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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 Act¹⁴ and Marine Mammal Protection Act¹⁵ to the Migratory Bird Treaty Act¹⁶ and the Magnuson-Stevens Fisheries Conservation Act,¹⁷ not to mention the National Environmental Policy Act (NEPA)¹⁸ and public lands laws¹⁹ 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 Treaties⁴⁵ 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 un rebutted 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 plan 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 Court¹⁰⁰ 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 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).

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ENDNOTES: A PATTERN OF RULING AGAINST MOTHER NATURE: WILDLIFE SPECIES CASES DECIDED BY JUSTICE KAVANAUGH ON THE DC CIRCUIT

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¹⁶ See Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 [hereinafter MBTA] (making it unlawful to take, kill, or possess migratory birds); see also 50 C.F.R. § 10.13 (2016) (listing the protected birds under the Migratory Bird Treaty Act and treaties).

¹⁷ See Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891 (acting to conserve and manage fishery resources found off the coasts of the United States).

¹⁸ See generally National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 [hereinafter NEPA] (enriching the understanding of the importance of natural resources and ecological systems to citizens).

¹⁹ See, e.g., National Park Organic Act, 54 U.S.C. § 100101 (2012); National Forest Management Act, 16 U.S.C. §§ 1601-1687 (2012); Federal Land Management and Policy Act, 43 U.S.C. §§ 1701-1787 (2012); National Wildlife Refuge System Act, 16 U.S.C. §§ 668dd-668ee (2012).

²⁰ See Joseph Tomain, *Kavanaugh's Political Leanings Likely Will Be Written into Law*, CINCINNATI ENQUIRER (August 6, 2018), <https://www.cincinnati.com/story/opinion/2018/08/06/opinion-kavanaughs-political-leanings-likely-written-into-law/862653002/> (stating that environmental cases often “pit corporate interests against the public interest for a clean and healthy environment. Here, Kavanaugh’s ‘hands-off’ approach to policy is jettisoned. In his opinions, Kavanaugh is unafraid to strain the interpretation of statutes, engage the judiciary in policymaking, and, on occasion, give mini-lectures on constitutional law and government. His environmental law opinions, then, directly involve policy and politics. In other words, Kavanaugh is unafraid to make, not follow, the law”).

²¹ See, e.g., U.S. Envtl. Prot. Agency v. EME Homer City Generation, 572 U.S. 489, 524 (2014) (overturning Justice Kavanaugh’s decision 6-2 in a case where Justice Kavanaugh holds the EPA to an illegally high standard of review, with human lives and health on the line); Mexichem Fluor, Inc. v. U.S. Envtl. Prot. Agency, 866 F.3d 451, 453-54, 464 (D.C. Cir. 2017) (stating Justice Kavanaugh, over a powerful dissent, created a new reading of Section 612 of the Clean Air Act that allows foreign manufacturers of ozone-depleting and climate change-inducing hydrofluorocarbons to avoid regulation; this decision, too, has been appealed to the U.S. Supreme Court on a writ of certiorari).

²² According to an August 2018 Public Citizen study, Justice Kavanaugh ruled in favor of Big Business – defined as the Chamber of Commerce, National Association of Manufacturers, and American Petroleum Institute – in twenty-five (25) of the thirty-three (33) cases in this category, for a seventy-six percent favorable bias rate. *Judge Brett Kavanaugh's Decisions in Cases with Leading Business Association Involvement*, CHAMBER WATCH (Aug. 30, 2018), <https://www.chamberofcommercewatch.org/judge-kavanaugh-business-decisions/>.

²³ *Id.*

²⁴ No. 17-71, slip op. 1 (U.S. Nov. 27, 2018).

²⁵ *Id.* at 15.

²⁶ *Id.*

²⁷ See, e.g., Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 534-35 (2007) (forcing the EPA to take action under the Clean Air Act against global warming and climate change); Rapanos v. United States, 547 U.S. 715, 733-37 (2006) (emphasizing that regulation of wetlands falls under the Clean Water Act); Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon, 515 U.S. 687, 703-08 (1995) (upholding the inclusion of “habitat harm” as definition of “take” under the ESA).

