

Back in the days of the Soviet Union, people known as Kremlinologists used to try to figure out what was going on behind the scenes by seeing who was standing next to whom in official photos. We have a bit more visibility into the Supreme Court, but only a bit. That being said, there are signs that the conservative supermajority has already begun to experience internal tensions. That could be good news for environmental law.

The main evidence consists of two recent speeches by arch-conservative Justices. The first speech was [given](#) by Justice Samuel Alito last week. Alito went out of his way to attack an [opinion](#) written by his erstwhile ally, Neil Gorsuch, as “indefensible.” Notably, that opinion was also joined by Chief Justice Roberts. Alito’s disagreement with that opinion was no surprise; what was notable was that he was resurrecting his disagreement with this fellow two years after the fact. Gorsuch may continue to be a bit of a maverick; just this morning he joined the liberals in dissenting in an immigration case.

The second [speech](#) was given by Justice Clarence Thomas. He made a point of contrasting the Rehnquist Court, which he viewed as a paragon of collegiality, with the Roberts Court. He might have made the contrast in terms of the decades involved, but instead he chose to specifically tie the shift in tone to the identity of the Chief Justice, a clear jab at Roberts. At another point, without being clear about the target of his criticism, he bemoaned those lacking courage: “Like they know what is right, and they’re scared to death of doing it. And then they come up with all these excuses for not doing it.”

Thomas is clearly the most extremist of the conservatives, seeing no daylight between his judicial decisions and his political and ideological commitments. Alito is less outspoken, but judging from voting patterns, he and Thomas seem increasingly like comrades in arms.

Another notable point was that Clarence Thomas, while decrying leaks from the Court, felt free to make disparaging comments about the strategy of a party defending gun control in a pending case. It’s not so relevant to my theme in this post, but it was also striking how much Alito and Thomas are focused on liberals and Democrats as the source of all the evils they decried. Demonstrators outside the houses of Justices came in for criticism but nary a word was said about rioters seizing the Capitol and forcing Congress to flee.

The gap between Roberts and his fellow conservatives has emerged in other cases, such as his actions in some cases on the Court’s “shadow docket.” I have also seen suggestions that some of his fellow conservatives may never have forgiven Roberts for switching his view in a key case upholding Obamacare. There are also clear signs of heightened tensions between the Court’s handful of remaining liberals and the conservatives, which is no surprise.

Last year's voting patterns may also be meaningful. According to the [New York Times](#):

Overall, the three-member liberal bloc was in the majority in 13 of the 28 divided decisions, having attracted at least two votes from the court's six-member conservative majority. Those votes most frequently came from Chief Justice Roberts and the three newest justices, all appointed by President Donald J. Trump: Neil M. Gorsuch, Brett M. Kavanaugh and Amy Coney Barrett, who joined the court in October.

I don't want to pretend that this is anything more than speculation, but there seem to be three possible developments to watch for. First, whether the schism between Roberts and Gorsuch versus Alito and Thomas over methods of statutory interpretation hardens. Second, will the growing gap between Roberts and the other conservatives lead him to move in their direction to maintain his leadership or push him toward the liberals? Third, what happens with the two newest Justices, who have been conspicuously absent during all of this? Barrett and Kavanaugh are undoubtedly conservative, but at least in some cases they have seemed more lawyerly than Alito and Thomas.

If these fracture lines develop, that could be good news for environmental regulation. In some cases, the liberals may be able to peel a couple of votes from the conservative bloc to eke out a win. In cases the liberals lose, the majority opinion may go to a conservative Justice who will write a more limited majority opinion than the bomb-throwing preferred by Thomas. And in some other cases, the conservatives may agree on the result but be unable to agree on a single rationale, giving lower court judges more room for interpretation.

All of this is to suggest that the Supreme Court may - with the emphasis on "may" - be less of an engine of destruction of environmental regulation than we fear. The Court's opinion in the current [West Virginia](#) case will be an important clue. Keep an eye on how much anti-regulatory rhetoric infects the majority opinion, how broadly the majority phrases its legal analysis, and how much of EPA's power to regulate carbon emissions remains standing.