# Judge Brett Kavanaugh

Judge Brett Kavanaugh is currently a United States Circuit Court Judge of the United States Court of Appeals for the District of Columbia Circuit. A protégé of Kenneth Starr, Kavanaugh played a lead role in drafting the Starr report, which urged the impeachment of President Bill Clinton. Kavanaugh also served as Staff Secretary in the Executive Office of the President of the United States during the George W. Bush Administration.

Key findings:

**A protégé of Ken Starr, Kavanaugh supported Bill Clinton’s impeachment and worked in the George W. Bush Administration before his appointment to the federal bench.** Though articles in the Washington Post have described Kavanaugh as “charming…brilliant, affable and disarming,” he has been a part of some of the most vicious partisan struggles in recent times. After college and law school at Yale, Kavanaugh clerked for federal appellate judge Alex Kozinski and Supreme Court Justice Anthony Kennedy. In 2003, George W. Bush nominated Kavanaugh to the DC Circuit; however, he didn’t win Senate confirmation until 2006 due to concern among Democrats regarding Kavanaugh’s work on the Starr investigation, warrantless wiretapping, and detainee treatment. According to an article in the Christian Science Monitor, “When…Bush first nominated…Kavanaugh…the nominee had no judicial experience, little courtroom experience…” In 2006, the American Bar Association downgraded its rating of Kavanaugh from “well-qualified” to “qualified.” A 2003 ABA review noted that “he had never tried a case to verdict or judgment” and “had very little experience with criminal cases…one judge who witnessed the nominee’s oral presentation in court commented that the nominee was ‘less than adequate’ before the court, had been ‘sanctimonious,’ and had demonstrated ‘experience on the level of an associate.’” Ultimately, he was confirmed by the Senate in a 57-36 vote. Kavanaugh is married with two daughters.

**Kavanaugh has a conservative judicial philosophy and has applied principles of textualism and originalism; however, he has also been called pragmatic, though multiple news outlets have reported on what SCOTUS Blog called “a string of cases involving rulings” by the EPA where “Kavanaugh has largely…attempted to rein in Obama-era regulations.”** According to a 2018 article on SCOTUS Blog, “Kavanaugh generally brings a pragmatic approach to judging, although his judicial philosophy is conservative, and he has applied principles of textualism and originalism espoused by the late Justice Antonin Scalia.” A 2002 article in the Washington Post noted that “Kavanaugh finds time to speak at occasional gatherings of the Federalist Society.” “I will interpret the law as written and not impose personal policy choices…I will call them as I see them…” he said in 2006; he added that some of the court’s worst times were “moments of judicial activism.” In 2018, SCOTUS Blog wrote that notable among Kavanaugh’s cases “are a string of cases involving rulings by the Environmental Protection Agency…Kavanaugh has largely…attempted to rein in Obama-era EPA regulations…” A 2015 article in Greenwire said that Kavanaugh “has pounded the administration in a series of legal opinions rebuffing some of its most high-profile air pollution rules.” SCOTUS Blog also wrote that “Kavanaugh is clearly inclined to resist the expansion of administrative-agency authority, but he has tended to approach administrative law issues on a case-by-case basis, rather than by mounting a frontal attack on the doctrine of deference to agency interpretations of ambiguous statutes famously set forth in Chevron v. National Resources Defense Council.” SCOTUS Blog noted that although “not a dyed-in-the-wool originalist like Scalia, who maintained that judges should attempt to interpret the words of the Constitution as they were understood at the time they were written, Kavanaugh has relied on originalist principles in controversial cases…In labor and employment law cases more generally, Kavanaugh’s rulings have tended to favor employers.” A 2018 article in the Los Angeles Times said that “he has avoided any direct comments in his legal opinions about Roe v. Wade.”

**As his potential Supreme Court appointment is seriously weighed by the Trump Administration, Kavanaugh has drawn criticism from some conservatives for certain of his rulings on social issues.** A 2018 article in SCOTUS Blog said that “In some high-profile cases, Kavanaugh has not always pleased ideological purists in conservative circles. For example, Kavanaugh rejected two constitutional challenges to the ACA…Kavanaugh took a conservative position, but did not go as far as one of his colleagues, in a recent case combining the hot-button issues of abortion and immigration. In Garza v. Hargan, a pregnant undocumented teen in immigration custody wanted to obtain an abortion, but was prevented by her government custodians from doing so. Kavanaugh wrote a panel decision vacating a district-court order that required the government to allow the teen to leave the detention facility to obtain the abortion; the panel imposed an additional waiting period to give the government time to obtain a sponsor. According to a 2018 CNN article, “a source who opposes abortion rights who was only willing to speak on background, said concerns have been expressed privately to the White House that Kavanaugh's dissent should have gone farther.” Regarding the ACA, a 2018 article in New York Magazine said that “even though Kavanaugh made it abundantly clear that he was horrified by the individual mandate at issue in the case, he rejected a challenge to it as untimely, while providing some foundation for the rationalization of the mandate under Congress’s tax powers, which Chief Justice John Roberts seized upon in his majority opinion upholding the mandate.”

**Kavanaugh has issued several opinions and statements on environmental issues:**

Climate Change. According to a 2012 article in Greenwire, “Kavanaugh…concluded by observing that climate change is an ‘urgent and important’ problem but one that Congress must take the lead on.” In 2017, Kavanaugh wrote that “EPA’s well-intentioned policy objectives with respect to climate change do not on their own authorize the agency to regulate…Under the Constitution, congressional inaction does not license an agency to take matters into its own hands, even to solve a pressing policy issue such as climate change…Climate change is not a blank check for the president.” Greenwire reported that “some experts saw…Kavanaugh’s remarks…as the court’s questioning the ability of EPA to use the Clean Air Act to issue regulations aimed at addressing climate change.”

EPA Biofuels. In 2017, Kavanaugh’s court rejected EPA’s justification for reducing renewable fuel requirements in a win for the biofuels industry. Kavanaugh wrote that “EPA exceeded its authority under the 'inadequate domestic supply' provision when it interpreted the term 'supply' to allow it to consider demand-side constraints in the market for renewable fuel.”

EPA Cement Kiln Emissions. A 2018 article in SCOTUS Blog said that “on occasion, a Kavanaugh opinion siding with the EPA’s opponents has been a win for environmental interests, as in Natural Resources Defense Council v. EPA, in 2014, in which he wrote an opinion that vacated an EPA rule establishing an affirmative defense for cement-kiln operators sued for exceeding emission limits.”

EPA Cross-State Air Pollution Rule. In 2012, in a sweeping 2-1 decision, Kavanaugh’s court vacated EPA’s cross-state air pollution rule, finding the agency violated federal law by exceeding its authority in setting emissions limits on states. According to an article in SNL Daily Coal Report, “Writing for the two-judge majority of the three-judge panel…Kavanaugh held that the CSAPR required states to make emissions reductions beyond what was required by the law, and that the EPA trampled on states' rights by improperly failing to provide the states with an initial opportunity to make reductions on their own accord before imposing federal implementation plans. ‘Congress could well decide to alter the statute to permit or require EPA's preferred approach to the good neighbor issue,’ Kavanaugh wrote. ‘Unless and until Congress does so, we must apply and enforce the statute as it's now written…Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set. EPA did not do so here…’” According to a 2015 article in Clean Air Report, “The U.S. Court of Appeals for the District of Columbia Circuit's ruling remanding Cross-State Air Pollution Rule (CSAPR) ‘budgets’ to EPA for reconsideration casts major doubt over the viability of any future agency interstate emissions trading program because of strict limits the court appears to place on such programs, sources say…The D.C. Circuit's ruling for now ends long-running litigation of CSAPR -- although some related lawsuits continue - following an initial 2-1 decision issued in 2012 that rejected all challenges to the trading program. Critics of the rule then appealed it to the Supreme Court, which issued a 6-2 ruling in April 2014 that upheld the overall structure of the trading regime. However, the high court did not address a host of technical and other challenges to the rule -- including fights over the budgets, which are emissions limits established for states under CSAPR. The justices remanded the litigation over the rule to the D.C. Circuit, which issued a July 28 unanimous ruling that left the structure of the rule largely intact, but vacated and remanded to EPA the budgets for 13 states after finding flaws in EPA's approach.” Kavanaugh’s unanimous opinion focused on the need to avoid over-control of emissions from upwind states in CSAPR.

EPA Greenhouse Gas Emissions. In 2012, Kavanaugh dissented from the denial of rehearing a case involving regulation of greenhouse-gas emissions. According to an article in SCOTUS Blog, “Kavanaugh resisted the agency’s attempt to adapt the language of a 1970 statute, the Clean Air Act, to permit regulation of an environmental problem that Congress did not anticipate when it enacted the statute, concluding that the EPA had ‘exceeded its statutory authority’ when it issued the greenhouse-gas regulations. He argued that accepting the EPA’s approach would allow agencies to ‘adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness,’ and warned that ‘undue deference or abdication to an agency carries its own systemic costs.’” In 2017, Kavanaugh’s court, in a 2-1 decision, faulted EPA’s interpretation of a section of the Clean Air Act for addressing ozone-depleting substances; the court found EPA exceeded its authority with a rule that eliminated some uses for HFCs and approved certain replacements. According to an article in Greenwire, “Kavanaugh concluded that EPA only had authority to require the replacement once of ozone-depleting substances with non-ozone-depleting substance.”

