



DPCC

DEMOCRATIC POLICY & COMMUNICATIONS COMMITTEE
CHAIRWOMAN DEBBIE STABENOW

CAPTURED COURTS
OCTOBER 2020

WHAT'S AT STAKE: CLIMATE AND THE ENVIRONMENT

How Captured Courts Rig the System for Corporate Polluters

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Justice Ruth Bader Ginsburg



[Supreme Court of the United States](#)

Throughout her career, Justice Ruth Bader Ginsburg worked tirelessly to bend the arc of the moral universe toward justice. When she joined first the D.C. Circuit and then the Supreme Court, she was known for building consensus among judges across the political spectrum. Ginsburg was also a staunch advocate for environmental protections and regulation. Her decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* (2000) – that citizens could sue a polluter even if it stopped operating its polluting facility – has had enormous and lasting consequences for the ability of environmental groups to bring lawsuits without being dismissed. She was instrumental in empowering the Environmental Protection Agency, under the Clean Air Act, to regulate greenhouse-gas emissions from automobiles (*Massachusetts v. EPA*).

Justice Ginsburg was a reliable vote in favor of expansive Clean Water Act jurisdiction, arguing for broad federal jurisdiction to regulate America's waterways. She joined the majority in *County of Maui v. Hawaii Wildlife Fund*, which ruled that groundwater pollution is subject to regulation under the Clean Water Act. She joined a unanimous court in 2001 in holding that the EPA cannot consider implementation costs when deciding on national air quality limits for smog and other major pollutants (*Whitman v. American Trucking Associations, Inc.*). *Whitman* is widely regarded as one of the Court's most important environmental decisions, as the resulting EPA regulations are credited with saving and improving millions of lives. Ginsburg's environmental advocacy made the nation safer, healthier, and more secure for the next generation. Her absence on the Court will resonate for years to come.

Justice Ginsburg's death places the legitimacy of the Court and our political process in jeopardy. Little more than an hour after Ginsburg's passing, Mitch McConnell announced that the Senate would vote on Trump's nominee for her replacement. For Senate Republicans, it hardly matters whom Trump selects. The wealthy special interests that fund the Republican Party have made sure that whomever President Trump nominates will be a reliable vote to roll back environmental protections in favor of polluters and hasten the effects of climate change that Justice Ginsburg sought to stem. Her legacy is at risk and with it the health of our planet and our people for generations to come.



- **The Roberts Majority is ready to adopt long-discarded and extreme legal doctrines** that will make it harder for Congress and federal agencies to protect the environment.
- **Justice Kennedy, long a swing vote in favor of environmental protection, has been replaced** by Justice Kavanaugh, who auditioned for appointment as an avowed opponent of government regulation.
- **Whether it is climate change or the basic clean air and water protections Americans depend on**, effective environmental protection is at risk for years to come.
- **America's captured courts are worsening the historic injustice faced by low-income communities and communities of color**, which have suffered disproportionately from corporate pollution and the dismantling of environmental protections.

How We Got Here

Most people want the government to protect public health and the environment. Clean air and water provisions are wildly popular across the political spectrum. As increasingly devastating wildfires once again threaten lives and property in the West, nearly 70% of Americans believe the government is not doing enough to reduce the effects of climate change.¹

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Polluters, recognizing that achieving their goals through a fair and open political process would be hopeless, have employed a two-part strategy. First, they focused on capturing the Republican Party, control of which allowed them to block environmental legislation in Congress (and when Republicans controlled the White House, undo environmental regulations). Second, they focused on capturing the courts. By orchestrating the appointment of a raft of anti-regulation, corporatist judges to the federal judiciary, polluters achieved the judicial equivalent of a two-fer. First, their handpicked judges are loosening campaign finance restrictions, allowing them even greater control of the Republican Party. And second, they are making it harder to use existing laws such as the Clean Air Act and the Clean Water Act to address ongoing and emerging environmental crises the polluters are causing.

