

A new appointment by Trump would shift the Supreme Court well to the right, making Brett Kavanaugh the swing voter in many cases. Kavanaugh has clear views about the powers of agencies like EPA. With him as the swing voter, the main strategy used by Obama to make environmental progress would be off limits for future Presidents.

When Obama was stymied by congressional deadlock, he turned to the administrative process. Through broad interpretation of the authority of agencies like EPA, the Obama Administration tackled problems like carbon emissions from power plants and protection of the nation's wetlands. The Obama Administration looked for ambiguities in existing laws and then interpreted them in favor of broader environmental action.

This type of creative reinterpretation would be impossible under the Kavanaugh Court. The Kavanaugh Court might even strike down some existing environmental laws or new legislation passed by Congress.

Kavanaugh takes a dim view of agencies deciding what he regards as "major" issues. It's not clear what major means here. It at least includes any major expansion of regulatory authority and maybe any issue of large economic or political consequence. At the very least, Congress would have to clearly empower the agency to decide such an issue.

Kavanaugh has hinted more recently that it might be unconstitutional for Congress to delegate such authority to an agency. Instead, any issue of major importance would have to be settled by Congress itself rather than given to an agency. It would all depend on whether Kavanaugh considered a particular issue to qualify as a major question.

Here are some examples of things that might be considered major:

1. Obama's regulation protecting wetlands, the so-called WOTUS rule, because it would expand the category of wetlands subject to federal protection.
2. Obama's regulation limiting carbon emissions from power plants, because it would use EPA authority to expand the use of renewable energy rather than simply requiring changes at individual coal-fired power plants.
3. Federal air quality standards, because setting the nationwide standards for air pollution has enormous economic consequences.

It's also possible that Kavanaugh would overrule *Massachusetts v. EPA*, which gave EPA the power to regulate greenhouse gases. That seems to qualify as a major issue, and Kavanaugh probably wouldn't think the statute gave EPA clear authority.

Putting aside “major” issues, Kavanaugh would divide the world of agency actions into two categories. In one category, the agency must decide between two different interpretations of a law, both of which are plausible. In those situations, courts currently defer to the agency’s choice of interpretations. That would end. Under Kavanaugh, courts would decide for themselves which interpretation is better. These “normal” issues of interpretation can still be quite important, even if they aren’t considered “major.”

The other category of “non-major” issues involves statutes giving broad leeway to agencies on less fraught matters. For lack of a better term, we might call those “normal” regulatory issues. For example many laws require EPA to identify the best available technology for controlling a particular kind of pollution. This is the only category of cases where Kavanaugh would be willing to defer to agencies.

Putting all of this together, the upshot is that agency authority would be badly cramped. Even routine issues of statutory interpretation might be much more difficult for agencies to win than today. Using existing authority for bold regulatory action, on climate change or anything else, would be off the table under the Kavanaugh Court.