EPA California Emissions. In 2010, Kavanaugh wrote an opinion upholding EPA’s review of California’s limits on emissions from in-use non-road engines.

EPA Ethanol Blends. In 2012, in a 2-1 ruling, Kavanaugh’s court rejected suits over EPA’s partial waivers allowing the sale of ethanol blends up to 15 percent after finding groups lacked the standing to sue. Kavanaugh’s dissent outlined reasons for why EPA’s partial waivers violated the Clean Air Act. In 2015, an article in the Examiner stated that “a federal appeals court slammed the ethanol industry…for suing the Environmental Protection Agency, and then slammed the EPA's defense even though the agency won the case…The three-judge panel ruled that because E30 ethanol fuels are not commercial, it had only one choice -- to ‘disagree’ and ‘therefore deny the petition,’ according to the opinion written by Judge Brett Kavanaugh…But the decision is as much a repudiation of the EPA's arguments in the case, as it is a denial of the green fuel industry's attempt to get the agency to approve E30…Kavanaugh's opinion briefly touches on the decision against the industry, before launching into why most of the EPA's key arguments against the petitioners were wrong. ‘Before reaching the merits’ of the industry's arguments, Kavanaugh writes, ‘we address several threshold arguments raised by EPA regarding the court's authority to decide the case. We reject each of those arguments.’ The bulk of Kavanaugh's opinion is directed at why the EPA is wrong.”

EPA Mining. In 2014, Kavanaugh wrote a panel decision upholding an EPA program aimed at addressing the environmental effects on waterways of mountaintop-removal coal mining. SCOTUS Blog wrote that it was one example of the fact that “Kavanaugh has not always ruled against the EPA.” “In our view, EPA and the Corps acted within their statutory authority…” he wrote. In 2016, Kavanaugh dissented in a split decision that upheld EPA’s Clean Water Act decision to block disposal sites underlying a final permit for a West Virginia coal mine, finding that the mining company failed to preserve its claims that the agency must consider the costs of blocking the project. “In my view, EPA's utterly one-sided analysis did not come close to satisfying the agency's duty under the Administrative Procedure Act and relevant Supreme Court precedents to consider and justify the costs of revoking Mingo Logan's previously issued permit,” Kavanaugh wrote.

EPA Monitoring of Emissions. In 2008, Kavanaugh dissented in a 2-1 ruling, concluding that the 1990 Clean Air Act amendments allowed the EPA to restrict state and local authorities’ emissions-monitoring activity.

EPA Power Plant Monitoring. In 2014, Kavanaugh dissented in part from a ruling that upheld the EPA’s decision not to consider cost when determining whether it is “appropriate and necessary” to regulate power plants. According to SCOTUS Blog, “He argued that ‘as a matter of common sense, common parlance, and common practice, determining whether it is ‘appropriate’ to regulate requires consideration of costs.’ Reversing the D.C. Circuit’s decision, the Supreme Court, in a 5-4 opinion by Scalia that quoted from Kavanaugh’s dissent, held that the EPA’s refusal to consider costs was unreasonable.”

Yucca Mountain. In 2012, Kavanaugh argued that NRC ought not to have the final word on the Yucca Mountain controversy; because DOE was acting expressly on the elected executive’s orders, the president’s choice should govern. According to a 2013 article in the Aiken Standard, “The 2-to-1 decision, written by Judge Brett Kavanaugh and joined in a concurring opinion by Judge Arthur Randolph, granted a writ of mandamus forcing the Nuclear Regulatory Commission to continue the licensing process for the Yucca Mountain facility.”

## Background

### Personal

**2002: Washington Post: “Kavanaugh Has Few Enemies…Even Legal Opponents Find Him Charming…”** “For a man with such a record of controversial cases, Kavanaugh has few enemies. Even legal opponents find him charming, and his friends say he has none of the hard edges of an ideologue. ‘I don't view him as a hard-core right-wing Republican, said Doug Gansler, a Democrat who is the Maryland state's attorney in Montgomery County. ‘He's seemingly much more moderate than his writings and words would suggest.’” [Washington Post, 10/15/02]

**2006: Washington Post: “Kavanaugh Also Is Widely Described as Brilliant, Affable and Disarming…”** “Kavanaugh also is widely described as brilliant, affable and disarming, attributes that prevented Democrats from successfully demonizing Roberts. And as they did with the Roberts nomination, Democrats are focusing largely on what they do not know about the nominee, an approach that gained little traction in the chief justice's confirmation debate.” [Washington Post, 5/9/06]

**Kavanaugh and Wife Had Two Daughters.** “Kavanaugh participates in various volunteer activities, including serving meals at Catholic Charities and tutoring at a local elementary school, and he has run the Boston Marathon twice. He is a parishioner at Blessed Sacrament Catholic Church. Kavanaugh and his wife Ashley – who served as the personal secretary to George W. Bush while he was governor of Texas and then president – have two daughters.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

### Professional

**After College and Law School at Yale, Kavanaugh Clerked for Federal Appellate Judge Alex Kozinski and Supreme Court Justice Anthony Kennedy.** “After college and law school at Yale, Kavanaugh clerked for federal appellate judge Alex Kozinski and Supreme Court Justice Anthony M. Kennedy, and worked briefly at President George H.W. Bush's Justice Department. In between and after stints on the Whitewater investigation, Kavanaugh spent about three years at Starr's firm, Kirkland & Ellis.” [Washington Post, 10/15/02]

* **In White House, Kavanaugh Developed Executive Order Related to Presidential Records Act, Giving Former Presidents and Their Families More Power to Prevent the Release of Presidential Powers.** “In the White House, Kavanaugh developed an executive order related to the Presidential Records Act, giving former presidents and their families more power to prevent the release of presidential papers. The order infuriated historians, and an effort to overturn it is underway in Congress.” [Washington Post, 10/15/02]

**1999: Washington Post Article Referred to Kavanaugh as “Starr Protégé…”** Starr protégé Brett Kavanaugh…Kavanaugh was concerned that Starr thought it was the catalogue of Clinton's sexual behavior that provided a basis for recommending that Clinton should be bounced out of office, rather than the alleged crimes. The narrative was going to give ammunition to Starr's critics that he was a sex-crazed prosecutor. [Washington Post, 6/15/99]

**2002: Washington Post: “For the Past Eight Years, Kavanaugh…Has Had a Hand in Virtually Every High-Profile Legal Battle Involving Presidential Power.”** “Indeed, for the past eight years, Kavanaugh, 37, has had a hand in virtually every high-profile legal battle involving presidential power.” [Washington Post, 10/15/02]

**2003: George W. Bush Nominated Kavanaugh to DC Circuit.** “Brett Kavanaugh helped write the report that led to Bill Clinton's impeachment. He helped litigate the Florida recount that made George W. Bush president. He's a White House aide who helped choose controversial judicial nominees. He even sued to try to stop the return of Cuban orphan Elian Gonzalez. So it's no surprise Democrats aren't pleased that Bush has nominated to the nation's second-highest court someone at the heart of so many of their political nightmares. ‘Brett Kavanaugh's nomination to the D.C. Circuit (Court of Appeals) is not just a drop of salt in the partisan wounds, it's the whole shaker,’ said Sen. Charles Schumer, D-N.Y, during confirmation hearings Tuesday before the Senate Judiciary Committee. Democrats contended that Kavanaugh can't put aside his partisan views to rule fairly and that the 39-year-old is too inexperienced for the high judgeship. Schumer called Kavanaugh's nomination ‘among the most political in history’ and ‘judicial payment for political services rendered.’” [Deseret Morning News, 4/28/04]

* **2006: AP: “Nomination Has Languished amid Democratic Concerns.”** “Kavanaugh, a former aide to special prosecutor Kenneth Starr and now White House staff secretary, was nominated to the post in 2003 but his nomination has languished amid Democratic concerns.” [AP, 5/2/06]
* **2006: Judiciary Committee Democrats Said Kavanaugh’s 2004 Confirmation Hearing Was Outdated after Kavanaugh Had Worked on Warrantless Wiretapping, Detainee Treatment, and Potential Connections to Jack Abramoff.** “Judiciary Committee Democrats, backed by all seven Gang of 14 Democrats, say Brett Kavanaugh's confirmation hearing two years ago is seriously outdated. That's because since then, Kavanaugh's worked in the same White House counsel's office that's dealt with warrantless wiretapping, with detainee treatment, and possibly with convicted lobbyist Jack Abramoff. What's more, as ranking Democrat Patrick Leahy noted, the American Bar Association's lowered its rating of Kavanaugh. A minority now, rather than a majority, finds him well qualified.” [NPR Morning Edition, 5/5/06]

