NACAA
national association of clean air agencies

Change at the U.S. Supreme Court: What Does it Mean for the Clean Air Act?

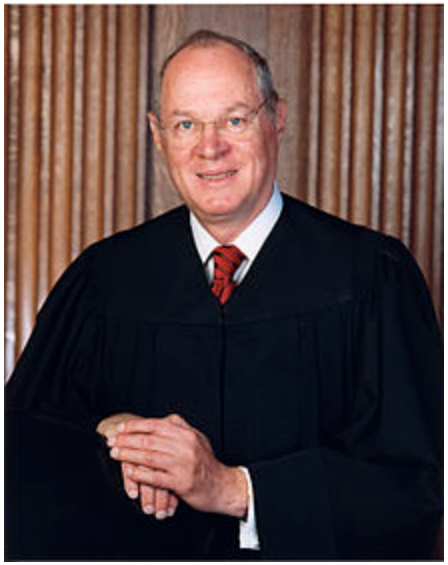
NACAA 2018 Summer Board of Directors and Committee Chairs' Meeting

Milwaukee, WI
July 28, 2018

Karen Mongoven, NACAA

Justice Kennedy Retires

- On June 27, 2018, Justice Anthony Kennedy announced his retirement from the U.S. Supreme Court
- Nominated by President Reagan, joined SCOTUS on February 18, 1988



NACAA
national association of clean air agencies

Justice Kennedy Retires

- Kennedy, though conservative, has often served as a “swing” vote between the Court’s four reliably liberal and four reliably conservative justices
- In nominating his successor, President Trump has the opportunity to move the Court firmly to the right
- On July 9, Trump nominated D.C. Circuit Judge Brett Kavanaugh to replace Justice Kennedy

NACAA
national association of clean air agencies

Kennedy and the Clean Air Act

- During his tenure, Justice Kennedy participated in 11 Clean Air Act cases
- In all but one of those cases, he sided with the majority
  - Exception was Alaska Dep't of Envtl. Conservation v. EPA (2004), in which the 5-4 majority held that EPA has authority to overrule a state's BACT determination
  - Kennedy authored dissent, joined by the conservatives
- Recent CAA cases:
  - Michigan v. EPA (2015): Joined 5-4 opinion by Scalia, held that EPA unlawfully ignored costs when deciding to regulate the emission of hazardous air pollutant from power plants in MATS rule.

NACAA
national association of clean air agencies

Kennedy and the Clean Air Act

- Recent CAA cases (cont.):
  - Utility Air Regulatory Group v. EPA (2014): Complex 5-4 decision, Kennedy joined with majority to strike down EPA's GHG Tailoring and Timing Rules, held that EPA may not impose PSD and Title V permitting obligations on stationary sources based solely on their GHG emissions, but may regulate GHG emissions from sources already subject to PSD based on emissions of conventional pollutants.
  - EPA v. EME Homer City Generation (2014): Reversed a D.C. Circuit opinion that struck down the Cross State Air Pollution Rule. Kennedy joined 6-2 majority opinion by Ginsburg (Alito did not participate).

NACAA
national association of clean air agencies

Kennedy and the Clean Air Act

- Recent CAA cases (cont.):
  - AEP v. Connecticut (2012): Held that the Clean Air Act displaces the federal common law right to seek the abatement of CO_2 emissions from fossil fuel fired power plants. Kennedy joined 8-0 opinion by Ginsburg (Sotomayor did not participate).
- Where CAA opinions have been split, Justice Kennedy provided a "liberal swing" vote in only one case: Massachusetts v. EPA (2007).

NACAA
national association of clean air agencies

Massachusetts v. EPA (2007)

- A group of states and NGOs sued EPA over its failure to act on a petition to regulate GHG emissions from automobiles under CAA Section 202(a)(1)
- 5-4 decision with Justice Kennedy joining justices Stevens, Souter, Ginsberg and Breyer in the majority
- Justice Stevens authored the majority opinion, which included three holdings:
  - The petitioning states had standing to challenge EPA's denial of their rulemaking petition
  - GHGs fall within the Clean Air Act's definition of "air pollutant"
  - EPA must evaluate whether an endangerment finding is appropriate and cannot rely on separate policy justifications as a rationale not to regulate.
- Chief Justice Roberts and Justices Scalia, Thomas and Alito dissented

NACAA
national association of clean air agencies

Massachusetts v. EPA (2007)

- Since 2007, the court has undergone the following changes:
  - Justice Souter ➔ Justice Sotomayor (2009)
  - Justice Stevens ➔ Justice Kagan (2010)
  - Justice Scalia ➔ Justice Gorsuch (2017)

    and soon….
  - Justice Kennedy ➔ Justice Kavanaugh?