Any discussion of environmental policy must start with Citizens United. In Citizens United, the five Republican appointees on the Court delivered a victory polluting interests long sought: the ability to spend unlimited amounts in elections. In the decade since, the fossil fuel industry has spent profligately on elections. By one calculation, "contributions to outside spending groups legalized by" Citizens United have totaled more than \$147 million, while the fossil fuel mouthpiece U.S. Chamber of Commerce has itself spent \$143 million.² That may seem like a lot, but keep in mind that fossil fuel polluters are defending what the International Monetary Fund has

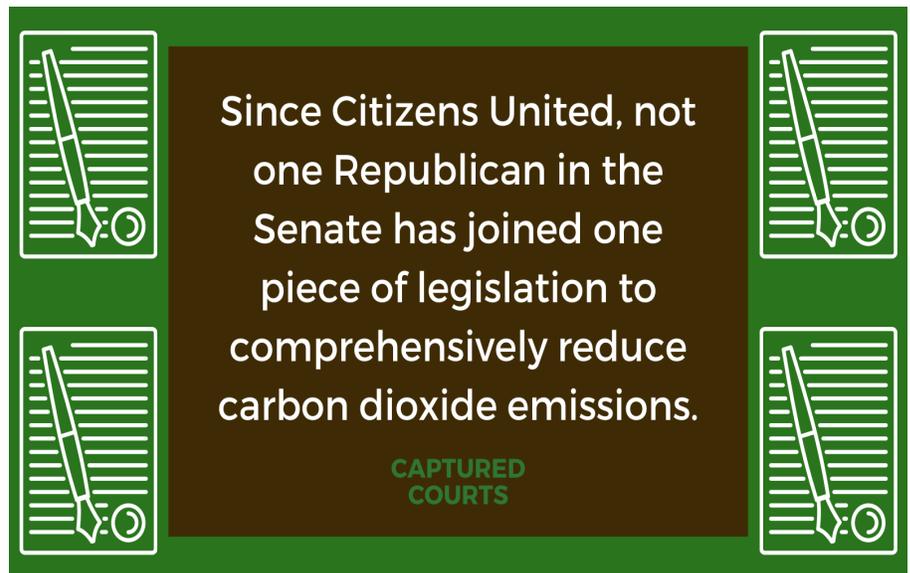
described as a \$649 billion annual subsidy in the United States.³ That level of political spending is a tiny fraction of the annual reward.

It worked. Since Citizens United, not one Republican in the Senate has joined one piece of legislation to comprehensively reduce carbon dioxide emissions. Instead, the GOP has become a reliable industry tool to stop climate legislation and provide political camouflage for industry self-interest.

It had not always been this way. Indeed, a Republican – President Richard Nixon – championed the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration.⁴ He also signed two landmark environmental laws, the Clean Air Act and the Clean Water Act.⁵ Republican President George H.W. Bush proposed and signed the Clean Air Act Amendments of 1990.⁶ What changed? When fossil fuel money became the lifeblood of the Republican Party, that party's support for science-based environmental protection ended. The bipartisan legislative process stopped.

But that's not all polluters achieved. They have been working for decades to make federal courts a graveyard for environmental regulations. As far back as the Reagan Administration, right-wing lawyers in the Department of Justice worked vigorously to lay the legal groundwork for the Republican Party's anti-regulatory agenda. In 1987, for example, DOJ lawyer David McIntosh – one of the founders of the Federalist Society – wrote to Attorney General Edwin Meese that the Department should explore whether agencies such as the EPA "are unconstitutional."⁷

For a decade, the most extreme anti-environmental cases were tempered by now-retired Justice Anthony Kennedy. Although Justice Kennedy was deeply conservative on most issues, he often provided the decisive swing vote upholding public protections in important environmental cases. Most notably, Justice Kennedy provided the critical fifth vote for Justice Stevens's majority opinion in *Massachusetts v. EPA*, the landmark ruling that the Clean Air Act authorizes EPA to regulate greenhouse gases (GHGs).⁸ In *Rapanos v. United States*, Kennedy likewise denied Justice Scalia



a majority for his opinion that would have limited the geographic reach of the Clean Water Act.⁹ Even Justice Antonin Scalia – as hostile to environmental regulation as any justice – allowed important environmental protections to survive through his commitment to the doctrine of Chevron deference, the principle that courts, consistent with their limited roles, should defer to reasonable agency interpretations of their governing statutes.¹⁰