**Christian Science Monitor: “When…Bush First Nominated…Kavanaugh…The Nominee Had No Judicial Experience, Little Courtroom Experience, and…Worked on Some of the Most Disturbing Issues for Democrats…”** “When President Bush first nominated his staff secretary, Brett Kavanaugh, to a vacancy on the US Court of Appeals for the District of Columbia Circuit in 2003, critics said he must be spoiling for a fight. The nominee had no judicial experience, little courtroom experience and also worked on some of the most disturbing issues for Democrats: the impeachment report on President Clinton and the Florida recount in the 2000 presidential election. As a senior official in the Bush White House, Mr. Kavanaugh also has helped pick and prep other controversial judicial nominees.” [Christian Science Monitor, 5/11/06]

**2006: American Bar Association Downgraded Its Rating of Kavanaugh from “Well-Qualified” to “Qualified.”** “The American Bar Association downgraded its rating of President Bush's appellate court nominee Brett Kavanaugh after new interviews raised concerns about his courtroom experience and open-mindedness, the chairman of the peer-review panel said Monday. The 14-member committee changed the White House aide's rating from ‘well-qualified’ to ‘qualified’ last month in part because six members of the panel downgraded their rating from the last time Kavanaugh was reviewed, panel chairman Steven Tober said. Nonetheless, Tober wrote in a statement Monday to the Senate Judiciary Committee that Kavanaugh is ‘indeed qualified to serve on the federal bench.’ ‘This nominee enjoys a solid reputation for integrity, intellectual capacity and writing and analytical ability,’ Tober wrote. ‘The concern has been and remains focused on the breadth of his professional experience.’ In the statement, Tober said new interviews conducted since the ABA's previous rating of Kavanaugh in 2005 raised ‘additional concern over whether this nominee is so insulated that he will be unable to judge fairly in the future.’” [AP, 5/8/06]

* **2003 ABA Review Noted “That He Had Never Tried a Case to Verdict Or Judgment” and “Had Very Little Experience with Criminal Cases.”** “But those who hope to block Kavanaugh's confirmation to the U.S. Court of Appeals for the D.C. Circuit -- generally seen as second only to the Supreme Court in importance -- received some new ammunition yesterday from the American Bar Association. When the ABA first reviewed Kavanaugh in 2003, it said in a statement yesterday, ‘it was noted that he had never tried a case to verdict or judgment’ and ‘he had very little experience with criminal cases.’” [Washington Post, 5/9/06]
* **ABA: “One Judge Who Witnessed the Nominee’s Oral Presentation in Court Commented that the Nominee Was ‘Less than Adequate’ before the Court, Had Been ‘Sanctimonious,’ and Demonstrated ‘Experience on the Level of an Associate.’”** “The statement said: ‘Additional interviews conducted in 2006 expanded upon those earlier concerns. One judge who witnessed the nominee's oral presentation in court commented that the nominee was 'less than adequate' before the court, had been 'sanctimonious,' and demonstrated 'experience on the level of an associate.' A lawyer who had observed him during a different court proceeding stated: 'Mr. Kavanaugh did not handle the case well as an advocate and dissembled.' The statement also said that some interviewees concluded that Kavanaugh was ‘insulated.’” [Washington Post, 5/9/06]

**May 2006: Kavanaugh Won Senate Approval as Appellate Judge in 57-36 Vote.** “White House aide Brett Kavanaugh won Senate confirmation as an appellate judge Friday after a three-year wait, a new victory for President Bush in a drive to place a more conservative stamp on the nation's courts. Bush said Kavanaugh would be ‘a brilliant, thoughtful and fair-minded judge.’ Confirmed on a 57-36 vote, Kavanaugh had been warmly praised by Republicans but widely opposed by Democrats who had briefly threatened to filibuster his nomination to the U.S. Court of Appeals for the District of Columbia Circuit. Democratic critics said the 41-year-old White House staff secretary's record spoke of loyalty to Bush but was thin on courtroom experience. ‘Mr. Kavanaugh is a political operative,’ said Sen. Edward Kennedy, D-Mass., a member of the Judiciary Committee. ‘I can say with confidence that Mr. Kavanaugh would be the youngest, least experienced and most partisan appointee to the court in decades.’” [AP, 5/26/18]

## Philosophy

### Judicial Philosophy

**2002: Washington Post: “As a Lawyer Working for Kenneth Starr…He Was Devoted to Restricting the Powers of the President…Now, as a Lawyer in the Bush White House, He Is Devoted to Expanding the Chief Executive’s Powers.”** “But for Bethesda native Kavanaugh, there's an intriguing twist: As a lawyer working for Kenneth Starr during the Whitewater investigation, he was devoted to restricting the powers of the president. Now, as a lawyer in the Bush White House, he is devoted to expanding the chief executive's powers.” [Washington Post, 10/15/02]

**2002: Washington Post: “Kavanaugh Finds Time to Speak at Occasional Gathering of the Federalist Society…”** “Still, Kavanaugh finds time to speak at occasional gathering of the Federalist Society, a club of elite conservative lawyers. But for those who see that as evidence he's an ideologue, Kavanaugh also belongs to the American Bar Association -- the organization Kavanaugh's office has removed from the judicial selection process.” [Washington Post, 10/15/02]

**2006: Kavanaugh: “I Will Interpret the Law as Written and Not Impose Personal Policy Choices…I Will Call Them as I See Them Regardless of Who the Litigants May Be.”** “Appeals court nominee Brett Kavanaugh told senators Tuesday he played no role as a White House aide in President Bush's policies on detainees, and he promised to use precedent, not personal views or loyalties, in issuing judgments from the bench. ‘I pledge to each member of the Senate that if confirmed I will interpret the law as written and not impose personal policy choices,’ Kavanaugh told the Senate Judiciary Committee. He noted that cases involving high government officials, including the president, often come before the U.S. Court of Appeals for the District of Columbia, the circuit where he would serve if confirmed. ‘I will call them as I see them regardless of who the litigants may be ... regardless of whether the president was involved,’ he said.” [AP, 5/9/06]

**2006: Kavanaugh Said Some of the Court’s Worst Times Were “Moments of Judicial Activism.”** “For all the independence he pledged, Kavanaugh voiced the same opposition to judicial activism as Bush when discussing Supreme Court decisions. Some of the court's worst times have been ‘moments of judicial activism,’ Kavanaugh said. He cited, among others, the 1857 Dred Scott decision, when the Supreme Court ruled that black men could be ‘treated as an ordinary article of merchandise…’ He asked whether Kavanaugh had been involved in several controversial White House policies, including treatment of detainees at Guantanamo Bay and any torture techniques used on detainees overseas. He also was asked whether he knew convicted lobbyist Jack Abramoff. He replied 'no' to each.” [AP, 5/9/06]

**2018: SCOTUS Blog: “Kavanaugh Generally Brings a Pragmatic Approach to Judging, Although His Judicial Philosophy Is Conservative, and He Has Applied Principles of Textualism and Originalism Espoused by the Late Justice Antonin Scalia.”** “Perhaps because of his years of executive-branch experience, Kavanaugh generally brings a pragmatic approach to judging, although his judicial philosophy is conservative, and he has applied principles of textualism and originalism espoused by the late Justice Antonin Scalia.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018: SCOTUS Blog: “Notable among (Kavanaugh’s Cases) Are a String of Cases Involving Rulings by the Environmental Protection Agency.”** “Adam Feldman of Empirical SCOTUS has calculated that as of the end of 2017, Kavanaugh had written opinions in 286 cases. Because the D.C. Circuit’s caseload is weighted toward review of administrative agency decisions, Kavanaugh has written most often in administrative law cases – 122, by Feldman’s count. Notable among these are a string of cases involving rulings by the Environmental Protection Agency.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