²⁸ See Carpenter Indus. Council v. Zinke, 854 F.3d 1, 9 (D.C. Cir. 2017); Otay Mesa Prop., L.P. v. U.S. Dep’t of the Interior, 646 F.3d 914, 918-19 (D.C. Cir. 2011); Am. Bird Conservancy v. Fed. Comm. Comm’n, 516 F.3d 1027, 1035-37 (D.C. Cir. 2008).

²⁹ *Am. Bird Conservancy, Inc.*, 516 F.3d at 1035-37.

³⁰ *Id.* at 1031 n.1 (explaining that Justice Kavanaugh was incorrect in asserting that the petitioner’s case was not ripe because the FCC was not, in fact, reconsidering its order regarding migratory birds and communication towers in the Gulf Coast region).

³¹ 854 F.3d at 1.

³² *Id.* at 5 (“A dollar of economic harm is still an injury-in-fact for standing purposes.”).

³³ *Id.*

³⁴ 646 F.3d 914 (D.C. Cir. 2011).

³⁵ *Id.* at 918 (finding that, absent further explanation, a survey of the plaintiffs’ property which found an endangered species in one location was not enough to demonstrate that the plaintiffs’ property was occupied by that species for the purposes of the ESA).

³⁶ 829 F.3d 710 (D.C. Cir. 2016).

³⁷ *Id.* at 732 (Kavanaugh, J., dissenting) (emphasis in original) (contending that the “EPA considered the benefits to animals of revoking the permit, but [the] EPA never considered the costs to humans”).

³⁸ Order No. 15-1363 (D.C. Cir. 2018) (concerning the Clean Power Plan).

³⁹ *Id.*

⁴⁰ 472 F.3d 872 (D.C. Cir. 2006).

⁴¹ *Id.* at 879-82 (Kavanaugh, J., concurring).

⁴² Justice Kavanaugh’s 96-4 “against wildlife” total score is notable because other judges on the D.C. Circuit scored much better than Justice Kavanaugh’s. Judge David Sentelle, for example, undoubtedly a conservative jurist, appointed by President Reagan to fill Justice Scalia’s seat on the D.C. Circuit, possesses a 57-43 “against wildlife” score. Judge Merrick Garland, President Obama’s pick to replace Justice Scalia on the Supreme Court, but who never received a vote by the majority Senate Republicans, possesses a 46-54 “against wildlife” score, meaning he votes with wildlife fifty-four percent of the time. See *infra* Appendix A and B.

⁴³ *Fund for Animals v. Kempthorne*, 472 F.3d 872, 873 (D.C. Cir. 2006) (holding that “[t]he amended Migratory Bird Treaty Act does not ban the hunting or killing of non-native migratory bird species, including mute swans”).

⁴⁴ *Id.* at 873, 879.

⁴⁵ See generally Convention for the Protection of Migratory Birds, U.S. – Great Britain, Aug. 16, 1916, 39 Stat. 1702; Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds, Etc., February 7, 1963, 50 Stat. 1311; The Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329; Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, 29 U.S.T. 4647.

⁴⁶ *Fund for Animals Inc.*, 472 F.3d at 881-82.

⁴⁷ See, e.g., 1911 Treaty for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 154; 1942 Western Hemisphere Convention on Nature Protection and Wildlife Preservation, May 1, 1942, 56 Stat. 1374; 161 U.N.T.S. 193; 1975 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085; 1976 Agreement on Conservation of Polar Bears, Nov. 15, 1973, 13 I.L.M. 13.

⁴⁸ Despite voluminous U.S. Supreme Court precedent upholding the law-making force of treaties pursuant to U.S. Const. Art. II, § 2, Justice Kavanaugh’s unnecessary “extra” concurrence also oddly laments treaties’ ability “to eliminate the House of Representatives from the law-making process.” *Fund for Animals*, 472 F.3d at 881 (Kavanaugh, J., concurring); see also Darren Samuelsohn, *Kavanaugh's Words on Presidential Probes Come Back to Haunt Him*, POLITICO (July 10, 2018), <https://www.politico.com/story/2018/07/10/brett-kavanaugh-presidential-investigations-708705>.

⁴⁹ *Fund for Animals*, 472 F.3d at 875-76.

⁵⁰ *Id.* at 873 (quoting 16 U.S.C. § 703(a) (2012)).

⁵¹ Migratory Bird Treaty Reform Act of 2004, 16 U.S.C. § 703 (a)(1) (2012).

