit seeking to compel the final determinations is barred.[101]

Here, Justice Kavanaugh found a way to deny the plaintiffs an opportunity to protect wildlife threatened with extinction.[102]

Justice Kavanaugh Decision in *Friends of Animals*: Against Wildlife Species

Defenders of Wildlife v. Jewell, 815 F.3d 1 (D.C. Cir. 2016).

A panel that included Justice Kavanaugh ruled against ESA protections for the dunes sagebrush lizard of New Mexico and Texas, whose habitat closely overlaps with current and potential drilling actions by the oil and gas industry.[103] The court considered whether a weak and unenforceable state management agreement could be considered in denying ESA protections for the lizard.[104] Despite serious problems with the Texas plan especially, the panel side-stepped the issue of adequacy of the state conservation plans by noting that the Department of the Interior had "new information" from the states and the federal agencies.[105] Further, the industry itself that indicated "current and future threats are not of sufficient imminence, intensity, or magnitude to indicate that the lizard . . . is in danger of extinction, or likely to be become endangered within the foreseeable future."[106] Thus, Justice Kavanaugh supported a spurious policy reversal by the FWS that lessened protections for the lizard.[107]

Justice Kavanaugh Decision in *Defenders of Wildlife*: Against Wildlife Species

Ark Initiative v. Tidwell, 816 F.3d 119 (D.C. Cir. 2016).

Justice Kavanaugh was part of a panel that ruled against full protections for "roadless areas" under the National Forest Management Act and NEPA.[108] Despite the statute requirement that roadless areas contain no roads or developments, this panel allowed the Forest Service to permit ski facilities in prime wildlife habitat for the lynx and countless other species, based upon the discretion of the Agency to exclude certain multiple use areas from roadless protection under the original Clinton-era roadless rule.[109] The result of the decision here is to allow recreational skiing on approximately 8,300 acres of land despite the harm to the lynx's habitat.[110]

Justice Kavanaugh Decision *Ark Initiative*: Against Wildlife Species

Friends of Animals v. Jewell, 824 F.3d 1033 (D.C. Cir. 2016).

The plaintiffs and appellants attempted to protect three species of ESA-listed foreign antelopes: the scimitar-horned oryx, addax, and dama gazelle.[111] After the George W. Bush Administration issued an import take permit exemption for these three highly endangered mammals,[112] Friends of Animals successfully sued to stop the harmful practice of sport hunt importing.[113] After that previous litigation, Congress passed a rider on an appropriations bill allowing the FWS exemption program for the three species of antelope.[114] The D.C. Circuit, including Justice Kavanaugh, upheld Congress' ability to pass such riders: "Congress acted within constitutional bounds when it passed Section 127. Therefore, there can be no doubt that the [FWS] was fully authorized to reinstate the Captive-Bred Exemption."[115]

Justice Kavanaugh Decision *Friends of Animals*: Against Wildlife Species

Earthreports, Inc. v. Federal Energy Regulatory Commission, 828 F.3d 949 (D.C. Cir. 2016).

Justice Kavanaugh was part of a panel that ruled against species protection, including NEPA protections on behalf of the highly endangered North Atlantic right whale.[116] At issue in this case was approval of the highly controversial Cove Point liquefied natural gas (LNG) plant off the west shore of the Chesapeake Bay, Maryland.[117] The judges, including Justice Kavanaugh, held that "because petitioners fail to show that the Commission's NEPA analysis was deficient for failing to consider indirect effects of the Cove Point conversion project or inadequately considered their remaining concerns and that [FERC] thus acted arbitrarily and capriciously, we deny the petition for review."[118] Justice Kavanaugh here disregarded the plaintiff's attempt to protect species under NEPA, by deferring

to FERC's questionable determination of negligible impact to the wildlife species.[119]

Justice Kavanaugh Decision *Earthreports, Inc*: Against Wildlife Species

Mingo Logan Coal Co. v. U.S. Environmental Protection Agency, 829 F.3d 710 (D.C. Cir. 2016) (Dissenting Opinion by Justice Kavanaugh).