Now Republican-appointed judges are setting about to make this deregulatory agenda a reality. Environmental protection has borne the brunt of the Roberts Five’s anti-regulatory zeal, freeing big corporations to pollute. The Republican-appointed justices have rejected federal claims under the Endangered Species Act, the National Environmental Policy Act, and the Clean Air Act.¹¹ They have denied environmental groups standing and used the Takings Clause of the Fifth Amendment to make it harder for state and local governments to regulate development.¹² They also took an unprecedented procedural path to block the Obama Administration’s Clean Power Plan.¹³

Where the Court Is Headed

With Justice Kennedy now gone, more extreme legal theories designed to hobble government regulation – such as the “unitary executive theory” and the “non-delegation doctrine” – are gradually becoming the new law of the land. Many of these theories were incubated in the Federalist Society, a “think tank” that receives untold millions of dollars from polluters and other corporate interests that resent regulation by the federal government.¹⁴

Big-money polluting interests like the Koch enterprise clearly gain by rigging the courts to dismantle environmental protections, but who stands to lose?

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The “non-delegation doctrine”: “For decades, Congress has passed laws that directed the executive branch to protect the environment. Since 1928, it has been basic constitutional law that Congress can broadly delegate to the executive branch the ability to regulate on any policy issue. Congress simply

doesn’t have the time or expertise to legislate all the details of how best to regulate the air and water and revise those regulations as new technologies become available. Agencies, staffed with career scientists and subject to rules that require transparency



and public comment, have – when allowed to do their jobs scrupulously and without interference – ably issued and revised regulations that have improved the quality of our environment. That is, until last year’s decision in *Gundy v. United States*, a case that had nothing to do with environmental law on its face but that could jeopardize all that we have come to expect about environmental regulation.¹⁵

In *Gundy*, together with another case the following term (*Paul v. United States*), the Court’s right-wing majority forecast its willingness to revive the long-abandoned “non-delegation doctrine,” which would bar Congress from delegating regulatory power to administrative agencies.¹⁶ The result? Agencies stripped of their basic authorities, severely weakened environmental and public safety protections, and a field day for corporate polluters.

Chevron deference: Central to agencies’ abilities to apply their expertise about how environmental statutes should apply in the real world is the deference of courts to administrative agencies’ reasonable interpretations of statutes within the domains of agency expertise.¹⁷ This judicial deference has been a foundation of administrative law for nearly forty years, since the Supreme Court’s landmark decision in *Chevron v. Natural Resources Defense Council*. Now, the Roberts Five look poised to overturn that decision, shifting power to the courts, where President Trump’s army of anti-regulatory judges can strike down environmental policies they dislike. Indeed, as discussed below, animosity toward Chevron deference has been a litmus test for President Trump’s two nominations to the Supreme Court.

The “Unitary Executive Theory”: For decades, conservative legal movement elites have elevated a fringe concept of separation of powers known as the “Unitary Executive Theory (UET),” under which the president possesses total power to control the executive branch, including administrative agencies. This theory exposes executive branch officials who regulate corporate interests to direct political pressure – pressure that polluters are expert at applying.

Independent regulators can be thorns in the side of big industry interests that prop up the Republican Party. UET is a constitutional weapon to get rid of them. This year, in a constitutional challenge to the Consumer Financial Protection Board, the Court’s Republican majority embraced the UET to invalidate Congress’s requirement that the CFPB’s director be removable only for cause.¹⁸ That likely signals a continuing effort by the Roberts Five against other regulators whose job it is to protect the public, and it’s a signal of encouragement by the Roberts Five to the corporate apparatus backing this theory to keep up the effort. For example, the Federal Energy Regulatory Commission (FERC), the critically important agency that regulates oil pipelines and the transmission and sale of electricity and natural gas, is run by a multi-member panel of independent commissioners. As with the CFPB Director, Congress insulated these



commissioners from political interference by making them fireable only for cause. And while FERC's multi-member structure narrowly distinguishes it from the single-director CFPB structure the Supreme Court struck down this year, the Court's embrace of UET fundamentally threatens FERC's future independence.

