



Brett Kavanaugh vote: Will 'asterisk justice' bring political stain to Supreme Court?

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Washington – Brett Kavanaugh will bring a lot of baggage with him to the Supreme Court, adding to perceptions that the third branch of government is just as political as the other two.

Kavanaugh's 50-48 confirmation ends a tumultuous three months in which he was accused of sexual assault and lying under oath. He responded by accusing Democrats and liberal interest groups of a "calculated and orchestrated political hit."

For a high court that already features four conservatives named by Republican presidents and four liberals chosen by Democratic presidents, the addition of a justice viewed as partisan, intemperate or both is almost certain to fuel doubts about the court's legitimacy.

"The court relies to a large extent on people's sense that it's not just another partisan institution," says David Strauss, a professor at the University of Chicago Law School. "It's going to be tougher for people to see the court that way."

Kavanaugh's confirmation was destined to be controversial. Two years ago, Republicans brazenly blocked President Barack Obama's third high court nominee and gave the seat to President Donald Trump's choice. Then Associate Justice Anthony Kennedy's retirement put the court's ideological balance in play.

From a list of 25 potential nominees, Trump chose the judge with the longest paper trail and the most political pedigree, someone who had pursued President Bill Clinton toward his eventual impeachment, then served President George W. Bush over two-thirds of his presidency.

With Republicans united behind him, Kavanaugh, 53, survived all that. For several days before the Senate Judiciary Committee in early September, he cited Chief Justice John Roberts in saying that when it comes to politics, judges must "stay not just away from the line, but three ZIP codes away from the line."

But then came sexual misconduct claims and allegations of excessive drinking in high school and college, which led to a series of embarrassing questions and evasive answers at a second Judiciary Committee hearing last week. With his reputation in tatters, Kavanaugh displayed a temperament judges are supposed to keep hidden.

"This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly

stoked about my judicial record, revenge on behalf of the Clintons, and millions of dollars in money from outside, left-wing opposition groups," he said.

With that single declaration, Supreme Court experts say, he made himself – and, by extension, the court – appear as partisan as the White House and Congress.

"I do think that there's going to be a lot of hostility toward the court in the new term," says Stephen Vladeck, a professor at the University of Texas School of Law. "The question is whether that entrenches the justices in their positions, or whether it becomes sort of a lever to moderate the court."

Associate Justice Elena Kagan, speaking at Princeton University Friday, said increased partisanship would be a mistake.

"This is a really divided time," Kagan said. "Part of the court's strength and part of the court's legitimacy depends on people not seeing the court in the way that people see the rest of the governing structures of this country."

'Lasting injuries'

Kavanaugh will be watched closely in the days, weeks, months and years ahead for signs of reconciliation or revenge. His behavior on the bench during oral arguments will be one clue, including how he gets along with the other justices on what he has called a "team of nine."

Despite the historically close vote, Kavanaugh isn't alone in emerging from confirmation with battle scars.

Associate Justice Clarence Thomas was confirmed 52-48 in 1991 after being accused by Anita Hill of sexual harassment in the workplace and enduring what he called a "high-tech lynching" at the hands of the Judiciary Committee. Thereafter, he went into self-imposed isolation from the media. He almost never participates in oral arguments.

Associate Justice Samuel Alito was confirmed 58-42 in 2006 after a hearing in which he was forced to say, "I'm not any kind of bigot" – a line of questioning that caused his wife to leave the room in tears. He has said he still avoids walking by the Senate building where his confirmation hearing was held.

"These confirmation fights leave lasting injuries for nominees," says Jonathan Turley, a professor at George Washington University Law School. Kavanaugh, he says, "knows that many people in the country will never accept his denials, so he will be forever an asterisk justice."

Kavanaugh warned senators at last month's sexual assault hearing that "what goes around comes around," which some took to imply revenge from the bench. His allies say the reference was to future nominations, not his actions on the court.

"Some people will never see him as legitimate or worthy of being on the court, but most of those people didn't like him to begin with," says Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute. "So at the end of the day, I think he'll be attacked and supported sort of in the same way that Thomas has been."

With a solid conservative majority now, the court will be watched to see if it moves the country that way or issues surprising rulings in the other direction.

Three years after the high court handed the 2000 presidential election to George W. Bush by a 5-4 vote many saw as highly partisan, the justices issued two major rulings applauded by liberals. They struck down sodomy laws aimed at gay couples and upheld the limited use of college affirmative action programs.

“Some of the unfortunate perception that *Bush v. Gore* left with at least a large chunk of the American public was to some degree ameliorated,” Vladeck says.

Along those lines, Kavanaugh will be watched for instances in which he sides with those who opposed his confirmation, rather than his conservative supporters.

Michael McConnell, a former federal appeals court judge and director of the constitutional law center at Stanford Law School, predicts Kavanaugh will change public perceptions “by acting as a judge the way he always has, and not how partisan opponents have tried to portray him.”

Harvard Law School professor Laurence Tribe wrote in *The New York Times* that the newest justice should recuse himself from “cases involving individuals or groups that Judge Kavanaugh has now singled out, under oath and in front of the entire nation, as implacable adversaries.”

That, however, is unlikely. Supreme Court justices decide for themselves when to step aside, and they generally do it only if they have a financial stake in the outcome or have been involved in the case at an earlier stage.

Influence at risk

The anger Kavanaugh displayed in his second Judiciary Committee hearing wasn't welcomed by former Supreme Court Justice John Paul Stevens, who concluded that he lacks the temperament to serve.

What remains unclear is how Kavanaugh's new colleagues feel. Many know him well: Associate Justice Neil Gorsuch clerked with him for Kennedy a quarter-century ago. Kagan hired him to teach a class at Harvard Law School when she was its dean. Roberts, Thomas and Associate Justice Ruth Bader Ginsburg served on the same federal appeals court, though at different times.

“It’s highly unlikely that this is going to create a division on the court on some personal level,” Turley says. “The size of this court demands not just compromise but collegiality. It is hard to get anything done if you carve out justices you don’t want to deal with.”

Roberts, only the nation's 17th chief justice, will be watched closely as the keeper of the court's reputation. Coincidentally, he also moves to the center of the court ideologically with Kennedy gone.

“Now more than ever, the pressure’s really going to be on the chief justice,” Vladeck says.

One thing that could rankle the other justices is the likely presence of protesters inside the august marble courtroom, usually a place for polite oral arguments where even whispering is frowned upon. After the *Bush v. Gore* ruling in 2000 and the *Citizens United v. FEC* campaign finance ruling a decade later, protests proliferated.

“I wouldn’t be surprised if they ramped up security a little bit,” Shapiro says.

Ultimately, one test of the court's ability to maintain its reputation will be the reaction of other levels and branches of government. States and lower courts can drag their feet when it comes to implementing Supreme Court directives. Presidents can put pressure on sitting justices. The House of Representatives can bring impeachment proceedings.

“The long-term effects on the court might be substantial,” Strauss says. “There are a lot of ways in which the court can lose its influence.”