Justice Kavanaugh wrote a defiant dissent in a case involving the waste caused by mountaintop removal to mine coal.[120] Although the EPA had voluminous scientific studies demonstrating that dumping this waste into rivers and streams would have an "unacceptable adverse impacts" to the environment and wildlife species, Justice Kavanaugh would have issued the mining company the permit, which the EPA had revoked through its clear and unambiguous authority under the Clean Water Act.[121] In other words, Justice Kavanaugh had no problem with the coal company continuing to pollute and destroy rivers and streams with their waste from an industrial practice that already greatly contributes to global warming and toxic air pollution.[122] Justice Kavanaugh argued that the coal company's cost-benefit analysis should override the Agency's public health assessments.[123] As the majority said of Justice Kavanaugh's dissent:

> In reply to our dissenting colleague's one-paragraph *cri de coeur* characterizing Mingo Logan's forfeiture as "entirely unfair" based on EPA's stance that costs are "irrelevant," . . . we have an equally pithy reply: A party has an obligation to substantiate its position, including in the face of its opponent's rejection thereof . . . . Forfeiture here is hardly "unfair" to Mingo Logan but, in any event, its minimal proof of its costs—as far as we can tell—mirrors their de minimis nature. And even if the EPA could be tagged with the "bait-and-switch" charge—a proposition we roundly reject—Mingo Logan's failure to prove up its costs on review by the district court should mute its lament. In the end, Mingo Logan at no point—not before the EPA nor in district court—made any effort to describe its costs or make an argument about them. In that light, Mingo Logan can hardly now complain about unfairness. Moreover, as we have noted . . . Mingo Logan effectively accepted the EPA's position on the relevance of its reliance costs. It is hardly "unfair" to expect Mingo Logan to have raised whatever arguments it might have about the EPA's position before the EPA itself.[124]

Thus, Justice Kavanaugh's attempt to illegally insert cost-benefit analysis into a case could have had disastrous impacts on many species within the Appalachian ecosystems.[125]

Justice Kavanaugh Decision in *Mingo Logan Coal Co.*: Against Wildlife Species

Carpenters Industrial Council v. Zinke, 854 F.3d 1 (D.C. Cir. 2017) (Opinion by Justice Kavanaugh).

Justice Kavanaugh wrote the majority opinion for this case, in which the timber industry sued FWS over its designation of critical habitat for the northern spotted owl in the Pacific Northwest.[126] In 2012, the FWS designated 9.5 million acres of federal forest lands in California, Oregon, and Washington as critical habitat for the northern spotted owl under the ESA.[127] In response to the designation, the plaintiff, a forest products manufacturing trade association comprised of companies that source timber from those forest lands, sued the FWS to challenge the legality of this critical habitat designation.[128] Justice Kavanaugh opened his decision by stating that, "[w]hen the government adopts a rule that makes it more difficult to harvest timber from certain forest lands, lumber companies that obtain timber from those forest lands may lose a source of timber supply and suffer economic harm."[129] Justice Kavanaugh further noted that the displacement of the timber industry in the Pacific Northwest as a prime economic force has been a "phenomenon occur[ing] in the Pacific Northwest . . . ."[130] Responding to the question of whether or not the plaintiffs had standing to challenge the FWS designation of critical habitat, Justice Kavanaugh ruled that the Council had demonstrated a

> [S]ubstantial probability that the critical habitat designation will cause a decrease in the supply of timber from the designated forest lands, that Council Members obtain their timber from those forest lands, and that Council members will suffer economic harm as a result of the decrease in the timber supply from those forest lands.[131]

Justice Kavanaugh ruled squarely in favor of the timber and wood products industry and against the conservation and protection of wildlife.[132]

Justice Kavanaugh Decision in *Carpenters Industrial Council*: Against Wildlife Species

West Virginia v. U.S. Environmental Protection Agency, active and pending, D.C. Circuit (Case No. 15-1363) (after stay and remand by U.S Supreme Court).