The Commerce Clause: The Constitution's Commerce Clause¹⁹ gives the federal government the power to "regulate Commerce...among the several States." "Since 1970, every major environmental law passed by the federal government has relied on the clause for constitutionality."²⁰

The anti-regulatory interests behind the Republican Party have spent decades chipping away at the scope of this Clause. Going back to Chief Justice Rehnquist's tenure in the 1990s, the Supreme Court's Republican-appointed justices have used bare 5-4 partisan majorities to strike down laws of Congress – such as the Gun-Free School Zones Act of 1990 and the Violence Against Women Act – as exceeding the scope of Congress's Commerce powers.²¹ When Chief Justice Roberts joined the Court's liberal wing to uphold the Affordable Care Act, he insisted on doing so only under the Constitution's narrower taxing power, using his leverage to undermine the Commerce Clause.²² And in the environmental context, Republican-appointed justices have signaled that they believe Congress's power to pass environmental laws under the Commerce Clause is constrained by "the States' traditional and primary power over land and water use."²³

As other commentators have noted: "The current Supreme Court, which has demonstrated its hostility to environmental regulation as well as federal power in general, will have a strong tool in the Commerce Clause to dismantle climate policies. No matter how narrowly tailored the law is or how squarely it falls under the Commerce Clause, the Court will likely be able to find a way to continue to undermine federal power in pursuit of a retrograde policy agenda."²⁴

Who's Behind It

Not long ago, these legal theories were seen as extreme by judges and mainstream legal thinkers. But through the Federalist Society and other conservative legal centers, and in the courts and through impact litigation and amicus briefs, the conservative legal movement has brought these fringe theories steadily to the center of the current legal debate. Nominating judges that are steeped in these theories is part of the plan. In describing the Trump Administration's efforts to nominate ideologically vetted Federalist Society members to the bench, former White House Counsel (and Federalist Society member) Donald McGahn put it plainly: "There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin."²⁵



Whether it is climate change or the basic clean air & water protections Americans depend on, effective environmental protection is at risk.

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Take, for example, the UET. According to the Center for Media and Democracy:

“A constellation of conservative groups has filed amicus briefs backing the plaintiff in *Seila Law LLC v. Consumer Financial Protection Bureau*. Many of these groups are funded by foundations in the right-wing philanthropic network of billionaire libertarian Charles Koch, a network that has fought the agency for years Since 2014, 16 right-wing foundations have donated a total of nearly \$69 million to 11 groups that filed amicus briefs in favor of scrapping the CFPB Some of these foundations are directly tied to Koch, including the Charles Koch Foundation, which gave the most money, and the Charles Koch Institute. Others – donor-advised fund sponsors DonorsTrust and Donors Capital Fund – are heavily financed by Koch. Still more, including the Adolph Coors Foundation and the Lynde and Harry Bradley Foundation, are part of the greater Koch political donor network.”

The same 16 foundations that fund the amicus brief filers also give to the Federalist Society, to the tune of \$33 million since 2014.

These same polluting interests lurk behind an armada of anti-environment “public-interest” litigation groups, such as the Pacific Legal Foundation (PLF), which bring strategic litigation to attack and dismantle environmental protections. As shown in the Senate Democrats’ Captured Courts report, PLF was a creation of the fossil fuel industry – its first board chairman was a fossil fuel executive motivated by “apoplectic” fury against environmental lawsuits. PLF served as the template for dozens of other anonymously funded right-wing legal nonprofits, such as the Southeastern Legal Foundation and Washington Legal Foundation, which push our federal courts to undermine environmental regulations that constrain their industrialist backers. Not only that, but many of Trump’s judges – such as former Scott Pruitt aide Patrick Wyrick, or former PLF lawyer Damien Schiff (who once called Justice Kennedy a “judicial prostitute”) – were drawn directly from this hothouse of anti-environmental activism.

How Trump's Justices Will Change Environmental Law

Strong evidence suggests that President Trump and his “insourced” Federalist Society team nominated Gorsuch and Kavanaugh specifically because of their demonstrated hostility to environmental regulations and other public regulatory protections so loathed by the GOP’s corporate backers.