* **SCOTUS Blog: “Kavanaugh Has Largely…Attempted to Rein in Obama-Era EPA Regulations…”** “Kavanaugh has largely, but not always, attempted to rein in Obama-era EPA regulations, on several occasions in dissents from panel rulings or denials of rehearing on banc in cases that were later reversed in full or in part by the Supreme Court.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]
* **Greenwire: Kavanaugh Had a “Pretty Good Track Record” of Writing Dissents that Signaled to Scalia that the High Court Should Hear a Case.”** “In Greenwire, Amanda Reilly quotes a law professor’s assertion that Kavanaugh ‘has a ‘pretty good track record’ of writing dissents that signaled to Scalia that the high court should hear a case.’” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]
* **Greenwire: Kavanaugh “Has Pounded the Administration in a Series of Legal Opinions Rebuffing Some of Its Most High-Profile Air Pollution Rules.”** “A Republican operative-turned federal judge has emerged as one of the most powerful critics of President Obama's environmental rules. Judge Brett Kavanaugh -- a 50-year-old George W. Bush administration appointee to the U.S. Court of Appeals for the District of Columbia Circuit -- has pounded the administration in a series of legal opinions rebuffing some of its most high-profile air pollution rules. And because he's widely seen as an influential voice with Supreme Court justices and a leading contender for a GOP nomination to the high court, Kavanaugh's legal moves are being closely watched by those on both sides of the environmental debate. Given Kavanaugh's ‘track record in these important cases over the last few years, I would think him a judge that is more open to second-guessing the EPA than nearly anyone,’ said Tom Donnelly, counsel at the left-leaning Constitutional Accountability Center. Kavanaugh ‘happened to be on a bunch of big environmental cases, and he's written separately in several of them and the Supreme Court paid attention,’ said Jonathan Adler, a law professor at Case Western Reserve University who previously clerked on the D.C. Circuit.” [Greenwire, 10/13/15]

**2018: SCOTUS Blog: “Kavanaugh Is Clearly Inclined to Resist the Expansion of Administrative-Agency Authority, But He Has Tended to Approach Administrative Law Issues on a Case-by-Case Basis, Rather than by Mounting a Frontal Attack on the Doctrine of Deference to Agency Interpretations…”** “Kavanaugh is clearly inclined to resist the expansion of administrative-agency authority, but he has tended to approach administrative law issues on a case-by-case basis, rather than by mounting a frontal attack on the doctrine of deference to agency interpretations of ambiguous statutes famously set forth in Chevron v. National Resources Defense Council. Yet a recent case suggests that Kavanaugh is developing his own method of empowering courts to hold the line against the administrative state, through what Kavanaugh refers to as the ‘major rules doctrine.’ Chief Justice John Roberts notably relied on a similar approach in 2015, in King v. Burwell, a challenge to the Affordable Care Act’s health-care-subsidy system. Roberts wrote for a 6-3 majority that whether the ACA covered subsidies bought on federal exchanges was ‘a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.’” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018: SCOTUS Blog: “Kavanaugh Has Written Several Notable Rulings Involving Separation-of-Powers Concerns, Many Directed at Reining in the Authority of Independent Agencies.”** “Kavanaugh has written several notable rulings involving separation-of-powers concerns, many directed at reining in the authority of independent agencies.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018 SCOTUS Blog: “Kavanaugh Also Expressed an Expansive View of the Government’s Power to Detain Enemy Combatants—and a Limited View of the Court’s Authority to Curtail that Power…”** “Kavanaugh also expressed an expansive view of the government’s power to detain enemy combatants – and a limited view of the court’s authority to curtail that power — in a series of cases that followed the Supreme Court’s 2008 decision in Boumediene v. Bush, which held that enemy combatants detained at Guantanamo Bay are entitled to habeas corpus protections and can challenge their detention in federal court. After Boumediene, according to a 2011 article by Stephen Vladeck, commentators ‘have accused the D.C. Circuit in general—and some of its judges in particular – of actively subverting Boumediene by adopting holdings and reaching results that have both the intent and the effect of vitiating the … decision.’ Prominent among those judges is Kavanaugh. For example, in al-Bihani v. Obama, in 2010, Kavanaugh voted with a panel that held that ‘preponderance of the evidence’ is the appropriate burden of proof for the government to meet in Guantanamo detention cases, and that hearsay evidence can properly be admissible in these cases.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018: SCOTUS Blog: “In Recent Years, Kavanaugh Has Begun to Spell out an Approach to Statutory Interpretation, in what He Explains as an Effort to Limit Judicial Activism.”** “In recent years, Kavanaugh has begun to spell out an approach to statutory interpretation, in what he explains as an effort to limit judicial activism. In a 2017 speech at Notre Dame Law School, Kavanaugh, like Roberts during his confirmation hearing, endorsed a ‘vision[] of the rule of law as a law of rules, and of the judge as umpire,’ cautioning against allowing judges to import their policy preferences into their rulings. He argued that ‘[s]everal substantive canons of statutory interpretation, such as constitutional avoidance, legislative history, and Chevron, depend on an initial determination of whether the text is clear or ambiguous,’ and that there are no clear guidelines for making that determination. He went on to assert that rather than trying to decide whether a statute is ambiguous, ‘judges should strive to find the best reading of the statute, based on the words, context, and appropriate semantic canons of construction.’ In a 2016 review of ‘Judging Statutes,’ by Robert Katzmann, Kavanaugh took issue with Katzmann’s endorsement of the use of legislative history to interpret statutes, arguing that ‘the decision whether to resort to legislative history is often indeterminate,’ and that the use of legislative history should ‘be largely limited to helping answer the question of whether the literal reading of the statute produces an absurdity.’” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018: SCOTUS Blog: “Although Not a Dyed-in-the-Wool Originalist Like Scalia…Kavanaugh Has Relied on Originalist Principles in Controversial Cases.”** “Although not a dyed-in-the-wool originalist like Scalia, who maintained that judges should attempt to interpret the words of the Constitution as they were understood at the time they were written, Kavanaugh has relied on originalist principles in controversial cases. In Heller v. District of Columbia, a 2011 challenge to a city law, enacted after an earlier law regulating handguns was invalidated by the Supreme Court, that banned possession of semi-automatic rifles and required registration of all guns, Kavanaugh dissented from the panel opinion that applied intermediate scrutiny to largely uphold the statute. In Kavanaugh’s words, the Supreme Court left ‘little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.’” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018: SCOTUS Blog: “In Labor and Employment Law Cases More Generally, Kavanaugh’s Rulings Have Tended to Favor Employers.”** “In labor and employment law cases more generally, Kavanaugh’s rulings have tended to favor employers. In 2016, in Verizon New England v. NLRB, Kavanaugh held that the NLRB had improperly overturned an arbitration decision when it found that a ‘union’s waiver of its members’ right to picket did not waive their right to visibly display pro-union signs in cars on Verizon property.’ In National Association of Federal Employees v. Vilsack, in 2012, he dissented from an opinion holding that a random drug-testing program for government employees who work in residential Job Corps centers required a showing of individualized suspicion under the Fourth Amendment. Partial dissents from panel rulings upholding NLRB findings of unfair labor practices or discriminatory hiring include Midwest Division MMC v. NLRB (2017) and NLRB v. CNN America (2017).” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018: Los Angeles Times: “He Has Avoided Any Direct Comments in His Legal Opinions about Roe v. Wade.** “Like many judges, he has avoided any direct comments in his legal opinions about Roe vs. Wade, the landmark abortion ruling that will loom large over upcoming confirmation hearings.” [Los Angeles Times, 6/29/18]

### Special Prosecutor

**1999: Kavanaugh Urged Senate Confirmation for Special Prosecutor.** KAVANAUGH: “Well, I think there's no way to avoid some political overtones to what's being done. But what you want to avoid is the perception, the public perception that there's some kind of political assaults being conducted on the administration. If the special prosecutor is confirmed by the Senate; appointed by the administration, I think that would take a lot of the public, make a lot of the public assaults less credible as they occurred over time.” [CNN, 6/30/99]

### Obamacare

**2011: Kavanaugh Said Health Care Overhaul “Could Be the Blueprint for a Privatized Social Safety Net…Delicate Act to Declare an Act of Congress Unconstitutional.”** “Just down the street from the U.S. Capitol where the health care overhaul was written, three appeals court judges on Friday probed whether the landmark measure signals a new direction in social policy and if it's up to courts to ‘get in the middle’ of that movement, as Judge Brett Kavanaugh, a Republican appointee, put it. ‘This could be the blueprint for a privatized social safety net,’ mused Kavanaugh, whose comments were somewhat surprising given that he is a former aide in the President George W. Bush administration and a member of the conservative Federalist Society. He placed the health care law (PL 111-148, PL 11-152) in the context of a historical policy progression beginning with the New Deal era of the 1930s and continuing with the Great Society of the 1960s. It is a ‘delicate act to declare an action of Congress unconstitutional,’ Kavanaugh -- who dominated the appeals court session -- also said. But he sent no firm signals on whether he would support doing that.” [Congressional Quarterly HealthBeat, 9/23/11]

**2011: Kavanaugh Dissented in 2-1 Case that Upheld ACA.** “Late last year, a three-judge panel of the D.C. Circuit voted, two to one, to uphold President Obama's health-care reform, known as the Affordable Care Act (ACA). Kavanaugh dissented, primarily on the ground that the lawsuit was premature. In a sixty-five-page opinion, Kavanaugh appeared to offer some advice to the Republicans who are challenging Obama in the election this year. ‘Under the Constitution,’ Kavanaugh wrote, ‘the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.’ In other words, according to Kavanaugh, even if the Supreme Court upholds the law this spring, a President Santorum, say, could refuse to enforce ACA because he ‘deems’ the law unconstitutional. That, to put the matter plainly, is not how it works. Courts, not Presidents, ‘deem’ laws unconstitutional, or uphold them. ‘It is emphatically the province and duty of the judicial department to say what the law is,’ Chief Justice John Marshall wrote in Marbury v. Madison, in 1803, and that observation, and that case, have served as bedrocks of American constitutional law ever since. Kavanaugh, in his decision, wasn't interpreting the Constitution; he was pandering to the base.” [New Yorker, 3/26/12]