⁵² *Fund for Animals*, 472 F.3d at 876-77.

⁵³ *Id.* at 873, 879.

⁵⁴ *Oceana, Inc. v. Gutierrez*, 488 F.3d 1020, 1021, 1025 (D.C. Cir. 2007).

⁵⁵ *Id.* at 1021-22, 1025-26.

⁵⁶ *Id.* at 1025-26.

⁵⁷ See *id.* at 1021-22, 1025-26.

⁵⁸ See *Am. Bird Conservancy v. Fed. Comm. Comm’n*, 516 F.3d 1027, 1034-35 (D.C. Cir. 2008).

⁵⁹ *Id.* at 1035.

⁶⁰ *Id.* at 1031.

⁶¹ *Id.*

⁶² *North Carolina Fisheries Ass’n v. Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008).

⁶³ *Id.* at 19.

⁶⁴ *Id.* at 21.

⁶⁵ E. Niagara Pub. Power All. v. Fed. Energy Regulatory Comm'n, 558 F.3d 564, 566 (D.C. Cir. 2009).

⁶⁶ *Id.*

⁶⁷ *Id.*; see also 16 U.S.C. § 808(a)(2)(D) (2012).

⁶⁸ E. Niagara Pub. Power All., 558 F.3d at 567.

⁶⁹ *Id.* at 567-68.

⁷⁰ For full disclosure, the author represented and argued for the Defendant-Intervenor, which was on the losing side of the case.

⁷¹ Otay Mesa Prop. v. U.S. Dep't of Interior, 646 F.3d 914, 916-19 (D.C. Cir. 2011) [hereinafter *Otay Mesa II*].

⁷² Otay Mesa Prop. v. U.S. Dep't of Interior, 714 F. Supp. 2d 73, 83 (D.D.C. 2010) [hereinafter *Otay Mesa I*].

⁷³ *Otay Mesa II*, 646 F.3d at 916-17.

⁷⁴ *Id.* at 918-19.

⁷⁵ *Id.* at 919.

⁷⁶ Sierra Club v. Van Antwerp, 661 F.3d 1147, 1149-50 (D.C. Cir. 2012) [hereinafter *Sierra Club II*].

⁷⁷ *Id.*; see also Sierra Club v. Van Antwerp, 719 F. Supp. 2d 58, 76 (D.D.C. 2010) [hereinafter *Sierra Club I*].

⁷⁸ *Sierra Club I*, 719 F. Supp. 2d at 61.

⁷⁹ *Sierra Club II*, 661 F.3d at 1156.

⁸⁰ *Id.* at 1157.

⁸¹ See 16 U.S.C. § 1538(a)(2) (2012); see also *Sierra Club II*, 661 F.3d at 1156.

⁸² Justice Kavanaugh did not order ESA Section 7 consultation in this case despite the clear federal scientific evidence that the snake would be harmed. On other environmental cases where it has been alleged Justice Kavanaugh was "pro-environment," these very small handful of decisions are easily explainable on other grounds. See, e.g., Nat'l Mining Assoc. v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014) (holding that the Clean Water Act did not prohibit interagency coordination and that an EPA guidance on state-issued water pollution permits was not subject to judicial review); Nat. Res. Def. Council v. U.S. Evtl. Prot. Agency, 749 F. 3d 1055 (D.C. Cir. 2014) (denying the Natural Resources Defense Council's petition on cement pollution except with regard to clearly suspect the EPA affirmative defense policy in the Agency rule); Am. Trucking Ass'ns v. Evtl. Prot. Agency, 600 F.3d 624 (D.C. Cir. 2010) (upholding stricter California motor vehicle standards). Assuming these flimsy "defenses of the environment" represent "two total wins," even a broken clock is correct twice per day.

⁸³ Friends of Blackwater v. Salazar, 691 F.3d 428, 439-40 (D.C. Cir. 2012).

⁸⁴ *Id.* at 438 (arguing the impracticability of the Secretary adopting criteria that "by their nature could never be met and hence would preclude delisting a species so long as those criteria remain in effect").

⁸⁵ *Id.* at 440.

⁸⁶ 16 U.S.C. § 1535(f) (2012) (stating that state laws may be more, but not less, restrictive than the regulations in the ESA).

