

Clean Air Act Practitioners Debate Brett Kavanaugh's Judicial Record

“I have upheld agencies in dozens and dozens of cases,” insisted now-Justice Brett M. Kavanaugh, parrying questions from Democratic senators accusing him of leading an effort to “rein in” executive agencies. Meanwhile, environmental commentators offered dueling versions of his record.

The Heritage Foundation, for example, touted examples of environmental victories penned by Kavanaugh. Earthjustice, by contrast, proclaimed that he had ruled against the environment 89 percent of the time. Observers noted that he recognized climate change as a “pressing policy issue.” At the same time, he posited a narrow vision of EPA’s statutory authority, admonishing that “climate change is not a blank check for the president.”

Clean Air Act practitioners are well familiar with Kavanaugh’s body of work from his service on the D.C. Circuit. No other

Supreme Court nominee had been as steeped in the act. Often referred to as the second highest court in the land, the D.C. Circuit is clearly the most important court for the Air Act, given its exclusive jurisdiction over EPA’s nationwide rules and actions.

And Judge Kavanaugh stood out among his peers. He was a key protagonist in the D.C. Circuit’s last three air cases that went up to the Supreme Court, voting against EPA each time. His dissent (from the denial of rehearing en banc) questioning the agency’s authority to treat greenhouse gases as a “pollutant” for purposes of stationary source permitting was vindicated in *Utility Air Regulatory Group v. EPA* (2014). His decision striking down the agency’s regulation of interstate transport of pollutants was reversed in *EPA v. EME Homer City Generation* (2014). And his dissenting opinion

proved to be prescient in *Michigan v. EPA* (2015), involving the Mercury and Air Toxics Standard, as the Supreme Court ultimately agreed with his criticism of the agency’s failure to consider costs. His decisions were driven by his judicial philosophy: intense textual analysis; skepticism of *Chevron* deference; insistence on clear statements from Congress; proponent of cost-benefit analysis.

The picture may not be as stark as some contend. From January 2014 through September 2018, the D.C. Circuit issued 52 decisions and substantive orders in CAA cases. By my count, EPA had a winning average of 73 percent in those cases — 38 favorable or largely favorable, 10 unfavorable, 4 mixed. Kavanaugh participated in 17 of these cases, authoring opinions in 11 of them.

Each of these cases was decided during the Obama administration or involved review of Obama-era regulations. EPA’s record here was 14-2-1 — winning 82 percent. By comparison, Kavanaugh’s voting record in these 17 cases was 12 in favor of EPA, 3 against, and 2 mixed, thus ruling for EPA about 71 percent of the time.

How did Kavanaugh’s voting record compare to that of his colleagues? The 17 cases produced 51 individual votes, with three judges on each panel. All told, EPA’s record was 41 votes for, 6 against, and 4 mixed (an 80 percent favorability percentage). Kavanaugh’s voting record for EPA (71 percent favorable) was somewhat lower than average. That remains true even if we break down the 51 votes among Democratic-appointed judges (83 percent favorable to EPA) and Republican-appointed judges (79 percent favorable).

Of course, these data reflect a five-year snapshot, not his whole tenure on the bench. Moreover, the agency is sued



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by environmental groups as often as it is sued by industry. And these cases run the gamut from profound questions of congressional purpose to routine administrative-law cases decided on procedural grounds. Nonetheless, measuring a judge’s record based on how the agency fared provides at least one objective benchmark for practitioners.

Taking the data with an appropriate grain of salt, what do they show? In general, they paint a picture of EPA having a very good CAA record in the D.C. Circuit, winning around three-quarters of its cases, with a noticeably, but not radically, better record before Democratic-appointed judges. And Kavanaugh’s record — while indicating somewhat lower than average favorability for EPA compared with his peers — fits generally within this pattern.

Practitioners also look for clues in two important CAA cases where Kavanaugh criticized environmental positions at argument but did not vote. In the hearing on the Clean Power Plan in 2016, Kavanaugh led the charge in questioning EPA’s authority. More recently, a decision by a two-judge panel, issued in 2018 after Kavanaugh recused himself, set aside the current EPA’s two-year delay of the prior administration’s amendments bolstering the act’s risk management program for chemical facilities. The panel decried the agency for making a “mockery” of the statute, but Kavanaugh’s questions at oral argument indicate that he may have harbored greater sympathy for the Trump EPA’s ability to change policy direction.

His CAA record is worse than some, but he was not a major outlier on air decisions