This ongoing litigation concerns fossil fuel states and industries against the Obama Clean Power Plan, which seeks to reduce greenhouse gas (GHG) pollution from utilities under Section 111 of the Clean Air Act.[133] At the two-day oral argument before the D.C. Circuit in September 2016, Justice Kavanaugh asserted that "[t]he policy is laudable. The earth is warming. Humans are contributing. I understand the international impact and the problem of the commons. The pope's involved. If Congress does this, they can account for the people who lose their jobs. If we do this, we can't."[134] Justice Kavanaugh's legal position on climate change is deceitful for several reasons. First, Congress has already "done this" through the Clean Air Act, which not only commands that the EPA reduce all air pollutants that are found to harm human health and public welfare, but also specifically includes the term "climate" as part of what the Agency must consider as "effects" on public welfare.[135] Equally problematic,

Justice Kavanaugh's position is at odds with the Supreme Court's historic decision in *Massachusetts v. U.S. Environmental Protection Agency*,[136] where a coalition of states and environmental groups defeated the George W. Bush Administration's refusal to regulate GHGs under the Clean Air Act; the Supreme Court squarely held that the EPA does have such authority and must utilize it.[137] Finally, as it relates to the power of Congress, Justice Kavanaugh has unequivocally and repeatedly attacked Congressional attempts to limit the amount of money and the secrecy of money in federal elections.[138]

The Clean Power Plan litigation cuts to the heart of a central legal question to all of environmental and wildlife law: would Justice Kavanaugh support any meaningful attempt by the EPA to regulate and limit GHGs, or would he throw his lot behind President Trump and the small industry handful who still deny climate change is even a problem? Further, would Justice Kavanaugh support a repeal or weakening of *Massachusetts v. U.S. Environmental Protection Agency,* either by supporting a repeal or weakening of the carbon dioxide/greenhouse gas endangerment finding(s) or by judicially effectuating or blessing agency inaction on any meaningful regulatory response to an endangerment finding.[139] Thousands of plant and animal species, on land and in water, are at grave risk because of global warming and climate change.[140]

Justice Kavanaugh position in *West Virginia*: Against Wildlife Species.

V. The Future for Wildlife Under Kavanaugh

While it is undeniably typical for most long-standing federal judges to rule for and against certain interests based upon the facts and law of a particular case, as well as the specific procedural history of the case, it is nonetheless unusual for a judge on the federal bench to rule consistently against one set of interests over another. Justice Kavanaugh regularly and routinely decided in favor of corporate and industrial interests over the "public interest."[141] As it relates to wildlife species cases specifically, Justice Kavanaugh's meager four percent favorable decision record on behalf of wildlife "species" is alarming.

Justice Kavanaugh is a man who apparently has already made up his mind. He frequently stretches statutes to comport with his own personal policy view of the world. Ninety-six percent of the time, Mother Earth loses under Justice Kavanaugh. Again, Justice Kavanaugh's paltry four percent pro-wildlife record is far outside the judicial mainstream as compared to a conservative (Judge Sentelle with a forty-three percent pro-wildlife record) and a moderate (Garland with fifty-six percent pro-wildlife record) judge.

In the summer and autumn of 2018, a rational defender of wildlife conservation could have concluded that possessing only eight Justices for a few extra months might have served the Court, and the country, better in the long run.[142] At the very least, no final vote should have occurred in the Senate until all of Justice Kavanaugh's governmental records were released to the public. [143] The stakes are now too high for the Supreme Court's deciding vote to be driven by party allegiance. We need a truly independent and fair jurist on the Supreme Court at this pivotal point in the country's history. How many other Trump appointees are like Justice Kavanaugh?[144]

VI. Conclusion

Unless he resigns or is impeached, Justice Kavanaugh will have a lasting impact on the U.S. Supreme Court and the laws of our country. From wildlife's perspective, Justice Kavanaugh possesses the angry hand, the one that writes hostile decision after hostile decision against the public's unique interest in wildlife. The dusky gopher frogs in *Weyerhaeuser Company v. U.S. Fish and Wildlife Service* are certainly happy Mr. Kavanaugh was still a judge when that case was heard before the high court. Only a change of heart by the Justice himself will ensure future justice for wildlife in the United States.[145]

Endnotes

1 *See* Seung Min Kim & John Wagner, *Kavanaugh sworn in as Supreme Court justice after divided Senate votes for confirmation*, Wash. Post (Oct. 10, 2018), https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17_story.html?utm_term=.c3e6df30c49c.