⁸⁷ Conservation Force v. Jewell, 733 F.3d 1200, 1202, 1207 (D.C. Cir. 2013).

⁸⁸ *Id.* at 1207.

⁸⁹ *Id.* at 1203-05.

⁹⁰ Center for Biological Diversity v. U.S. Evtl. Prot. Agency, 749 F.3d 1079, 1080 (D.C. Cir. 2014); see generally Clean Air Act, 42 U.S.C.S. § 7409(b)(2) (describing national secondary ambient air quality standards which specify "a level of air quality the attainment and maintenance of which . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air").

⁹¹ See generally *Center for Biological Diversity*, 749 F.3d at 1080-82.

⁹² *Id.* at 1085 (quoting the Final Rule, 77 Fed. Reg. 10218, 20,236 (Apr. 3, 2012), to explain that direct exposure is not the only way in which chemicals can cause harm).

⁹³ *Id.* at 1089 (quoting the rule and explaining that the EPA "determined that a revision was not 'appropriate' when scientific uncertainty deprived the Agency of a 'reasoned way to choose' an appropriate standard").

⁹⁴ *Id.* at 1090 n.18.

⁹⁵ *Id.* at 903.

⁹⁶ *Id.* at 901.

⁹⁷ *Id.*; see also 16 U.S.C. § 1533 (a)(1) (2012) (stating that determinations are conclusions that a species is or is not endangered or threatened); 16 U.S.C. § 1533 (b)(3)-(4) (2012) (outlining the statutory time frames by which FWS or NMFS must respond to petitions to list or delist)

⁹⁸ *Friends of Animals v. Ashe*, 808 F.3d 900, 901 (D.C. Cir. 2015).

⁹⁹ *Id.* at 903.

¹⁰⁰ *Id.* at 900-01.

¹⁰¹ *Id.* at 904-05.

¹⁰² See 16 U.S.C. § 1533(b)(3)(B) (2012).

¹⁰³ Defs. of Wildlife v. Jewell, 815 F.3d 1, 3, 5 (D.C. Cir. 2016).

¹⁰⁴ *Id.* at 3, 7, 8.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 3, 6-7.

¹⁰⁸ Ark Initiative v. Tidwell, 816 F.3d 119, 121, 122 (D.C. Cir. 2016); see 36 C.F.R. § 294.41 (defining roadless area characteristics as "(1) high quality or undisturbed soil, water, and air; (2) sources of public drinking water; (3) diversity of plant and animal communities; (4) Habitat for threatened, endangered, proposed, candidate, and sensitive species, and for those species dependent on large, undisturbed areas of land; (5) primitive, semi-primitive nonmotorized and semi-primitive motorized classes of dispersed recreation; (6) reference landscapes; (7) natural-appearing landscapes with high scenic quality; (8) traditional cultural properties and sacred sites; and (9) other locally identified unique characteristics").

¹⁰⁹ See *Ark Initiative*, 816 F.3d at 122, 128.

¹¹⁰ *Id.* at 122.

¹¹¹ See *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 105-06 (D.D.C. 2009).

¹¹² See 16 U.S.C. § 1539(a)(1)(A).

¹¹³ See *Salazar*, 626 F. Supp. 2d at 107 (stating the cause of action and discussing the import take permit exemption to the ESA that allows for the trade of hunted trophies of an endangered captive-bred animal).

¹¹⁴ See *Friends of Animals v. Jewell*, 824 F.3d 1033, 1036-37 (D.C. Cir. 2016).

¹¹⁵ *Id.* at 1037.

¹¹⁶ See *Earthreports, Inc. v. Fed. Energy Regulatory Comm'n*, 828 F.3d 949, 952 (D.C. Cir. 2016).

¹¹⁷ *Id.* at 952.

¹¹⁸ *Id.* at 959.

¹¹⁹ See generally *id.*

¹²⁰ Mingo Logan Coal Co. v. U.S. Evtl. Prot. Agency, 829 F.3d 710, 730-41 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

¹²¹ *Id.* at 717, 730; see also Clean Water Act, 33 U.S.C. §§ 1251-1388. The Clean Water Act's wetlands provisions, under Section 404 of the Act, have proven to be a lightning rod for conservative legal activists, including Justice Kavanaugh, over the years.