### Concerns from Conservatives

**2018: SCOTUS Blog: “In Some High-Profile Cases, Kavanaugh Has Not Always Pleased Ideological Purists in Conservative Circles.”** “In some high-profile cases, Kavanaugh has not always pleased ideological purists in conservative circles. For example, Kavanaugh rejected two constitutional challenges to the ACA. In 2011, in a 65-page dissent in Seven-Sky v. Holder, Kavanaugh would have found that ‘the Anti-Injunction Act, which carefully limits the jurisdiction of federal courts over tax-related matters,’ deprived the panel of jurisdiction to decide the constitutional issues in the case.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

* **In a 2015 Dissent, Kavanaugh Would Have Held that the ACA Complied with the Clause of the Constitution that Required All Bills for Raising Revenue to Originate in the House of Representatives.** “And in a dissent from denial of rehearing en banc in Sissel v. U.S. Department of Health and Human Services, in 2015, Kavanaugh would have held that the ACA complied with the clause of the Constitution that requires all bills for raising revenue to originate in the House of Representatives because the statute ‘did in fact originate in the House.’” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]
* **2018: SCOTUS Blog: “Kavanaugh Took a Conservative Position, But Did Not Go as Far as One of His Colleagues, in a Recent Case Combining the Hot-Button Issues of Abortion and Immigration.”** “Kavanaugh took a conservative position, but did not go as far as one of his colleagues, in a recent case combining the hot-button issues of abortion and immigration. In Garza v. Hargan, a pregnant undocumented teen in immigration custody wanted to obtain an abortion, but was prevented by her government custodians from doing so. Kavanaugh wrote a panel decision vacating a district-court order that required the government to allow the teen to leave the detention facility to obtain the abortion; the panel imposed an additional waiting period to give the government time to obtain a sponsor. The en banc court reversed. Kavanaugh dissented, arguing that the en banc ruling was ‘ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.’” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]
* **“Kavanaugh…Noted that the Government Had Conceded the Teen’s Right to an Abortion.”** “In a separate dissent, Judge Karen LeCraft Henderson maintained that as a noncitizen, the teen had no due-process right to the abortion. Kavanaugh, in contrast, noted that the government had conceded the teen’s right to an abortion. He went on to assert that delaying the procedure while the government sought a sponsor was permissible under the Supreme Court’s precedent because it did not impose an undue burden on that right. At the government’s request, the Supreme Court vacated the D.C. Circuit’s decision this month in a per curiam decision in Azar v. Garza, ruling that the case became moot through no fault of the government’s when the teen obtained the abortion.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]
* **2015: Kavanaugh Dissented from Denial of Rehearing in a Religious Freedom Restoration Act Challenge to Process for Accommodating Religious Objections to ACA’s Contraceptive Mandate.** “Another controversial issue provoked a similar response from Kavanaugh. In 2015, in Priests for Life v. HHS, Kavanaugh dissented from denial of rehearing en banc in a Religious Freedom Restoration Act challenge to the process for accommodating religious objections to the ACA’s contraceptive mandate, which permitted religious nonprofits to self-certify their eligibility for an exemption from the birth-control benefit by notifying either their insurance company or the federal government of their faith-based objection to contraceptive coverage. The panel decision had upheld the accommodation, stating that a court is not required ‘simply to accept whatever beliefs a RFRA plaintiff avows—even erroneous beliefs about what a challenged regulation actually requires.’ Unlike other dissenters, who maintained that there is no compelling government interest in facilitating access to contraception, Kavanaugh would have ruled that a compelling interest does exist, but the government can achieve it in other ways. In a group of cases consolidated as Zubik v. Burwell, the Supreme Court in 2016, when it was short-handed after the death of Scalia, remanded the case for the parties to work towards a compromise accommodation.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2018: CNN: “A Source…Said Concerns Have Been Expressed Privately to the White House that Kavanaugh Dissent Should Have Gone Farther.”** “In 2011, Kavanaugh's court ruled in favor of the Affordable Care Act. While Kavanaugh dissented from that ruling, he also said that he would have ruled that the court did not have jurisdiction to hear the case because of a longstanding federal statute that limits the jurisdiction of federal courts to hear tax-related matters…More recently, the DC Circuit ruled in favor of the undocumented, pregnant teen who sought an abortion. Kavanaugh also dissented from that ruling, but a source who opposes abortion rights who was only willing to speak on background, said concerns have been expressed privately to the White House that Kavanaugh's dissent should have gone farther.” [CNN, 7/3/18]

**New York Magazine: “Even Though Kavanaugh Made It Abundantly Clear that He Was Horrified by the Individual Mandate…He Rejected a Challenge to It as Untimely, while Providing Some Foundation for the Rationalization of the Mandate under Congress’s Tax Powers, which…Justice…Roberts Seized upon in His Majority Opinion Upholding the Mandate.”** “Others have picked over Kavanaugh’s very complicated dissent in the 2011 case that led to the landmark SCOTUS decision validating Obamacare. Even though Kavanaugh made it abundantly clear that he was horrified by the individual mandate at issue in the case, he rejected a challenge to it as untimely, while providing some foundation for the rationalization of the mandate under Congress’s tax powers, which Chief Justice John Roberts seized upon in his majority opinion upholding the mandate.” [New York Magazine,

**2018: New York Times: “Kavanaugh…Once Argued that…Clinton Could Be Impeached for Lying to His Staff and Misleading the Public, a Broad Definition of Obstruction of Justice that Would Be Damaging If Applied to…Trump in the Russia Investigation.”** “Judge Brett M. Kavanaugh, the front-runner to replace Justice Anthony M. Kennedy on the Supreme Court, once argued that President Bill Clinton could be impeached for lying to his staff and misleading the public, a broad definition of obstruction of justice that would be damaging if applied to President Trump in the Russia investigation.” New York Times, 7/5/18]

* **New York Times: “Kavanaugh’s Arguments…Have Been Cited in Recent Days by Republicans with Reservations about Him and Have Raised Concerns…But…Kavanaugh Has Reconsidered Some of His Views since Then…”** “Judge Kavanaugh’s arguments — expressed in the report of the independent counsel, Kenneth W. Starr, which he co-wrote nearly 20 years ago — have been cited in recent days by Republicans with reservations about him and have raised concerns among some people close to Mr. Trump. But Judge Kavanaugh has reconsidered some of his views since then, and there is no evidence that they have derailed his candidacy.” New York Times, 7/5/18]

## Environment

### Climate Change

**Greenwire: Kavanaugh “Concluded by Observing that Climate Change Is an ‘Urgent and Important’ Problem But One that Congress Must Take the Lead on.”** “Kavanaugh's opinion, which industry lawyers are expected to give more attention to, addressed the argument that had appeared to be the challengers' best shot when the case was argued in February: that greenhouse gases could not be regulated via EPA's New Source Review/Prevention of Significant Deterioration program, known as PSD, because pollutants that can be regulated via the program are limited to the six covered by National Ambient Air Quality Standards, or NAAQS. The appeals court found that the phrase ‘any air pollutant’ in the Clean Air Act is not limited to the NAAQS and does include greenhouse gases. Kavanaugh queried that finding, arguing that nothing the Supreme Court decided in Massachusetts v. EPA determines which pollutants are covered under the PSD program. The case only applied to motor vehicle emissions, he noted. There is a ‘glaring problem’ in how EPA interpreted the law in order to expand the definition of ‘any air pollutant,’ Kavanaugh said. That is because it leads to what lawyers call ‘absurd results,’ namely that many more facilities would require Clean Air Act permitting. EPA addressed the issue by issuing the tailoring rule, which, Kavanaugh and other critics say, effectively involved rewriting the statute. ‘This is a very strange way to interpret a statute,’ Kavanaugh wrote. The much easier route for EPA, he added, would have been to interpret the statute in a way that only applied to the original six pollutants. To Kavanaugh, ‘it seems evident’ that the PSD statute refers only to the NAAQS pollutants. He concluded by observing that climate change is an ‘urgent and important’ problem but one that Congress must take the lead on.” [Greenwire, 12/20/12]