2 *Current Members*, Supreme Court, https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 26, 2018).

3 Letter from Alaska Wilderness League et al. on Opposing the Supreme Court Nomination of Judge Brett Kavanaugh to Chuck Grassley et al., Chairman, Senate Judicial Comm. (Aug. 10, 2018), https://www.cleanwateraction.org/sites/default/files/docs/publications/Oppose%20Judge%20Kavanaugh%20Environmental%20Community%20letter%208-10-18.pdf.

4 Pierson v. Post, 3 Cai. R. 175, 175 (1805).

5 The fraction is explained by two "split" decisions.

6 *See infra* Appendix A.

7 *See infra* Appendix B.

8 The author used Bloomberg Law to complete this search. *See* Bloomberg Law, https://www.bna.com/bloomberglaw/ (last visited Dec. 20, 2018).

9 *Id.*

10 *See infra* Part III.

11 *See* Edward E. Shea, *Environmental Law of the United States*, Comp. Envtl. Law & Reg. § 56:1 (Nicholas A. Robinson et al. eds., 2018).

12 *See id.; see also* Hughes v. Oklahoma, 441 U.S. 322, 324 (1979) (discussing state governments' trustee role in protecting wildlife not otherwise protected by the federal government); Lacoste v. Dep't of Conservation, 263 U.S. 186, 187 (1924) (discussing state ownership of wild animals within that state's territory).

13 The original Lacey Act, amended several times subsequently, was written to prevent wildlife taken in violation of one state's laws to be taken to another state. 16 U.S.C. §§ 3371-78 (2012); *see also* 1934 Fish and Wildlife Conservation Act, 16 U.S.C. §§ 661-667(c) (2012) (requiring the federal government to minimize and mitigate the adverse impacts upon wildlife from federal projects).

14 Endangered Species Act, 16 U.S.C. §§ 1531-1544 [hereinafter ESA].

15 *See* Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421(h) [hereinafter MMPA] (emphasizing that marine mammals should be protected, and the primary objective should be to maintain the health and stability of marine ecosystems).

continued on page 24

Appendices: A Pattern of Ruling Against Mother Nature: Wildlife Species Cases Decided by Justice Kavanaugh on the DC Circuit