Before his nomination to the Supreme Court, Judge Neil Gorsuch wrote an opinion holding that an agency’s interpretation is not “legally effective” until a court grants its approval.²⁶ Remarkably – and straying far outside the proper bounds of a lower court judge’s role – Gorsuch also wrote a separate concurring opinion addressing what he called the “elephant in the room” and arguing that the well-established Chevron doctrine was wrongly decided and should be overturned. “The time has come to face the behemoth,” he wrote. In none-too-subtle language, Federalist Society dark-money bundler Leonard Leo commented that “Judge Gorsuch’s opinions in the Chevron area do reflect . . . a growing concern about overreach by the administrative state and a lack of separation of powers.”²⁷ In other words: Gorsuch auditioned for appointment as a surefire vote to dismantle what Leo pejoratively calls “the administrative state.”

Through July 2020, the Trump administration has dismantled 100 major climate and environmental rules.²⁸ President Trump has been clear: he expects his judges to be loyal foot soldiers in this pro-polluter, pro-corporate campaign. We should take him at his word. If Amy Coney Barrett is confirmed to the Supreme Court, a 6-3 majority will be emboldened to roll back existing environmental protections and strip administrative agencies of the authority to implement new ones.

Amy Coney Barrett

What we know about Amy Coney Barrett’s record does not bode well for the environment. In one case, she held a park preservation group could not sue to block a construction project in Chicago’s Jackson Park.²⁹ Barrett also signed on to the 2018 opinion in *Orchard Hill Building Co. v. U.S. Army Corps of Engineers*, reversing a lower-court decision that protected wetlands under the Clean Water Act from being developed by a builder.³⁰ According to the environmental nonprofit Earthjustice, the opinion signaled Barrett’s “willingness to interpret environmental laws like the Clean Water Act narrowly in favor of industry interests.”³¹

Contrast that record, for example, with Justice Ruth Bader Ginsburg’s groundbreaking decision in *Friends of the Earth v. Laidlaw Environmental Services*, which upheld the right of people sickened by pollutants to sue responsible corporations,³² or the majority in *County of Maui v. Hawaii Wildlife Fund*,³³ joined by



Amy Coney Barrett
[The Federalist Society](#)

Justice Ginsburg, which broadened federal jurisdiction under the Clean Water Act to keep bodies of water clear of pollution.

Amy Coney Barrett's presence on the Supreme Court would give the fossil fuel industry and major corporations another reliable vote to block all types of environmental action, by Congress, by federal agencies, by states, and by private citizens. No wonder they're spending so many millions to make sure she gets on it.

Coming from the powerful D.C. Circuit (which hears the majority of the nation's important regulatory cases), Brett Kavanaugh's record of animosity toward environmental regulation was even clearer. As Harvard law professor and environmental law expert Richard Lazarus documented, Kavanaugh's record on the circuit court made clear that "unlike Kennedy, a Justice Kavanaugh would have denied Justice John Paul Stevens the majority he had" in *Massachusetts v. EPA*, "he would have provided Scalia with the majority he lacked for his narrow reading of the geographic reach of the Clean Water Act" in *Rapanos*, and "he would clearly have struck down EPA's interstate air pollution regulation," which the Supreme Court upheld in *EPA v. EME Homer Generation LP*. "Kavanaugh's record," Lazarus concluded, "suggests a readiness to invoke constitutional law as a basis for limiting the reach of federal environmental law." Others put it more bluntly: observers have dubbed him "a conservative critic of sweeping environmental regulations"³⁴ and "a disaster for the environment"³⁵ and have predicted that he will become "a potent anti-environment Justice."³⁶ Kavanaugh was also a frequent dissenter in the D.C. Circuit when the court ruled against polluter interests. In his *Mingo Logan Coal Co. v. EPA* dissent, for example, Kavanaugh would have allowed a coal company to continue polluting streams.³⁷ In his dissent in *Texas v. EPA*, Kavanaugh voted to strike down EPA rules that regulate GHG emissions from factories.³⁸

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These views were a feature, not a bug, of Kavanaugh's nomination. The Trump Administration boasted that "Judge Kavanaugh has overruled federal agency action 75 times ... Judge Kavanaugh protects American businesses from illegal job-killing regulation." The memo said that "Judge Kavanaugh helped kill President Obama's most destructive new environmental rules." The message was clear from Kavanaugh's

own auditioning: Kavanaugh could be counted on to vote for the big donors' deregulatory agenda.