¹²² See generally *Mingo Logan Coal Co.*, 829 F.3d at 732, 737-38 (Kavanaugh, J., dissenting) (construing a cost-benefit analysis to the EPA's permit decision making under Section 404 of the Clean Water Act).

¹²³ See *id.*

¹²⁴ *Id.* at 722, 723-24 n.7.

¹²⁵ See *id.*

¹²⁶ Carpenters Indus. Council v. Zinke, 854 F.3d 1, 2 (D.C. Cir. 2017).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 2-3.

¹³² *Id.* at 9.

¹³³ See generally Clean Air Act, 42 U.S.C. §§ 7401-7671 (2012).

¹³⁴ Coral Davenport, *Appeals Court Hears Challenges to Obama's Climate Change Rule*, N.Y. TIMES (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/us/politics/appeals-court-hears-challenge-to-obamas-climate-change-rules.html>.

¹³⁵ 42 U.S.C. § 7602(h).

¹³⁶ 549 U.S. 497 (2007).

¹³⁷ See *id.* at 534.

¹³⁸ See, e.g., *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 4 (D.C. Cir. 2009) ("The First Amendment, as interpreted by the Supreme Court, protects the right of individual citizens to spend unlimited amounts to express their views about policy issues and candidates for public office.").

¹³⁹ See, e.g., 42 U.S.C. § 7521(a)(1)-(3) (2012) (obligating the Agency's to make endangerment findings in specific circumstances).

¹⁴⁰ See generally Donald J. Wuebbles, David W. Fahey, & Kathy A. Hibbard, *Climate Science Special Report: Fourth National Climate Assessment*, U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM (2017) (analyzing how human-caused climate pollution has led to a number of negative impacts including wildlife and habitat declines).

¹⁴¹ See generally Robert Weissman, *An analysis of Justice Kavanaugh's Opinions in Split-Decision Cases*, PUBLIC CITIZEN (2018) (finding an “overwhelming tendency to reach conclusions favorable to business interests and opposed to consumers, workers, environmental protections, and victims of human rights abuses”).

¹⁴² The U.S. Constitution places no upper or lower limit on the number of Supreme Court justices. The number does not need to be nine. In the short term, the Senate should not be “rushed” in confirming an ideological jurist who would tip the balance of the Court, particularly with mid-term elections coming up, as well as the ongoing criminal investigation of the President and his aides. See, e.g., Bobby Cervantes, *Ted Cruz Says ‘Long Historical Precedent’ for Smaller Supreme Court*, POLITIFACT (Nov. 23, 2016), <https://www.politifact.com/texas/statements/2016/nov/23/ted-cruz/ted-cruz-says-long-historical-precedent-smaller-su/> (explaining that throughout the history of the Supreme Court, there have been large gaps of time with only eight justices, several times lasting over one year); Nick Fahey, *The Supreme Court Can Deal with Eight Justices*, CNBC (Mar. 3, 2016), <https://www.cnbc.com/2016/03/03/the-supreme-court-can-deal-with-eight-justices.html> (noting that nearly twenty percent of all Supreme Court opinions since 1946 have been tie votes).

¹⁴³ See, e.g., Igor Bobic, *Democratic Senator says Brett Kavanaugh confirmation process is ‘Not Normal,’* HUFFINGTON POST (Sept. 2, 2018), https://www.huffingtonpost.com/entry/brett-kavanaugh-documents_us_5b8c0a28e4b0cf7b00373cf9; John Bowden, *Feinstein ‘Alarmed’ National Archives is Withholding Kavanaugh Documents*, THE HILL (Aug. 8, 2018), <http://thehill.com/homenews/senate/400860-feinstein-alarmed-national-archives-is-withholding-kavanaugh-documentshttp://thehill.com/homenews/senate/400860-feinstein-alarmed-national-archives-is-withholding-kavanaugh-documents>; Sheryl Stolberg, *White House Withholds 100,000 pages of Judge Brett Kavanaugh’s Records*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/us/politics/kavanaugh-records.html>.

¹⁴⁴ Jordain Carney, *Republicans Confirming Trump’s Court Nominees at Record Pace*, THE HILL (May 1, 2018), <https://thehill.com/homenews/senate/385728-republicans-confirming-trumps-court-nominees-at-record-pace>.
¹⁴⁵ Cf. “And I brought you into a plentiful country, to eat the fruit thereof and the goodness thereof: but when ye entered, ye defiled my land, and made mine heritage an abomination.” *Jeremiah 2:7* (King James).