**2017: Kavanaugh: “EPA’s Well-Intentioned Policy Objectives with Respect to Climate Change Do Not on Their Own Authorize the Agency to Regulate…Congressional Inaction Does Not License an Agency to Take Matters into Its Own Hands, Even to Solve a Pressing Issue Such as Climate Change.”** “But the judge, who is one of the most conservative members of the court, also devoted ink in the opinion to a broader discussion of climate change. ‘EPA’s well-intentioned policy objectives with respect to climate change do not on their own authorize the agency to regulate,’ Kavanaugh wrote, adding, ‘Under the Constitution, congressional inaction does not license an agency to take matters into its own hands, even to solve a pressing policy issue such as climate change.’ The ‘bedrock separation of powers principles’ underlie the court’s decision in the case: ‘Climate change is not a blank check for the president,’ Kavanaugh wrote.” [Greenwire, 8/9/17]

* **Greenwire: “Some Experts Saw…Kavanaugh’s Remarks…as the Court’s Questioning the Ability of EPA to Use the Clean Air Act to Issue Regulations Aimed at Addressing Climate Change.”** “Some experts saw yesterday's decision and Kavanaugh's remarks -- which were joined by Judge Janice Rogers Brown, another George W. Bush appointee -- as the court's questioning the ability of EPA to use the Clean Air Act to issue regulations aimed at addressing climate change.” [Greenwire, 8/9/17]

### EPA Biofuels

**2017: Federal Court Rejected EPA’s Justification for Reducing Renewable Fuel Requirements in a Win for Biofuels Industry.** “A federal court today rejected U.S. EPA's justification for reducing renewable fuel requirements in a win for the biofuels industry. The U.S. Court of Appeals for the District of Columbia Circuit agreed with biofuel producers that the agency wrongly relied on its ‘inadequate domestic supply’ waiver authority to lower the nation's renewable fuel targets. The court vacated EPA's decision to reduce overall renewable fuel requirements in 2016 using the supply waiver authority. Conservative Judge Brett Kavanaugh, a George W. Bush appointee, wrote the 85-page opinion for the three-judge panel of the court.” [Greenwire, 7/28/17]

* **Kavanaugh: “We Hold that EPA Exceeded Its Authority under the ‘Inadequate Domestic Supply’ Provision When It Interpreted the Term ‘Supply’ to Allow It to Consider Demand-Side Constraints in the Market for Renewable Fuel.”** “‘We hold that EPA exceeded its authority under the 'inadequate domestic supply' provision when it interpreted the term 'supply' to allow it to consider demand-side constraints in the market for renewable fuel,’ Kavanaugh wrote. The D.C. Circuit rejected all other petitions challenging the rule, including the oil industry's challenges to the agency's cellulosic biofuel projections and its argument that EPA unlawfully failed to consider whether to change which parties are subject to renewable fuel standard requirements. In the 2007 renewable fuel standard, or RFS, Congress set out certain levels of conventional ethanol and advanced biofuels that must be used each year through 2022.” [Greenwire, 7/28/17]

### EPA Cement Kiln Emissions

**2018: SCOTUS Blog: “On Occasion, a Kavanaugh Opinion Siding with the EPA’s Opponents Has Been a Win for Environmental Interests…in 2014…He Wrote an Opinion that Vacated an EPA Rule Establishing an Affirmative Defence for Cement-Kiln Operators Sued for Exceeding Emission Limits.** “On occasion, a Kavanaugh opinion siding with the EPA’s opponents has been a win for environmental interests, as in Natural Resources Defense Council v. EPA, in 2014, in which he wrote an opinion that vacated an EPA rule establishing an affirmative defense for cement-kiln operators sued for exceeding emission limits.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

### EPA Cross-State Air Pollution Rule

**2012: In Sweeping 2-1 Decision, Court Vacated EPA’s Cross-State Air Pollution Rule, Finding Agency Violated Federal Law by Exceeding Its Authority in Setting Emissions Limits on States.** “In a sweeping decision, the U.S. Court of Appeals for the District of Columbia Circuit on Aug. 21 vacated the U.S. EPA’s Cross-State Air Pollution Rule, finding that the agency violated federal law by exceeding its authority in setting emissions limits on states.” [SNL Daily Coal Report, 8/22/12]

* **Writing for Two-Judge Majority, Kavanaugh Held that CSAPR Required States to Make Emissions Reductions beyond what Was Required by Law, and that EPA Trampled on States’ Rights by Improperly Failing to Provide States with Initial Opportunity to Make Reductions on Their Own Accord.** “Writing for the two-judge majority of the three-judge panel, Circuit Judge Brett Kavanaugh held that the CSAPR required states to make emissions reductions beyond what was required by the law, and that the EPA trampled on states' rights by improperly failing to provide the states with an initial opportunity to make reductions on their own accord before imposing federal implementation plans. ‘Congress could well decide to alter the statute to permit or require EPA's preferred approach to the good neighbor issue,’ Kavanaugh wrote. ‘Unless and until Congress does so, we must apply and enforce the statute as it's now written.’” [SNL Daily Coal Report, 8/22/12]
* **Kavanaugh: “Our Limited but Important Role Is to Independently Ensure that the Agency Stay within the Boundaries Congress Has Set.”** “Kavanaugh, joined by Circuit Judge Thomas Griffith, added that the decision should not be viewed as a comment on the wisdom or policy merits of CSAPR, because the court is not tasked with setting policy, but rather to ensure that the EPA is kept in check - echoing a refrain from many industry petitioners. ‘Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set. EPA did not do so here,’ Kavanaugh maintained.” [SNL Daily Coal Report, 8/22/12]

**Washington Post: “Divided Three-Judge Panel Threw out Rules Requiring States to Control the Air Pollution that Wafts over Their Borers into Other States.”** “Nowhere has this strategy been pursued with more fervor, or more success, than the U.S. Court of Appeals for the District of Columbia Circuit, where a new breed of activist judges are waging a determined and largely successful war on federal regulatory agencies. Their latest salvo came just before Labor Day, when a divided three-judge panel threw out rules requiring states to control the air pollution that wafts over their borders into other states. These rules were first ordered up by Congress back in 1970, have been more than 20 years in the making and had already been the subject of two challenges before the D.C. Circuit. According to estimates by the Environmental Protection Agency, these regulations would prevent between 13,000 and 34,000 premature deaths, 15,000 non-fatal heart attacks, 19,000 hospital and emergency room visits and 1.8 million days of missed work or school for each year. The projected annual compliance cost is $2.4 billion, compared with the annual health benefits of anywhere from $120 billion to $280 billion. But in reading the 60-page opinion by Judge Brett Kavanaugh, you'd have no clue of this historical, political, economic or health context.” [Washington Post, 10/14/12]

**2015: Clean Air Report: “US Court of Appeals for the District of Columbia Circuit’s Ruling Remanding…CSAPR ‘Budgets’ to EPA for Reconsideration Casts Major Doubt over the Viability of Any Future Agency Interstate Emissions Trading Program…”** “The U.S. Court of Appeals for the District of Columbia Circuit's ruling remanding Cross-State Air Pollution Rule (CSAPR) ‘budgets’ to EPA for reconsideration casts major doubt over the viability of any future agency interstate emissions trading program because of strict limits the court appears to place on such programs, sources say. But an EPA spokeswoman counters that ‘[t]his is not EPA's reading’ of the D.C. Circuit's July 28 decision in EME Homer City Generation L.P. v. EPA, which remanded the budgets but left the rest of the landmark sulfur dioxide (SO2) and nitrogen oxides (NOx) emissions trading program intact. The spokeswoman says EPA will address the ruling in a pending rulemaking designed to help further cut transported emissions beyond CSAPR's mandates.” [Clean Air Report, 8/13/15]

* **2014: 6-2 Supreme Court Ruling in April 2014 Upheld Overall Structure of the Trading Regime But Did Not Address Hos of Technical and Other Challenges to the Rule; Justices Remanded Litigation to DC Circuit.** “The D.C. Circuit's ruling for now ends long-running litigation of CSAPR -- although some related lawsuits continue - following an initial 2-1 decision issued in 2012 that rejected all challenges to the trading program. Critics of the rule then appealed it to the Supreme Court, which issued a 6-2 ruling in April 2014 that upheld the overall structure of the trading regime. However, the high court did not address a host of technical and other challenges to the rule -- including fights over the budgets, which are emissions limits established for states under CSAPR. The justices remanded the litigation over the rule to the D.C. Circuit, which issued a July 28 unanimous ruling that left the structure of the rule largely intact, but vacated and remanded to EPA the budgets for 13 states after finding flaws in EPA's approach.” [Clean Air Report, 8/13/15]
* **Kavanaugh Wrote Unanimous Opinion that Focused on the Need to Avoid Over-Control of Emissions from Upwind States in CSAPR.** “In last month's EME Homer City ruling, the unanimous three-judge panel expressed concern that EPA's vacated budgets led to ‘over-control’ -- forcing upwind states to cut emissions more than is required for downwind states to meet regulatory air standards. The court's concerns about over-control will have serious ramifications going forward for EPA's cost-effectiveness thresholds that are key to interstate trading efforts, sources say. The appellate court appears to imply that state-specific thresholds for cost-effectiveness are needed -- which would effectively eliminate interstate trading as a policy option, some legal observers say. Judge Brett Kavanaugh, writing the unanimous opinion in the new EME Homer City decision, focused on the need to avoid over-control of emissions from upwind states in CSAPR.” [Clean Air Report, 8/13/15]