NACAA
national association of clean air agencies

Massachusetts v. EPA (2007)

- If confirmed, could Justice Kavanaugh provide a crucial vote to overturn Massachusetts?
- Justice Alito and Justice Thomas have twice indicated they would overturn Massachusetts if given the chance
  - AEP v. Connecticut (2011) – concurrence based on the "assumption … for the sake of argument" that Massachusetts v. EPA is correct
  - Utility Air Regulatory Group v. EPA (2014) – "Massachusetts v. EPA was wrongly decided… and these cases further expose the flaws with that decision."
- But Chief Justice Roberts and Justice Scalia declined to join both concurrences

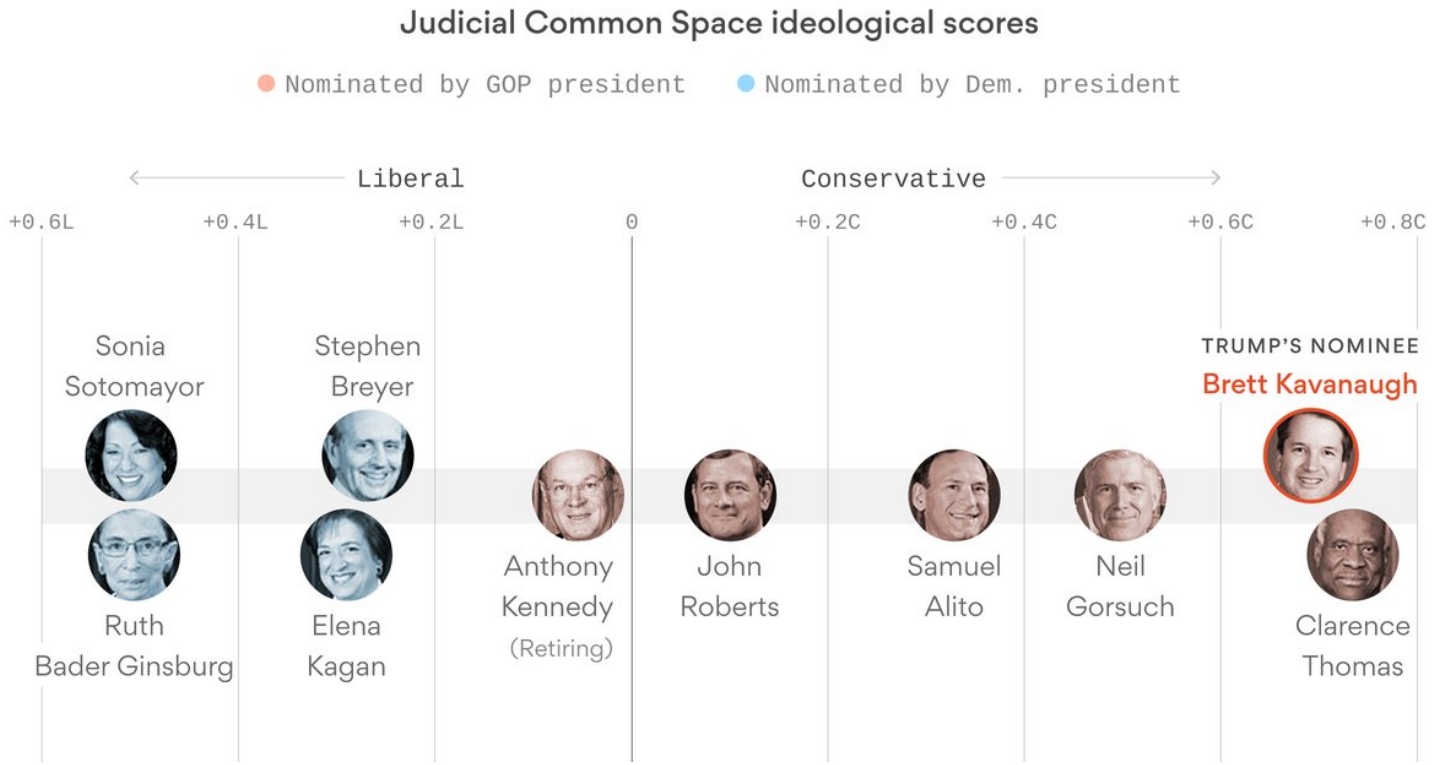
NACAA
national association of clean air agencies

Who is Brett Kavanaugh?

- 53 years old (born 1965 in Washington, D.C.)
- Yale undergrad, Yale law
- Clerked for Justice Kennedy (with Gorsuch), and for Judges Kozinski (9th Cir.) and Stapleton (3rd Cir.)
- Appointed to U.S. Court of Appeals for the D.C. Circuit in 2006 by President George W. Bush
- Authored more than 300 opinions in 12 years on the bench
- Previously worked for Independent Counsel Kenneth Starr; White House Counsel's Office; U.S. Solicitor General's Office; Kirkland & Ellis
- Lecturer at Harvard Law
- Considered "pragmatic but conservative"; a textualist

NACAA
national association of clean air agencies

How conservative is Kavanaugh?