ENDNOTES: REAL PROPERTY SUBLESSORS ESCAPE CERCLA OWNER LIABILITY IN THE SECOND CIRCUIT

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⁸ See *id.* (adding that an employee of the sublessee later burned the site to the ground, causing further PCE contamination).

⁹ See *Next Millennium Realty, LLC v. Adchem Corp.*, 2017 WL 4350729, at *10 (2017) (explaining that Next Millennium voluntarily conducted a cleanup of the site upon purchase in 1987-98 and sought cost recovery and contribution under CERCLA Sections 107, 113(f)(3)(B), and (g)(2)).

¹⁰ See Brief for Defendants-Appellees at 5, *Next Millennium Realty, LLC v. Adchem Corp.*, 2016 WL 5699964 (2d Cir. 2016) (No. 16-1260-cv) (arguing that strict liability is justified due to NSR’s benefit from the activities that caused the contamination).

¹¹ 215 F.3d 321 (2d Cir. 2000).

¹² See *Next Millennium*, 690 F. App’x at 714 (denying the plaintiff’s request to overrule *Commander Oil* due to case law that says the court is bound by prior decisions unless overruled by an en banc panel or by the Supreme Court).

¹³ See generally *Commander Oil Corp.*, 215 F.3d at 321 (diverging from the state-specific common law definition of “owner” under CERCLA).

¹⁴ See *id.* at 330-31 (explaining that the five factors are non-exclusive).

¹⁵ See *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(ARL), 2014 WL 5425488, at *11 (E.D.N.Y. Oct. 22, 2014), *aff’d sub nom.* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App’x 710, 715 (2d Cir. 2017) (concluding that the landowner had the benefits and responsibilities of ownership).

¹⁶ See *id.* (refusing to hold the dissolved corporation responsible despite the tenant acting as an owner by subleasing to an operator who caused the contamination of the site).

¹⁷ See generally *Commander Oil Corp.*, 215 F.3d at 327 (emphasizing the distinctions between “owner” and “operator” and assigning liability based on the unique facts of the case).

¹⁸ See Petition for Writ of Certiorari, *supra* note 1, at i (distinguishing the facts of the case from the factors set by *Commander Oil*).

¹⁹ See *Next Millennium Realty, LLC v. Adchem Corp.*, 138 S. Ct. 510 (2017) (giving no explanation as to why the Supreme Court denied certiorari).

²⁰ See generally, *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(GRB), 2016 WL 1178957 (E.D.N.Y. Mar. 23, 2016).

²¹ See Petition for Writ of Certiorari, *supra* note 1, at i, (asking the Supreme Court to change the standards for determining owner liability under CERCLA).

²² See *infra* Part II (discussing Congressional intent and liability under CERCLA).

²³ See *infra* Part II (outlining CERCLA, liability, contribution, and the Circuit split in owner liability under CERCLA).

²⁴ See *infra* Part III (demonstrating that courts that follow state common law definition of “ownership” place the financial burden of cleanup on those responsible for the contamination).

²⁵ See *infra* Part IV (explaining that the Second Circuit does not have the authority to overturn the flawed test itself).

²⁶ See *infra* Part V (concluding that the Second Circuit’s CERCLA interpretation does not hold true to the purpose of the statute).

²⁷ See Joseph A. Fischer, *All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the Ucata*, 30 Hous. L. Rev. 1979, 1988-90 (1994).

²⁸ See 126 Cong. Rec. 31, 981-82, reprinted in 1 Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act, 1980, at 820-23 (1983).

²⁹ Congress did not include a statement of congressional findings or a declaration of the statute’s policies, purposes, and goals as it usually does for environmental statutes, but courts have divined the larger remedial purposes of the statute. See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997) (explaining that Congress enacted CERCLA to facilitate prompt cleanup of hazardous waste sites and shift the cost of environmental response from taxpayers to parties who benefitted from activities that caused harmful waste).

³⁰ See 80 AM. JUR. 3D *PROOF OF FACTS* § 281, 293-94 (2004) (detailing Congress’s intent and scope for CERCLA liability).