Gorsuch's and Kavanaugh's nominations both enjoyed the strong backing of huge polluting interests that have sought to weaken environmental protections since the 1970s. The Koch brothers' flagship dark money outfit, Americans for Prosperity, committed "seven figures to paid advertising and grassroots engagement in support of Judge Kavanaugh's confirmation."³⁹ It also led "grassroots" efforts to boost Gorsuch to the bench, funding "500,000 phone calls, . . . online ads in 12 states . . . waves of direct mail and digital ads in support of Gorsuch's nomination."⁴⁰ The U.S. Chamber of Commerce – the lobbying mouthpiece for some of the world's worst polluters and the Supreme Court's most prolific amicus curiae, particularly in environmental cases⁴¹ – also leaned into the Gorsuch and Kavanaugh nominations with all its weight.⁴² Just months after his confirmation, Justice Gorsuch delivered a controversial keynote address at the Trump International Hotel. His host? A dark-money group funded by the Koch brothers.⁴³

Like his Supreme Court picks, Trump's appeals court judges have evinced hostility to administrative regulation. Fifth Circuit judge **Andrew Oldham**, for example, once described the administrative state as "enraging" and openly questioned its fundamental legitimacy, stating that the "entire existence of this edifice of administrative law is constitutionally suspect."⁴⁴ Of course, Trump's extreme judges have already begun implementing his anti-environmental agenda from the bench (and auditioning for further advancement to a Supreme Court vacancy):

- In *National Wildlife Federation v. Secretary of the U.S. Department of Transportation*, Sixth Circuit judges (and Trump Supreme Court short-listers) **Amul Thapar** and **Joan Larsen** reversed a district court ruling that held that a federal agency must comply with the Endangered Species Act and the National Environmental Policy Act before approving plans by an oil pipeline operator to deal with the serious risks of oil spills. In *Protecting Air for Waterville v. Ohio Environmental Protection Agency*, Larsen also voted to dismiss a petition to review air pollution permits issued to a company that wanted to build a natural gas pipeline in Ohio and Michigan.
- In *Guertin v. Michigan*, Trump Sixth Circuit judges **Amul Thapar**, **Joan Larsen**, **John Nalbandian**, and **Eric Murphy** would have prevented Flint, Michigan residents Shari Guerten and her daughter, who drank and bathed in lead-tainted water, from suing state and city officials for the contamination.

- In *Faludi v. U.S. Shale Solutions*, Fifth Circuit Judge James Ho openly auditioned for the Supreme Court, expressing his hope that the Court would revive the non-delegation doctrine – one of the key goals of the corporate anti-environmental movement.
- In *National Family Farm Coalition v. EPA*, Trump Ninth Circuit judge **Ryan D. Nelson** upheld the Trump EPA's decision to approve a toxic herbicide even though the agency had failed to consider adverse impacts of the herbicide on endangered species.
- In *National Resources Defense Council v. Wheeler*, Trump judge **Neomi Rao** (who one ally promised would “dismantle the administrative state” through her former role in the Trump Administration), voted to uphold a Trump EPA rule eliminating restrictions on dangerous emissions.
- In *Kane County v. United States*, Trump Tenth Circuit judges **Allison Eid** and **Joel Carson** voted to prevent an environmental group from participating in a lawsuit concerning proposed road construction in a protected wilderness area.
- In *EPIC v. Carlson*, Ninth Circuit Trump judge **Kenneth Lee** cast a dissenting vote that would have allowed expanded commercial logging without an environmental-impact statement.

In *United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers v. MSHA*, Trump D.C. Circuit Judge (and former Trump White House lawyer) **Gregory Katsas** partly dissented from a ruling concluding that under Trump, the Mine Safety and Health Administration (MSHA) improperly tried to weaken a rule protecting miners' health and safety.

The Supreme Court's Republican majority is already at work on the legal framework to undermine existing environmental regulations and impede future Presidents and Congresses that want to protect the environment.



