



The Odds of Atlantic Coast Pipeline Winning at the Supreme Court

January 17, 2020

Earlier this week, the opponents of the Atlantic Coast Pipeline (ACP) project filed their briefs with the Supreme Court in support of the decision voiding the approval of ACP to cross the Appalachian Trail (AT). The final reply briefs by ACP and the federal government are due on February 14 and the oral argument in the case is scheduled for February 24.

Prior to the oral argument, we will be issuing our analysis of the various arguments made in the briefs filed by all parties to the proceeding, followed by our assessment based on attending the oral argument. Today we dive into the voting statistics for the current justices to assess the likelihood of a decision that favors ACP and the federal government. As we set out in more detail below, we believe there is a very high probability that the Court will overturn the decision by the Fourth Circuit Court of Appeals and would expect the decision to be at least a 7-2 vote in favor of the government and ACP's position.

The ACP Case

As we discussed in *MVP and ACP – Similar Projects, Similar Problems, Different Paths*, both ACP and the Mountain Valley Pipeline projects cross the AT, a 2,192-mile footpath that traverses 14 states along the East Coast from Maine to Georgia. In an appeal of the federal government's grant to ACP of the authority to cross the AT, the Fourth Circuit vacated the grant to ACP and seemed to indicate that the federal government could not allow a pipeline to cross the AT on land owned by the federal government. This decision is what is on appeal to the Supreme Court.

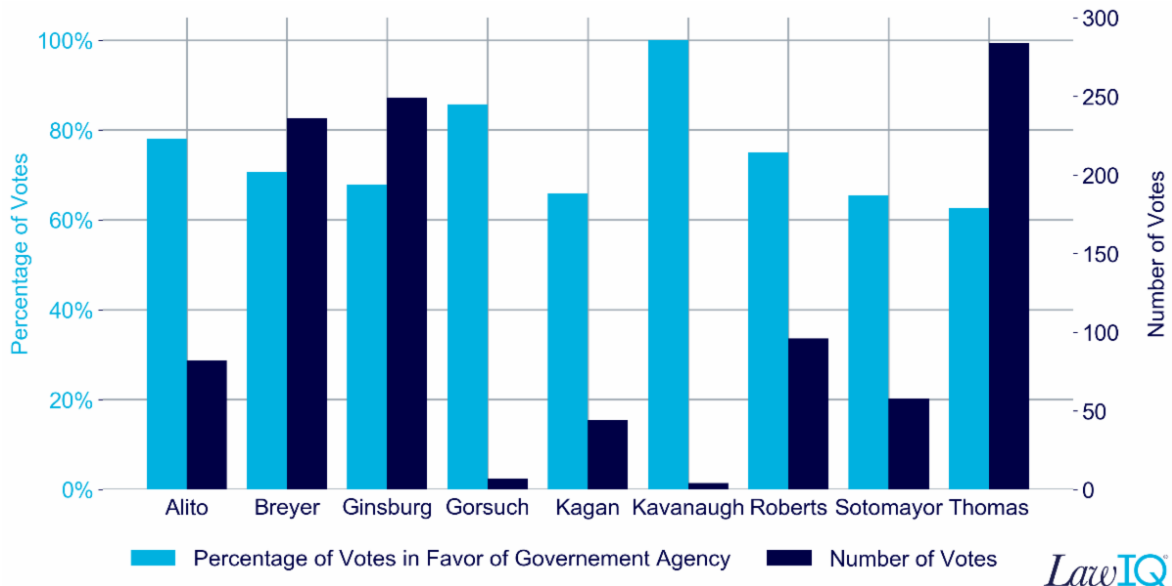
The Supreme Court

The Supreme Court has nine members. For any decision to gain a majority, therefore, the votes of five justices are needed in favor of the decision. The current justices have served anywhere from just over one year, for Justice Kavanaugh, to almost twenty years, for Justice Thomas. Using data from the Supreme Court Database maintained by the Washington University School of Law*, we looked at all of the votes by the individual justices over their terms in cases involving appeals by an agency of the

federal government that concerned a lower court's interpretation of a federal statute. We then segregated that data based on the party of the president at the time the argument was made to the Court.