³¹ See 42 U.S.C. § 9604(a) (2012) (highlighting the President’s broad authority to act in response to contaminations).

³² The original House bill makes it clear that Congress intended to impose liability on “any person who caused or contributed to the release or threatened release” H.R. 7020, 96th Cong. § 3071(a)(1)(C) (1980), reprinted in 2 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act, 1980, at 39 (1983). However, this causation language was omitted from the final bill. See 126 Cong. Rec. 31,981-82, reprinted in 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, 1980, at 821-24 (1983); see also B.F. GOODRICH Co. v. MURTHA, 958 F.2d 1192, 1198 (2d Cir. 1992) (explaining that CERCLA extends to those who contribute to the problems caused by hazardous substances); 3550 Stevens Creek Assoc. v. Barclays, 915 F.2d 1355, 1363 (9TH CIR. 1990) (explaining that CERCLA resulted from compromise within Congress to pass the statute quickly).

³³ See 42 U.S.C. § 9607(b) (2012) (amending CERCLA to exempt subsequent “innocent owners” from liability).

³⁴ See 42 U.S.C. § 9601(20)(F) (2012) (clarifying that the definition of “participation in management” requires more than “the capacity to influence, or the unexercised right to control”); Timothy Holly, Comment, *Potential Responsibility Under CERCLA: Canadyne-Georgia Corp. v. Nationsbank, N.A. (South)—An Illustration of Why We Need a Common Federal Rule Defining “Owned” and “Operated,”* 12 VILL. ENVTL. L.J. 119, 131-32 (2001) (noting that while SARA helped achieve a comprehensive CERCLA program, it did not clarify the circular definition of “owner”).

³⁵ See Holly, *supra* note 34, at 168-69 (clarifying that “participating in the management” as defined in ACA did not define “owner” as defined in section 101 of CERCLA).

³⁶ See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1986) (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)) (“[W]e will not interpret section 9607(a) in any way that