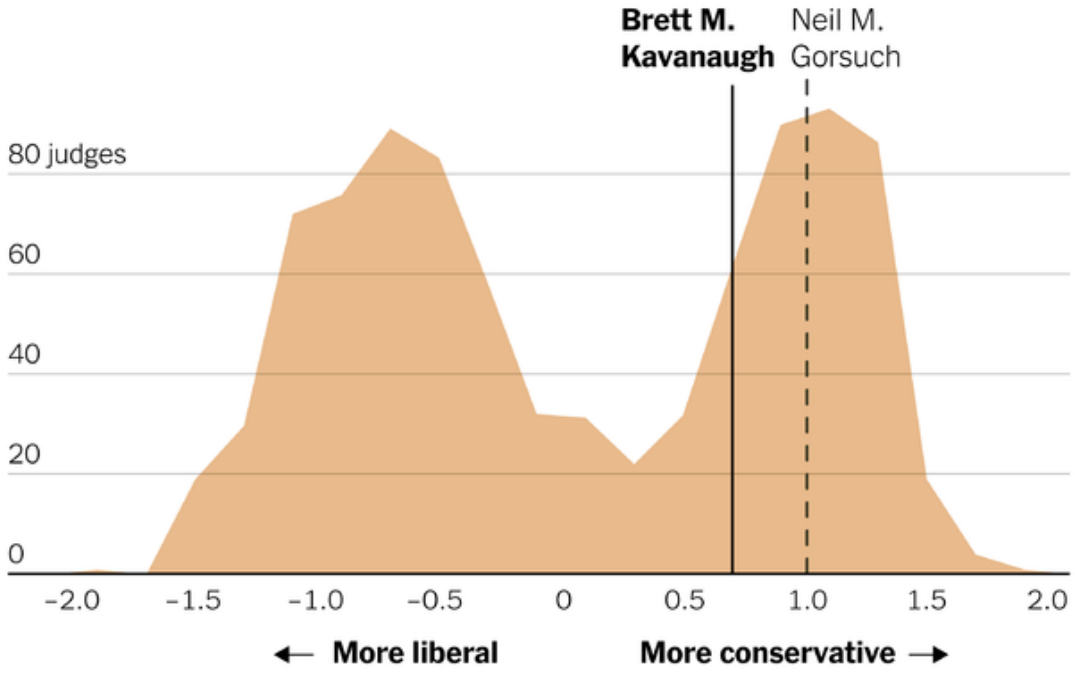
Source: Judicial Common Space, printed in Washington Post

NACAA
national association of clean air agencies

How conservative is Kavanaugh?

New York Times on how Kavanaugh compares with other federal judges. Based on the campaign finance scores of all current and former federal district and court of appeals judges nominated since 1981.

(Source: Database on Ideology, Money in Politics, and Elections; Adam Bonica, Stanford University Department of Political Science; Maya Sen, Harvard University, Kennedy School of Government; Adam Chilton and Kyle Rozema, University of Chicago Law School.)



NACAA
national association of clean air agencies

Significant CAA Opinions

- **MATS Dissent: White Stallion Energy Center, LLC v. EPA (D.C. Cir. 2014) (Kavanaugh, J., dissenting), rev'd in relevant part by Michigan v. EPA (S.Ct. 2015).**
  - EPA argued that it need not consider costs in determining whether regulation of HAPs emitted from electric power plants was "appropriate and necessary" under the CAA
  - D.C. Circuit panel on which Kavanaugh sat upheld EPA's approach
  - Kavanaugh dissented from that part of the decision, opining that it was unreasonable and therefore unlawful under the Administrative Procedure Act for EPA not to consider the costs imposed by regulations in determining whether such regulations were "appropriate and necessary"
  - Supreme Court reversed the panel decision. All nine Justices agreed that the statute requires consideration of costs. The Court's 5-4 majority opinion agreed with and cited Kavanaugh's dissent.