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Greg Katsas



Greg Katsas
[National Law Review](#)

President Trump has been open about his desire to have judges who will rule reliably in his interest. So when it came to picking a judge for a vacancy on the powerful D.C. Circuit, it was little surprise when Trump tapped loyalist Greg Katsas, one of his own White House lawyers.

Katsas's career to that point had been "defined by advocating for virtually unchecked executive power, trying to weaken civil rights laws, and working to eviscerate critical protections for the environment, workers, consumers, and investors."⁴⁵ As a corporate defense lawyer, Katsas represented some of the biggest polluters on the planet, like fossil fuel companies BP Exploration and Chevron.

At the White House, Katsas was part of the "team of elite lawyers" that Don McGahn assembled "with the stated goal of leading Trump Administration efforts to roll back regulatory powers across the U.S. government."⁴⁶ And like Trump's other D.C. Circuit appointee, Neomi Rao, Katsas has voted to strike down government environmental, consumer, and worker-protection regulations with zeal. He has cast votes, for example, making it easier for those defrauding the government to retaliate against whistleblowers and against health and safety regulations protecting mine workers. As Trump predicted, Katsas has also been a sure vote to protect the president from investigation.

In his spare time, Katsas organized a lobbying campaign on behalf of the dark-money-funded Federalist Society, beating back a proposed judicial ethics opinion that would have banned judicial membership in the group due to its overt partisanship. Katsas, who has been a Federalist Society member since 1989, is deeply entrenched in its dark-money network, having spoken at Federalist Society events at least 53 times.⁴⁷ Katsas recently was rewarded by being added to Trump's Supreme Court short list, which was devised by that same dark-money network.

All this hostility has serious implications for federal agencies' ability to regulate pollution under existing environmental statutes. For example, a future administration that desires to regulate GHG emissions under the Clean Air Act may well find itself stymied by the conservative majority on the Supreme Court.

In *Gundy*, four of the current Republican-appointed justices on the Supreme Court (Justice Kavanaugh did not take part in the ruling as the case was argued prior to his confirmation) signaled their belief that statutory provisions providing executive

agencies with broad regulatory authority were unconstitutional. (Not to be left out, in a later statement in *Paul v. United States*,⁴⁸ Justice Kavanaugh added his support for the conservatives' position in *Gundy*.)

The Clean Air Act provides the EPA with broad authority to regulate air pollution from new and existing sources.

It also allows the EPA to

determine which pollutants it will regulate, directing the agency to regulate pollutants that endanger human health and welfare. Given the conservatives' concern in *Gundy* with statutes that grant a "vast" "breadth of authority"⁴⁹ to federal agencies, and their criticism of such statutes for allowing regulatory shifts in different administrations, there is legitimate cause for concern that regulation of GHG emissions under the Clean Air Act will be attacked by the conservative majority, to the great benefit of fossil fuel polluters. The Republican majority on the Court might essentially gut the Clean Air Act as a tool to reduce carbon pollution.

Big-money polluting interests like the Koch enterprise clearly gain by rigging the courts to dismantle environmental protections, but who stands to lose? While all Americans will suffer from the increasingly dire effects of climate change and diminished air and water quality caused by unchecked corporate pollution, low-income communities and communities of color will suffer disproportionately.

The legacy of unequal exposure to environmental harms spans generations and is intertwined with our nation's tragic history of racism and discrimination. People of color are twice as likely to live within a mile of a dangerous industrial chemical facility, and children of color represent two-thirds of children living within a mile of facilities.⁵⁰ Black and Hispanic Americans experience significantly higher exposure than whites to particulate matter (PM) pollutants, which causes both immediate and long term respiratory and cardiovascular harm and is linked to a "large increase in the COVID-19 death rate."⁵¹ In the case of safe drinking water, "race, ethnicity, or language spoken had the strongest relationship to slow and inadequate enforcement of the Safe Drinking Water Act of any sociodemographic characteristic analyzed."⁵²

The right-wing takeover of federal courts will perpetuate and magnify these



environmental harms for communities of color, just as captured courts have hurt these communities in so many other areas. Chief Justice Roberts and the Republican justices have already shown obliviousness to racial injustice, all but dismissing voter suppression as a thing of the past in *Shelby County v. Holder*⁵³, ignoring the racist history of non-unanimous jury rulings in *Ramos v. Louisiana*,⁵⁴ and rejecting the blatant racial underpinnings of the President's decision to rescind Deferred Action for Childhood Arrivals (DACA) in *Department of Homeland Security v. Regents of the University of California*.⁵⁵