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
<i>Friends of Animals v. Jewell</i> , 824 F.3d 1033 (D.C. Cir. 2016)	Against wildlife
<i>Bldg. Indus. Ass'n of Superior Cal. v. Babbitt</i> , 161 F.3d 740 (D.C. Cir. 1998)	For wildlife
<i>Am. Wildlands v. Kempthorne</i> , 530 F.3d 991 (D.C. Cir. 2008)	Against wildlife
<i>Nat. Ass'n. of Home Builders v. Babbitt</i> , 130 F.3d 1041 (D.C. Cir. 1997)	Against wildlife
<i>Def. of Wildlife v. Gutierrez</i> , 532 F.3d 913 (D.C. Cir. 2008)	Against wildlife
<i>Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt</i> , 17 F.3d 1463 (D.C. Cir. 1994)	Against wildlife
<i>Ctr. for Biological Diversity v. U.S. Dep't. of Interior</i> , 563 F.3d 466 (D.C. Cir. 2009)	Half for wildlife
<i>Nat. Res. Def. Council, Inc. v. Hodel</i> , 865 F.2d 288 (D.C. Cir. 1988)	Half for wildlife
<i>Theodore Roosevelt Conservation Partn. v. Salazar</i> , 661 F.3d 66 (D.C. Cir. 2011) (Majority Opinion)	Against wildlife
<i>Anglers Conservation Network v. Pritzker</i> , 809 F.3d 664 (D.C. Cir. 2016) (Majority Opinion)	Against wildlife
<i>Marcum v. Salazar</i> , 694 F.3d 123 (D.C. Cir. 2012) (Majority Opinion)	For wildlife
<i>Spirit of the Sage Council v. Norton</i> , 411 F.3d 225 (D.C. Cir. 2005) (Majority Opinion)	For wildlife
<i>Animal Legal Def. Fund, Inc. v. Glickman</i> , 204 F.3d 229 (D.C. Cir. 2000) (Majority Opinion)	Against wildlife
<i>Def. of Wildlife & Sierra Club v. Perciasepe</i> , 714 F.3d 1317 (D.C. Cir. 2013) (Majority Opinion)	For wildlife
<i>Rhineland Paper Co. v. Fed. Energy Regulatory Comm'n</i> , 405 F.3d 1 (D.C. Cir. 2005) (Majority Opinion)	For wildlife
<i>Theodore Roosevelt Conservation Partn. v. Salazar</i> , 616 F.3d 497 (D.C. Cir. 2010) (Majority Opinion)	Against wildlife
<i>Grunewald v. Jarvis</i> , 776 F.3d 893 (D.C. Cir. 2015) (Majority Opinion)	Half/half
<i>C & W Fish Co. v. Fox</i> , 931 F.2d 1556 (D.C. Cir. 1991)	Against wildlife
<i>Ala. Power Co. v. Fed. Energy Regulatory Comm'n</i> , 979 F.2d 1561 (D.C. Cir. 1992)	For wildlife
<i>Ctr. for Biological Diversity v. U.S. Env'tl. Prot. Agency</i> , 749 F.3d 1079 (D.C. Cir. 2014)	Against wildlife
<i>S.D. Warren Co. v. Fed. Energy Regulatory Comm'n</i> , 164 Fed. Appx. 1 (D.C. Cir. 2005)	For wildlife
<i>Nat. Ass'n. of Home Builders v. U.S. Army Corps of Eng'rs</i> , 264 Fed. Appx. 10 (D.C. Cir. 2008)	For wildlife
<i>Am. Rivers & Ala. Rivers All. v. Fed. Energy Regulatory Comm'n</i> , 895 F.3d 32 (D.C. Cir. 2018)	For wildlife
<i>Nat'l Wildlife Federation v. Fed. Energy Regulatory Comm'n</i> , 912 F.2d 1471 (D.C. Cir. 1990)	Against wildlife
<i>Oceana, Inc. v. Locke</i> , 670 F.3d 1238 (D.C. Cir. 2011)	For wildlife
<i>Rancho Viejo, LLC v. Norton</i> , 334 F.3d 1158 (D.C. Cir. 2003)	Against wildlife
<i>Fla. Audubon Soc'y v. Bentsen</i> , 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
<i>Safari Club Int'l & Nat'l Rifle Ass'n of Am. v. Zinke</i> , 878 F.3d 316 (D.C. Cir. 2017)	Half for/half against wildlife
<i>Am. Wildlands v. Kempthorne</i> , 530 F.3d 991 (D.C. Cir. 2008)	Against wildlife
<i>In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. (Safari Club Int'l v. Salazar)</i> , 709 F.3d 1 (D.C. Cir. 2013)	Half for/half against
<i>Fund for Animals, Inc. v. Kempthorne</i> , 472 F.3d 872 (D.C. Cir. 2006)	Half for/half against
<i>Rancho Viejo, LLC v. Norton</i> , 323 F.3d 1062 (D.C. Cir. 2003)	For wildlife
<i>Conservation Force, Inc. v. Jewell</i> , 733 F.3d 1200 (D.C. Cir. 2013)	Half for/half against
<i>Am. Bird Conservancy, Inc. v. Fed. Comm'n Comm'n</i> , 516 F.3d 1027 (D.C. Cir. 2008)	For wildlife
<i>Sierra Club v. Van Antwerp</i> , 661 F.3d 1147 (D.C. Cir. 2012)	Three quarters against/ one quarter for
<i>Swanson Grp. Mfg., LLC v. Jewell</i> , 790 F.3d 235 (D.C. Cir. 2015)	For wildlife
<i>Animal Legal Def. Fund, Inc. v. Glickman</i> , 204 F.3d 229 (D.C. Cir. 2000)	Against wildlife
<i>Theodore Roosevelt Conservation Partn. v. Salazar</i> , 616 F.3d 497 (D.C. Cir. 2010)	Against wildlife
<i>Gerber v. Norton</i> , 294 F.3d 173 (D.C. Cir. 2002)	For wildlife
<i>Grunewald v. Jarvis</i> , 776 F.3d 893 (D.C. Cir. 2015)	Half for/half against
<i>Humane Soc'y of the U.S. v. Glickman</i> , 217 F.3d 882 (D.C. Cir. 2000)	For wildlife
<i>Oceana, Inc. v. Locke</i> , 670 F.3d 1238 (D.C. Cir. 2011)	For wildlife
<i>Conservation Law Found. v. Fed. Energy Regulatory Comm'n</i> , 216 F.3d 41 (D.C. Cir. 2000)	Against wildlife
<i>Davis v. Latschar</i> , 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	