How Each Justice Has Voted

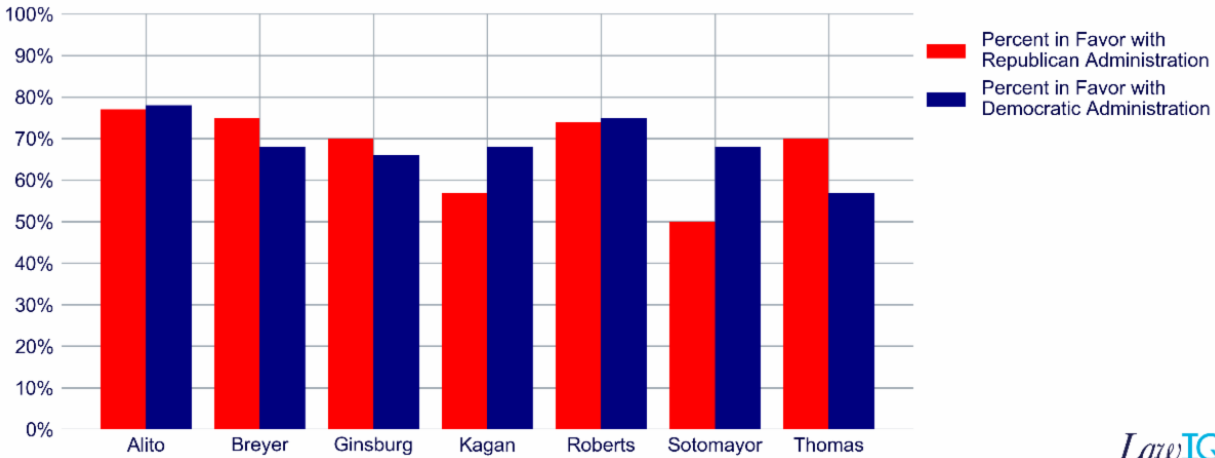
The chart below sets forth the number of votes in such cases by each of the current justices and details how often that justice voted in favor of the governmental agency's appeal of the lower court decision.



As can be seen, across the board, the votes of the individual justices are generally in favor of the appeal by the federal government agency, with most justices typically siding with the government's view two-thirds of the time, and with only Justice Thomas being somewhat more skeptical of the government's view.

Political Bias

Chief Justice Roberts has famously said that there are no "Obama judges or Trump judges, Bush judges or Clinton judges." However, there is certainly a feeling that the justices may look more favorably on an argument if it is made by an administration from the party that is more aligned with that justice's own views. So we have broken the votes set forth above into cases that were argued by Democratic and Republican administrations. We have such data for only seven of the current nine justices because Justices Kavanaugh and Gorsuch have only served during a Republican administration. In the chart below, we set forth the percentage of votes by each of these seven justices in favor of the government's position based on the party of the administration that argued the case to the Court.



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Perhaps given his public statements, it is not surprising to find that Chief Justice Roberts seems to show almost no alignment along these lines, supporting both Democratic and Republican administrations almost equally. Three of the justices, however, do seem to show some alignment with the party with which they are affiliated: as depicted above, Justice Thomas more frequently aligns with Republican administrations and Justices Kagan and Sotomayor more frequently align with Democratic administrations.

