

With Brett Kavanaugh On The Supreme Court, Liberal Lawyers Shift Strategies

By Amanda Terkel
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They're stepping up their coordination and may try to avoid the federal court system altogether.



Now that Brett Kavanaugh is an associate justice, no one doubts that this new Supreme Court will be the most conservative in decades. (ASSOCIATED PRESS) Liberal lawyers are reassessing their Supreme Court strategies now that they face not only a solidly conservative majority but the addition of a justice who has openly expressed animosity toward them.

When Brett Kavanaugh angrily testified before the Senate Judiciary Committee in response to sexual assault and misconduct allegations, he accused “the Clintons” and “left-wing opposition groups” of orchestrating a smear campaign against him. And he warned in a very unjudicial statement, “What goes around comes around.”

“The really scary thing for us right now is there are all these cases teed up already in front of the court. It’s terrifying,” said one lawyer for a liberal group who requested anonymity to speak candidly. “I live in a constant state of terror, and I do not want [the court] to take any of these cases now. And if they do, it’s going to be bad.”

Liberal groups that spoke with HuffPost said it's obviously still too early to tell how the new court will shake out. After all, Anthony Kennedy — the swing justice Kavanaugh replaced — was once considered more solidly in the court's conservative majority. But over the years, he shifted.

"We think it will be incumbent upon [Kavanaugh] and the other justices to show, moving forward, that the Supreme Court is a nonpartisan institution and will be applying the law fairly and neutrally," said Ian Fein, an attorney with the Natural Resources Defense Council. "We'll see whether the court applies the law fairly or not, and that may affect our long-term strategy."

But based on Kavanaugh's record, they're prepared for hostile territory. There's a sense that Kavanaugh was just about the worst person President Donald Trump could have picked, not just because of his conservative positions but also because of his partisan political record. And none doubt that this new court will be the most conservative they've faced in decades.

Some ways liberal groups said they're looking to shift with the new Supreme Court:

More Coordination Among Groups

Environmental groups told HuffPost that they're starting to talk with one another about developing approaches to the Supreme Court. If one group decides on a strategy — like trying to keep an issue away from the high court — that decision won't matter if another group makes a different choice. So they figure it makes sense if they work together.

A model they're looking at is the Tribal Supreme Court Project, a 2001 initiative staffed by attorneys from the Native American Rights Fund and the National Congress of American Indians. In the late 1990s and early 2000s, there were a series of decisions on Indian law that dealt significant losses to the tribes. This project was set up to promote greater coordination and approve strategies for dealing with the Supreme Court — and sometimes that strategy means keeping cases away from the court as much as possible.

"I'm at a very high alarm level and am encouraging folks to seriously consider making some big strategy changes," said an environmental lawyer involved in the

discussions, “but I think other folks are a little more hesitant and don’t want to make any big lurches yet.”

Focusing More On State Legislatures And Courts

No one is planning to give up on the federal judiciary altogether. On some issues, there’s just not a choice.

“The challenge with immigration law is that it’s a fundamentally federal arena,” said Kamal Essaheb, the director of policy and advocacy at the National Immigration Law Center.

But on others, state courts will be getting a fresh look. In 1977, William Brennan — a liberal stalwart during his three decades on the Supreme Court — wrote a [law review article](#) urging liberals to focus more on state courts to protect civil liberties at a time when the Supreme Court was turning more conservative.

“Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated and systematic violations of civil liberties,” he wrote. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism.”

Instead, he said, citizens had to trust state courts, “whose manifest purpose is to expand constitutional protections.”

“We will be going full bore at the state level,” said Pat Gallagher, the Sierra Club’s legal director, “because our biggest problem that we face is climate change and the need to convert our economy from a fossil-fuel-dependent economy to a clean energy economy. ... It just has to be done at the state level.”

“It’s not a new idea to turn to state courts for protection,” said Shannon Minter, the legal director for the National Center for Lesbian Rights, pointing to key decisions in the marriage equality movement that laid the groundwork for Supreme Court cases like [Lawrence v. Texas](#) and [Obergefell v. Hodges](#). “But given that we’re facing a much less receptive U.S. Supreme Court, I think you’ll probably see more litigation happening in state courts.”

Aside from the judiciary, liberal groups will be surveying the landscape at the state and local government levels after the November elections. During the Trump administration, states have been at the forefront of challenging some of the president's most conservative policies.

A central issue around Kavanaugh was whether he would overturn *Roe v. Wade*, the landmark case guaranteeing a woman's right to an abortion. Erica Sackin, a spokeswoman for Planned Parenthood, said the group is "doubling down" on its state policy work and looking at where it can expand services and strengthen abortion funds, which provide financial resources for women who can't afford the full cost of an abortion.

"We will work to create an ironclad group of states where abortion will remain legal even under a hostile Supreme Court," she said. "And we'll continue to fight tooth and nail to stop legislation that seeks to further restrict access to abortion."



Legal groups will increasingly tailor their arguments to Chief Justice John Roberts with the more conservative Supreme Court. (ASSOCIATED PRESS)

Swaying Chief Justice John Roberts

Ever since Chief Justice John Roberts' decision upholding the Affordable Care Act, liberals have been looking at him as someone who may occasionally break with the party's conservative wing. It's not that he's not conservative; there's just a sense that he is more of an institutionalist who doesn't want the Supreme Court to completely lose the public's trust.

Lawyers said that more arguments before the court will likely be tailored to influence Roberts, just as they were for Kennedy and Sandra Day O'Connor before him.

"He has some institutional sense, institutional preservation instincts, institutional reputation concerns, and those might be more heightened with a Justice Kavanaugh joining," said Thomas A. Saenz, the president and general counsel of the Mexican American Legal Defense Fund.

Several people pointed to Roberts' comments in the days after the Senate confirmed Kavanaugh, in which he said the job of being a justice "requires independence from the political branches."

"Our role is very clear: We are to interpret the laws and Constitution of the United States and ensure that the political branches act within them," he said.

"Those were heartening comments, and we'll see what actually happens when ideologically charged cases come before the new court, but it was good to know that the chief justice and hopefully the other justices are keeping an eye on their institutional legitimacy," said Adav Noti, the senior director of trial litigation at the Campaign Legal Center, which is a nonpartisan organization that focuses on campaign finance, voting rights, redistricting and government ethics.

Exposing The Bad

Sometimes, a bad decision by the Supreme Court can be useful. And liberal groups may have to rev up their activist wings in the Kavanaugh era to use those rulings to change policy in other ways.

"Sometimes you have to have the court reveal themselves, if you will, in a bad ruling that can then be legislatively overturned or certainly can influence the electorate,"

said Saenz. “Sometimes our job is to expose the court for the full scope of their thinking.”

“If that’s monstrous thinking, then there’s usually some political pushback in the form of a legislative fix or participation and the electorate,” he added. “What federal courts do does influence voters.”