By William J. Snape, III*

Appendix A

Judge Sentelle's Wildlife Decisions	
Case	**Notes**
Friends of Animals v. Jewell, 824 F.3d 1033 (D.C. Cir. 2016)	Against wildlife
Bldg. Indus. Ass'n of Superior Cal. v. Babbitt, 161 F.3d 740 (D.C. Cir. 1998)	For wildlife
Am. Wildlands v. Kempthorne, 530 F.3d 991 (D.C. Cir. 2008)	Against wildlife
Nat. Ass'n. of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997)	Against wildlife
Defs. of Wildlife v. Gutierrez, 532 F.3d 913 (D.C. Cir. 2008)	Against wildlife
Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994)	Against wildlife
Ctr. for Biological Diversity v. U.S. Dep't. of Interior, 563 F.3d 466 (D.C. Cir. 2009)	Half for wildlife
Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988)	Half for wildlife
Theodore Roosevelt Conservation Partn. v. Salazar, 661 F.3d 66 (D.C. Cir. 2011) (Majority Opinion)	Against wildlife
Anglers Conservation Network v. Pritzker, 809 F.3d 664 (D.C. Cir. 2016) (Majority Opinion)	Against wildlife
Marcum v. Salazar, 694 F.3d 123 (D.C. Cir. 2012) (Majority Opinion)	For wildlife
Spirit of the Sage Council v. Norton, 411 F.3d 225 (D.C. Cir. 2005) (Majority Opinion)	For wildlife
Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229 (D.C. Cir. 2000) (Majority Opinion)	Against wildlife
Defs. of Wildlife & Sierra Club v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013) (Majority Opinion)	For wildlife
Rhinelander Paper Co. v. Fed. Energy Regulatory Comm'n, 405 F.3d 1 (D.C. Cir. 2005) (Majority Opinion)	For wildlife
Theodore Roosevelt Conservation Partn. v. Salazar, 616 F.3d 497 (D.C. Cir. 2010) (Majority Opinion)	Against wildlife
Grunewald v. Jarvis, 776 F.3d 893 (D.C. Cir. 2015) (Majority Opinion)	Half/half
C & W Fish Co. v. Fox, 931 F.2d 1556 (D.C. Cir. 1991)	Against wildlife
Ala. Power Co. v. Fed. Energy Regulatory Comm'n, 979 F.2d 1561 (D.C. Cir. 1992)	For wildlife
Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency, 749 F.3d 1079 (D.C. Cir. 2014)	Against wildlife
S.D. Warren Co. v. Fed. Energy Regulatory Comm'n, 164 Fed. Appx. 1 (D.C. Cir. 2005)	For wildlife
Nat. Ass'n. of Home Builders v. U.S. Army Corps of Eng'rs, 264 Fed. Appx. 10 (D.C. Cir. 2008)	For wildlife
Am. Rivers & Ala. Rivers All. v. Fed. Energy Regulatory Comm'n, 895 F.3d 32 (D.C. Cir. 2018)	For wildlife
Nat'l Wildlife Federation v. Fed. Energy Regulatory Comm'n, 912 F.2d 1471 (D.C. Cir. 1990)	Against wildlife
Oceana, Inc. v. Locke, 670 F.3d 1238 (D.C. Cir. 2011)	For wildlife
Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003)	Against wildlife
Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996)	Against wildlife
27 TOTAL CASES	
11.5 CASES FOR WILDLIFE	
43% FOR WILDLIFE	
57% AGAINST WILDLIFE	

Appendix B

Judge Garland's Wildlife Decision	
Case	**Notes**
Safari Club Int'l & Nat'l Rifle Ass'n of Am. v. Zinke, 878 F.3d 316 (D.C. Cir. 2017)	Half for/half against wildlife
Am. Wildlands v. Kempthorne, 530 F.3d 991 (D.C. Cir. 2008)	Against wildlife
In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. (*Safari Club Int'l v. Salazar*), 709 F.3d 1 (D.C. Cir. 2013)	Half for/half against
Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006)	Half for/half against
Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003)	For wildlife
Conservation Force, Inc. v. Jewell, 733 F.3d 1200 (D.C. Cir. 2013)	Half for/half against
Am. Bird Conservancy, Inc. v. Fed. Commc'n Comm'n, 516 F.3d 1027 (D.C. Cir. 2008)	For wildlife
Sierra Club v. Van Antwerp, 661 F.3d 1147 (D.C. Cir. 2012)	Three quarters against/ one quarter for
Swanson Grp. Mfg., LLC v. Jewell, 790 F.3d 235 (D.C. Cir. 2015)	For wildlife
Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229 (D.C. Cir. 2000)	Against wildlife
Theodore Roosevelt Conservation Partn. v. Salazar, 616 F.3d 497 (D.C. Cir. 2010)	Against wildlife
Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002)	For wildlife
Grunewald v. Jarvis, 776 F.3d 893 (D.C. Cir. 2015)	Half for/half against
Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882 (D.C. Cir. 2000)	For wildlife
Oceana, Inc. v. Locke, 670 F.3d 1238 (D.C. Cir. 2011)	For wildlife
Conservation Law Found. v. Fed. Energy Regulatory Comm'n, 216 F.3d 41 (D.C. Cir. 2000)	Against wildlife
Davis v. Latschar, 202 F.3d 359 (D.C. Cir. 2000)	One half for/one half against
17 TOTAL CASE	
9.25 FOR SPECIES	
54% FOR WILDLIFE	
46% AGAINST WILDLIFE	