NACAA
national association of clean air agencies

Significant CAA Opinions

- **CSAPR: EME Homer City Generation, LP v. EPA (D.C. Cir. 2012), reversed in part and remanded (S.Ct. 2014).**
  - Kavanaugh wrote majority opinion – later overturned by Supreme Court – striking down CSAPR
  - Reasoned that EPA exceeded its statutory authority under the CAA by requiring upwind states to reduce emissions by more than their own significant contributions to pollution in downwind states
  - Supreme Court reversed that decision in part and remanded in a 6-2 decision. Court concluded that such potential "over-control" did not "'justif[y] wholesale invalidation" of the rule. The Court stated instead that upwind states could bring "particularized, as-applied" challenges to the rule.
  - The only Kavanaugh opinion reversed by SCOTUS

NACAA
national association of clean air agencies

Significant CAA Opinions

- **HFC Replacement Rule: Mexichem Fluor, Inc. v. EPA (D.C. Cir. 2017).**
  - Wrote 2-1 majority opinion for panel that struck down part of an EPA rule requiring manufacturers to replace hydrofluorocarbons (HFCs) in aerosols, motor vehicle air conditioners, commercial refrigerators and foams with lower global-warming-potential replacements.
  - Kavanaugh agreed with HFC producers that once a manufacturer replaced an ozone-depleting substance with a non-ozone-depleting substitute that had once been deemed acceptable by the agency – here, HFCs – EPA could not require the manufacturer to replace the HFCs with an alternative later determined to be safer.
  - Kavanaugh's decision turned largely on the meaning of the statutory word "replace"; he reasoned it connotes a one-time action and EPA stretched the word "beyond its ordinary meaning" in a manner that "borders on the absurd."
  - HFC replacement manufacturers (Honeywell and Chemours) and NRDC want SCOTUS to overturn Kavanaugh's opinion; 18 states filed amicus briefs this week in support of that effort.

NACAA
national association of clean air agencies

More Kavanaugh CAA Opinions….

- **RFS waiver: Americans for Clean Energy v. EPA (D.C. Cir. 2017).** Held: The RFS program's 'inadequate domestic supply' provision authorizes EPA to consider supply-side factors affecting the volume of renewable fuel that is available to refiners, blenders, and importers to meet the statutory volume requirements. It does not allow EPA to consider the volume of renewable fuel that is available to ultimate consumers or the demand-side constraints that affect the consumption of renewable fuel by consumers." The court vacated EPA's decision to use its "inadequate domestic supply" waiver authority to reduce total renewable fuel volume requirements for 2016 and remanded the rule to EPA. (3-0 opinion for court by Kavanaugh)
- **CPP Proposed Rule: In re Murray Energy Corp. (D.C. Cir. 2015).** Held: The D.C. Circuit does not have authority to review the legality of EPA's Clean Power Plan proposed rule to limit carbon dioxide (CO_2) from existing power plants because the proposal is not a final agency action. (2-judge opinion for court by Kavanaugh, 3rd judge concurred in judgment)

NACAA
national association of clean air agencies

… and more CAA opinions…

- **2012 $PM_{2.5}$ NAAQS: Nat'l Ass'n of Mfrs. v. EPA (D.C. Cir. 2014).** Rejected industry challenges to 2012 standard. Among other things: "Petitioners simply have not identified any way in which EPA jumped the rails of reasonableness in examining the science. EPA offered reasoned explanations for how it approached and weighed the evidence, and why the scientific evidence supported revision of the NAAQS." (3-0 opinion for court by Kavanaugh)
- **Portland Cement MACT: NRDC v. EPA (D.C. Cir. 2014).** Held: the emissions-related provisions of 2013 rule are permissible, including the extended 2015 compliance deadline, but **affirmative defense for private civil suits exceeds EPA's authority**. (3-0 opinion for court by Kavanaugh)
- **CO NAAQS: Communities for a Better Environment v. EPA (D.C. Cir. 2014).** Held: EPA acted reasonably in 2011 decision to retain the existing primary CO standards and petitioners lacked standing to challenge EPA's decision not to set a secondary standard. (3-0 opinion for the court by Kavanaugh)

NACAA
national association of clean air agencies

…and still more (not exhaustive)

Biomass Deferral Rule: Ctr. for Biological Diversity v. EPA (D.C. Cir. 2013). Court vacated EPA's "Deferral Rule" for biogenic carbon dioxide (CO_2) emissions, holding that the agency was not authorized under the CAA to temporarily exempt such emissions from the PSD and Title V permitting programs. (Decision was 2-1; Kavanaugh wrote concurring opinion).

- Kavanaugh: "As a policy matter, EPA may have very good reasons to temporarily exempt biogenic carbon dioxide from the PSD and Title V permitting programs. But Congress sets the policy in the statutes it enacts; EPA has discretion to act only within the statutory limits set by Congress. The statute does not give EPA the authority to distinguish a stationary source's emissions of biogenic carbon dioxide from emissions of other forms of carbon dioxide for purposes of these permitting programs."…
- "All of that said, I have mixed feelings about this case. **That's because I believe, contrary to this Circuit's precedent, that the PSD statute does not cover carbon dioxide, whether biogenic or not. *See Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc)."**

NACAA
national association of clean air agencies