### EPA Greenhouse Gas Emissions

**2012: Kavanaugh Dissented from Denial of Rehearing Case Involving Regulation of Greenhouse-Gas Emissions.** “Similarly, in Coalition for Responsible Regulation v. EPA, in 2012, Kavanaugh dissented from denial of rehearing en banc in a case involving regulation of greenhouse-gas emissions. Kavanaugh resisted the agency’s attempt to adapt the language of a 1970 statute, the Clean Air Act, to permit regulation of an environmental problem that Congress did not anticipate when it enacted the statute, concluding that the EPA had ‘exceeded its statutory authority’ when it issued the greenhouse-gas regulations. He argued that accepting the EPA’s approach would allow agencies to ‘adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness,’ and warned that ‘undue deference or abdication to an agency carries its own systemic costs.’ The Supreme Court, in another Scalia opinion, relied to some extent on Kavanaugh’s reasoning, and quoted from his dissent, in holding that the Clean Air Act did not authorize the EPA to require stationary sources to obtain permits solely based on greenhouse-gas emissions.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

**2017: In 2-1 Decision, Court Faulted EPA’s Interpretation of a Section of Clean Air Act for Addressing Ozone-Depleting Substances; Court Found EPA Exceeded Authority with a Rule that Eliminated Some Uses for HFCs and Approved Certain Replacements.** “Yesterday’s court decision tossing out an Obama-era policy for addressing potent greenhouse gases has reignited a debate over U.S. EPA’s authority to issue climate change regulations. The 2-1 U.S. Court of Appeals for the District of Columbia Circuit decision issued by Judge Brett Kavanaugh faulted EPA’s interpretation of a section of the Clean Air Act for addressing ozone-depleting substances. The court found that EPA exceeded its authority with a rule that eliminated some uses for hydrofluorocarbons (HFCs) and approved certain replacements. The decision is ‘significant’ for what it says about climate regulation and EPA authority generally, wrote Nicholas Bryner, a fellow in environmental law and policy at the UCLA School of Law.” [Greenwire, 8/9/17]

* **Greenwire: “Kavanaugh Concluded that EPA Only Had Authority to Require the Replacement Once of Ozone-Depleting Substances with Non-Ozone-Depleting Substance.”** “At issue was a rule EPA finalized in 2015 calling for the phase-out of certain uses of HFCs, short-lived chemicals that are potent greenhouse gases. The rule was part of the Obama administration's broader plan to address climate change. The legal question at the center of the lawsuit was whether EPA could use the Significant New Alternatives Policy (SNAP) Program, a Clean Air Act program geared toward phasing out ozone-depleting substances, to replace HFCs, which do not deplete the ozone layer of the Earth's stratosphere…Kavanaugh concluded that EPA only had authority to require the replacement once of ozone-depleting substances with non-ozone-depleting substance. The law does not, he said, allow EPA to later require companies to replace substitutes for ozone-depleting substances -- such as HFCs -- with alternatives based on climate change reasons (Greenwire, Aug. 8). Much of Kavanaugh's opinion yesterday consisted of a discussion of the word ‘replace’ and whether it connoted a one-time event or an ongoing process.” [Greenwire, 8/9/17]

### EPA California Emissions

**2010: Kavanaugh Wrote Opinion Upholding EPA’s Review of California’s Limits on Emissions from in-Use Non-Road Engines.** “And in 2010, in American Trucking Associations v. EPA, he wrote an opinion upholding the EPA’s review of California’s limits on emissions from in-use non-road engines.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

### EPA Ethanol Blends

**2012: In 2-1 Ruling, Court Rejected Suits over EPA’s Partial Waivers Allowing Sale of Ethanol Blends up to 15 Percent after Finding Groups Lacked Standing to Sue.** “A federal appeals court in a 2-1 ruling has rejected food, oil and engine industry groups' suits over EPA's partial waivers allowing sale of ethanol blends up to 15 percent (E15) after finding the groups lack standing to sue, but the dissenting opinion could spur an industry bid for rehearing as it details reasons why the waivers are illegal…The American Petroleum Institute (API) was quick to criticize the ruling, attacking the court's ‘astounding’ claim that it lacks standing to sue. The dissenting opinion argued the industry should have standing as it likely has no choice but to produce E15 in order to meet EPA renewable fuel mandates, and that E15 production would create high costs. The dissent also says that EPA lacks authority under the Clean Air Act to issue partial fuel waivers…” [Clean Energy Report, 8/27/12]

* **Kavanaugh’s Dissent Outlined Reasons for Why EPA’s Partial Waivers Violated Clean Air Act, which Could Form Basis of Industry Bid for Rehearing of the Ruling.** “Kavanaugh also outlined his reasons for why EPA's partial waivers violate the Clean Air Act, which could form the basis of an industry bid for rehearing of the ruling. ‘In granting the E15 partial waiver, EPA ran roughshod over the relevant statutory limits,’ he wrote. The Clean Air Act requires that EPA only grant waivers to fuels that will not cause of contribute to the failure of cars made after 1974, the judge wrote. But EPA acknowledged E15 could harm some engines built before 2001, and therefore limited its waiver to cars built after that date. But the judge said this violates the air law's requirement that new fuels not harm ‘any’ vehicle built after 1974. ‘EPA's E15 waiver thus plainly runs afoul of the statutory text. EPA's disregard of the statutory text is open and notorious -- and not much more needs to be said,’ he wrote. ‘If Congress wanted to authorize this kind of partial waiver, it could easily have said so (and going forward, could still easily do so).’” [Clean Energy Report, 8/27/12]

**2015: The Examiner: “A Federal Appeals Court Slammed the Ethanol Industry…for Suing the EPA…and Then Slammed the EPA’s Defense Even though the Agency Won the Case…”** “A federal appeals court slammed the ethanol industry on Tuesday for suing the Environmental Protection Agency, and then slammed the EPA's defense even though the agency won the case. The D.C. Circuit Court of Appeals threw out a lawsuit brought against the EPA a year ago for not including 30 percent ethanol fuel blends (E30) as a test fuel in the agency's landmark Tier 3 clean fuel and vehicle rules. The test fuel is used for setting baseline emissions for vehicles that the EPA regulates. Changing the fuel could change the stringency of emission reductions.” [The Examiner, 7/14/15]

* **Three-Judge Panel Ruled that because E30 Ethanol Fuels Were Not Commercial, It Had to Deny the Petition.** “The three-judge panel ruled that because E30 ethanol fuels are not commercial, it had only one choice -- to ‘disagree’ and ‘therefore deny the petition,’ according to the opinion written by Judge Brett Kavanaugh.” [The Examiner, 7/14/15]
* **The Examiner: “The Lawsuit Has Been Seen as an Attempt by Renewable Fuel Advocates…to Get Automakers to Build Cars that Can Handle Higher Blends of Ethanol, which the Oil Industry Argues Would Result in Engine Damage.”** “The lawsuit has been seen as an attempt by renewable fuel advocates -- including the Energy Futures Coalition -- to get automakers to build cars that can handle higher blends of ethanol, which the oil industry argues would result in engine damage.” [The Examiner, 7/14/15]
* **The Examiner: “The Decision Is as Much a Repudiation of the EPA’s Arguments in the Case, as It Is a Denial of the Green Fuel Industry’s Attempt to Get the Agency to Approve E30.”** “But the decision is as much a repudiation of the EPA's arguments in the case, as it is a denial of the green fuel industry's attempt to get the agency to approve E30.” [The Examiner, 7/14/15]
* **The Examiner: “The Bulk of Kavanaugh’s Opinion Is Directed at Why the EPA Is Wrong.”** “Kavanaugh's opinion briefly touches on the decision against the industry, before launching into why most of the EPA's key arguments against the petitioners were wrong. ‘Before reaching the merits’ of the industry's arguments, Kavanaugh writes, ‘we address several threshold arguments raised by EPA regarding the court's authority to decide the case. We reject each of those arguments.’ The bulk of Kavanaugh's opinion is directed at why the EPA is wrong. First, he writes that the agency argued that petitioners do not have article III standing -- a legal threshold for the court to take up a case based on the merits -- but the ethanol proponents do. ‘According to petitioners, the EPA's test fuel regulation prohibits the use of E30 as a test fuel. As a direct result of that regulation, petitioners claim that they face a regulatory impediment (what they view as an illegal regulatory impediment) that prevents their product from being used as a test fuel. That qualifies as an injury in fact,’ Kavanaugh writes.” [The Examiner, 7/14/15]