ACP's Argument May Be Neither Republican nor Democratic

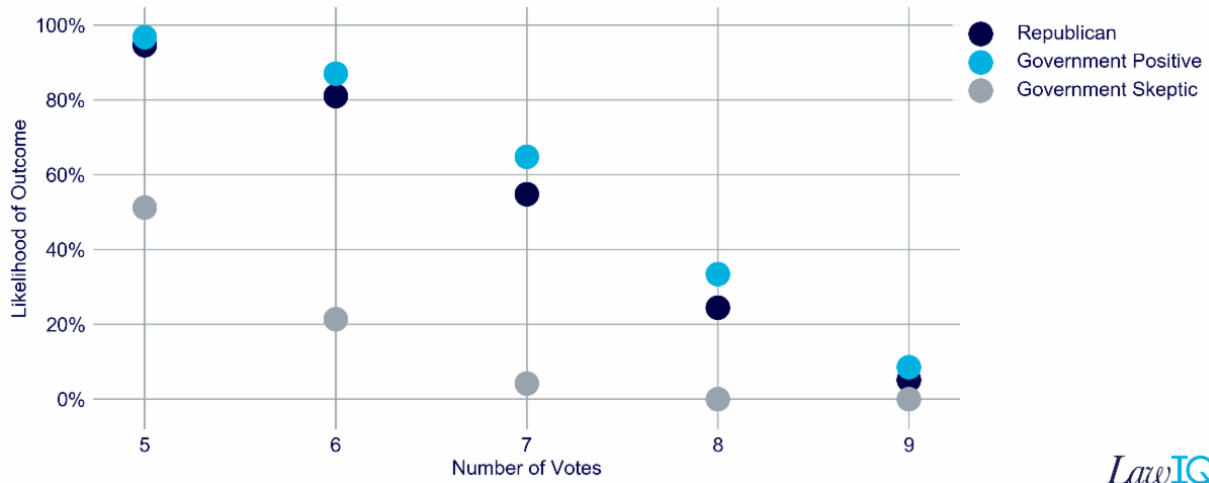
ACP and the government are arguing in this case that the interpretation of the statute is neither a Republican or Democratic interpretation because it is their view that the process followed in this case has been followed for over 50 years by both Republican and Democratic administrations. In their view, the real departure is in the Fourth Circuit's new interpretation of the relevant law. To the extent that argument is persuasive, individual justices may vote in a manner consistent with the frequency with which they vote for arguments made by the parties with which they align, rather than based on the fact that it is a Republican administration making the case.

Scenario Analysis

Given all of these factors, we ran a simulation using varying assumptions about how the justices would vote. We looked at the following three cases:

1. Where the justices vote as they have for Republican administrations (Republican)
2. Where the justices accept the argument that this is neither a Republican nor Democratic issue and vote in the manner most favorable to the agency (Government Positive)
3. Where the justices are highly skeptical of the administration's argument and dismiss the 50 years of history (Government Skeptic)

Using these various scenarios, we then ran simulations to determine how likely a positive outcome would be and how likely a specific vote total would be.



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As can be seen in the chart above, even under the most pessimistic scenario where every justice views the argument as if it were one being made by the party opposite of the one by which they were appointed, there is still a 50% chance that ACP wins its appeal. In the other two scenarios, the likelihood of a positive result goes up to well over 90%. In the scenario we view as most likely -- where all of the justices are no more hostile to the government's arguments than they would be to a Republican administration's interpretation -- the chances of winning are almost 95% and the chances of gaining seven votes in favor are over 50%. So, at worst, the case could be a coin flip, and at best it could be more like a slam dunk, because even LeBron James only makes 95% of his dunks. So while it seems likely that ACP will be victorious, the case could be like one of the four dunks that LeBron missed last year.

Given the justices' past votes on similar cases, we could readily expect a 7-2 vote with only Justices Kagan and Sotomayor voting to uphold the decision by the Fourth Circuit. We will be attending the oral argument of the case on February 24 and will provide our assessment later that day with our expectation of the final vote total and the outcome of the case.

* Harold J. Spaeth, Lee Epstein, et al. 2019 Supreme Court Database, Version 2019 Release 1.

URL: <http://Supremecourtdatabase.org>

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