What GOP court-packing means for America

With Gorsuch and Kavanaugh now installed for life at the Supreme Court, and a legion of Federalist Society movement warriors now planted in powerful seats on the lower courts, what should Americans concerned about our environmental future look out for? With President Trump's capture of the federal courts, fringe legal theories like non-delegation doctrine and the unitary executive theory are well on the way to becoming constitutional law. This will have devastating consequences for most Americans – except perhaps fossil fuel CEOs.

It's not always easy to see how the Court's decisions affect our natural environment. Important rulings for American environmental regulation are often buried in administrative law cases, like last term's CFPB decision, that have nothing to do with the environment. And with environmental agencies run by fossil fuel industry cronies like former EPA Administrator Scott Pruitt and current EPA Administrator Andrew Wheeler, most of the environmental damage will be done through those agencies, not the courts.

But make no mistake: The Supreme Court's Republican majority is already at work on the legal framework to undermine existing environmental regulations and impede future Presidents and Congresses that want to protect the environment. Gorsuch and Kavanaugh were likely chosen specifically for that task and will serve long beyond the Trump Administration. Americans looking to the future, knowing that we must immediately address our climate crisis, need to understand that a Supreme Court majority constructed by special interests expressly to thwart that objective stands squarely in their path.

CAPTURED COURTS OVERVIEW

The GOP's Big-Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law

In May 2020, DPCC released a report with Senators Schumer and Whitehouse to shed a light on the right-wing takeover of our judicial system. The Trump Administration and Mitch McConnell's Senate Republicans have few significant legislative accomplishments. Instead, they're packing the judiciary with far-right extremist judges. The Senate has confirmed more than 200 new life-tenured federal judges, most of whom were chosen not for their qualifications or experience—which are often lacking—but for their allegiance to Republican political goals.

This court capture has been perpetrated through a complex network of anonymously-funded groups like the Federalist Society and spearheaded by right-wing activists like Leonard Leo. Their web consists of:

1. deep-pocketed, special-interest donors, who provide the money;
2. shell entities, which funnel the money and exploit tax laws to keep donors' identities secret;
3. public relations firms and political operatives who run multi-million-dollar ad campaigns to support and oppose judges and generate press to craft favorable public narratives; and
4. a brain trust of ideological think tanks, academic institutions, and "public interest" law firms, filled with lawyers and professors who generate "intellectual capital"—law review articles, *amicus* briefs, and so on—to advance the donors' interests through the courts.

Senate Democrats' report exposes that web:

- How the "conservative legal movement" has rewritten federal law to favor the rich and powerful with 80 partisan Supreme Court decisions
- How the Federalist Society, Leonard Leo, and special-interest money dominate our courts
- How Mitch McConnell's broken Senate confirmation process helps Republicans and the big-money donors behind them

WHAT DOES GOP COURT-PACKING MEAN FOR AMERICA:

- Voters across the country wait in line for hours to vote
- Special interests flood our airways with political ads
- Workers have discrimination cases thrown out of court
- Communities can't regulate gun violence
- Polluters can pollute our air and water without consequence
- Access to healthcare, including protections for pre-existing conditions, remains under attack

BY THE NUMBERS:



AT LEAST \$250 MILLION in dark money is funding Republicans' court capture machine

86%

86% of Donald Trump's nominees to the Supreme Court and influential appellate courts are Federalist Society members



FOR 50 YEARS right-wing donors and paid-for activists built a "conservative legal movement" to deliver for their agenda



80+ PARTISAN 5-4 DECISIONS at the Roberts Supreme Court have delivered wins to the Republican Party and the big corporate interests behind it



NEARLY 90% of the House-passed bills that Mitch McConnell sidelined to confirm partisan judges received bipartisan support

Endnotes

- 1 Majorities of americans say the federal government is not doing enough to protect the climate, environment, PEW RESEARCH CENTER (Nov. 22, 2019), https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/ps_11-25-19_climate-energy-00-015/.
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