### EPA Mining

**2014: Kavanaugh Wrote Panel Decision Upholding an EPA Program Aimed at Addressing the Environmental Effects on Waterways of Mountaintop-Removal Coal Mining.”** “Kavanaugh has not always ruled against the EPA, however. In National Mining Association v. McCarthy, in 2014, he wrote a panel decision upholding an EPA program aimed at addressing the environmental effects on waterways of mountaintop-removal coal mining.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

* **Kavanaugh: “In Our View, EPA and the Corps Acted within Their Statutory Authority and Amounted to New Regulations that Required Public Notice and Comment Period.”** “A federal appeals court today sided with U.S. EPA in a broad challenge from two states and the mining industry to controversial Obama administration policies aimed at addressing the environmental effects on waterways of mountaintop-removal coal mining. The ruling from the U.S. Court of Appeals for the District of Columbia Circuit is a major win for the administration and reverses a lower court ruling siding with West Virginia, Kentucky and a host of mining interests. At issue are two policies issued shortly after President Obama took office that sought to address water contamination near mining operations by placing more stringent requirements on Clean Water Act permits. In June 2009, EPA and the Army Corps of Engineers adopted an ‘enhanced coordination process’ that allowed EPA to screen Section 404 dredge-and-fill permit applications before the corps approved them. Two years later, EPA issued a ‘final guidance’ that required state authorities to impose more restrictive discharge requirements on separate National Pollutant Discharge Elimination System, or NPDES, permits. The states, coal companies and trade groups led by the National Mining Association challenged both policies, arguing that they exceeded EPA's statutory authority and amounted to new regulations that required public notice and comment periods. The D.C. Circuit, in a unanimous ruling, disagreed. ‘In our view, EPA and the Corps acted within their statutory authority when they adopted the Enhanced Coordination Process,’ wrote Judge Brett Kavanaugh, a Republican appointee. ‘And under our precedents, the Final Guidance is not final agency action reviewable by the courts at this time.’” [Greenwire, 7/11/14]

**2016: Kavanaugh Dissented in Split Decision that Upheld EPA’s Clean Water Act Decision to Block Disposal Sites Underlying a Final Permit for a West Virginia Coal Mine, Finding that the Mining Company Failed to Preserve Its Claims that the Agency Must Consider Costs of Blocking the Project.** “The U.S. Court of Appeals for the District of Columbia Circuit in a split decision is upholding EPA's Clean Water Act (CWA) decision to block disposal sites underlying a final permit for a West Virginia coal mine, finding that the mining company failed to preserve its claims that the agency must consider costs of blocking the project. Both the narrowly written majority opinion by Judge Karen LeCraft Henderson and a vigorous dissent written by Judge Brett Kavanaugh, however, leave the door open for future rulings that EPA must consider a company's reliance costs associated with a project when making decisions under CWA section 404(c), the agency's so-called veto authority, particularly when a final permit has already been issued by the Army Corps of Engineers. The majority opinion says that while the court is backing the agency's decision, it is not holding that ‘EPA is generally exempt from considering costs in evaluating whether to withdraw a previously approved disposal site under section 404(c).’” [Inside EPA, 7/20/16]

* “**Kavanaugh: “EPA’s Utterly One-Sided Analysis Did Not Come Close to Satisfying the Agency’s Duty…to Consider and Justify the Costs of Revoking Mingo Logan’s Previously Issued Permit.”** And Kavanaugh writes, ‘In my view, EPA's utterly one-sided analysis did not come close to satisfying the agency's duty under the Administrative Procedure Act and relevant Supreme Court precedents to consider and justify the costs of revoking Mingo Logan's previously issued permit.’” [Inside EPA, 7/20/16]

### EPA Monitoring of Emissions

**2008: Kavanaugh Dissented in 2-1 Ruling, Concluding that the 1990 Clean Air Act Amendments Allowed EPA to Restrict State and Local Authorities’ Emissions-Monitoring Activity.** “The U.S. Court of Appeals for the District of Columbia Circuit vacated a U.S. Environmental Protection Agency rule in a 2-1 decision Aug. 19 that prohibits states from bolstering their monitoring requirements for emissions from power plants and other stationary sources. Judge Thomas Griffith, who penned the decision, explained that the rule failed to meet the statutory requirement that it ensure adequate monitoring of compliance with air pollution permits. Joined by Chief Judge David Sentelle, Griffith wrote, ‘EPA has offered nothing more than vague promises to act in the future’ to resolve inadequate monitoring mandates. Moreover, ‘state and local authorities must be allowed to cure these monitoring requirements before including them in permits.’ In a dissent, Judge Brett Kavanaugh, like his colleagues, made reference to a famous dictum from Justice Felix Frankfurter. ‘I strongly align myself with the majority's quotation from Justice Frankfurter about the best tool of statutory interpretation: 1) Read the statute. 2) Read the statute. 3) Read the statute!’ Kavanaugh said. Unlike his colleagues, however, Kavanaugh concluded that the 1990 Clear Air Act Amendments do indeed allow the EPA to restrict state and local authorities' emissions-monitoring activity. (Sierra Club et al v. EPA; 07-1039).” [SNL Power Daily Northeast, 8/21/08]

### EPA Power Plant Monitoring

**2014: In White Stallion Energy Center V. EPA, Kavanaugh Dissented in Part from a Ruling that Upheld the EPA’s Decision Not to Consider Cost When Determining Whether It Is “Appropriate and Necessary” to Regulate Power Plants.** “For example, in 2014, in White Stallion Energy Center v EPA, Kavanaugh dissented in part from a ruling that upheld the EPA’s decision not to consider cost when determining whether it is ‘appropriate and necessary’ to regulate power plants. He argued that ‘as a matter of common sense, common parlance, and common practice, determining whether it is ‘appropriate’ to regulate requires consideration of costs.’ Reversing the D.C. Circuit’s decision, the Supreme Court, in a 5-4 opinion by Scalia that quoted from Kavanaugh’s dissent, held that the EPA’s refusal to consider costs was unreasonable.” [SCOTUS Blog, [6/28/18](http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/)]

* **Environmental Policy Alert: “Kavanaugh Said EPA Should Have Considered Costs in Making the Appropriate and Necessary Finding for Regulating Electric Generating Units…Rather than Just Solely Health Hazards.”** “Although Judge Brett Kavanaugh provided a narrow dissent and concurrence, the majority generally backed EPA's threshold Clean Air Act determination that it was ‘appropriate and necessary’ that coal-fired power plants should be subject to strict maximum available control technology (MACT) air toxics standards under section 112. Kavanaugh said EPA should have considered costs in making the appropriate and necessary finding for regulating electric generating units (EGUs), rather than solely health hazards. But the majority countered that, ‘Even if the word 'appropriate' might require cost consideration in some contexts, such a reading of 'appropriate' is unwarranted here, where Congress directed EPA's attention to the conclusions of the study regarding public health hazards from EGU emissions.’” [Environmental Policy Alert, 4/16/14]

### Yucca Mountain

**2012: Kavanaugh Argued that NRC Ought Not to Have Final Word on Yucca Mountain Controversy; Because DOE Was Acting Expressly on the Elected Executive’s Orders, the President’s Choice Ought to Govern.** “Judge Kavanaugh argued that the NRC ought not have the final word on the Yucca Mountain controversy; instead, because the DOE was acting expressly on the elected executive's orders, the president's choice ought to govern. (18) Judge Kavanaugh's rationale was grounded in the presidential-control model and its ability to inject democratic accountability into the administrative state. (19) When an executive and independent agency clash, he suggested, the presidentially controlled executive agency ought to prevail. (20)” [Duke Law Journal, 5/1/12]

**2013: Aiken Standard: “Kavanaugh…Decision…Granted a Writ of Mandamus Forcing the Nuclear Regulatory Commission to Continue the Licensing Process for the Yucca Mountain Facility.”** “The recent decision by the U.S. Court of Appeals regarding the Yucca Mountain Nuclear Waste Repository was a major victory for both Aiken County and the Constitution. Whether this decision will jump start the mothballed facility remains unknown. The 2-to-1 decision, written by Judge Brett Kavanaugh and joined in a concurring opinion by Judge Arthur Randolph, granted a writ of mandamus forcing the Nuclear Regulatory Commission to continue the licensing process for the Yucca Mountain facility. The chain of events leading to this decision began in 2010 when Commission Chairman Gregory Jaczko, a former aide to Yucca Mountain opponent Sen. Harry Reid, violated the Nuclear Waste Policy Act. According to Judge Randolph, ‘Jaczko orchestrated a systematic campaign of noncompliance. Jaczko unilaterally ordered Commission staff to terminate the review process in October 2010; instructed staff to remove key findings from reports evaluating the Yucca Mountain site; and ignored the will of his fellow commissioners.’ Jaczko, under fire from his Nuclear Regulatory Commission colleagues on this and other matters, later resigned.” [Aiken Standard, 9/9/13]