

Court shift was decades in the making

NEWS ANALYSIS
WASHINGTON

President's nominee puts conservatives on brink of a right-leaning majority

BY PETER BAKER

President Trump's selection of Judge Brett M. Kavanaugh for the Supreme Court culminates a three-decade project unparalleled in American history to install a reliable conservative majority on the nation's highest tribunal, one that could shape the direction of the law for years to come.

All of the years of vetting and grooming and lobbying and list-making by conservative legal figures frustrated by Republican appointees who drifted to the left arguably has come down to this moment, when they stand on the precipice of appointing a fifth justice who, they hope, will at last establish a bench firmly committed to their principles.

"They've been pushing back for 30 years, and, obviously, the announcement tonight is a big step in the right direction," said Curt Levey, the president of the Committee for Justice, a conservative activist group, who has been working toward this goal full time since 2005. "It'll be the first time we can really say we have a conservative court, really the first time since the 1930s."

This presumes that Mr. Trump can push Judge Kavanaugh's nomination through a closely divided Senate heading into a midterm election season, hardly a given. More than any nomination in a dozen years, Mr. Trump's choice of a successor for Justice Anthony M. Kennedy, the influential swing vote retiring at the end of the month, holds the potential of changing the balance of power rather than simply replacing a like-minded justice with a younger version.

That has raised the stakes for groups on the left and the right, guaranteeing an incendiary, ideological, partisan and well-financed confirmation battle in a capital already riven by incendiary, ideological, partisan and well-financed politics. Activists on both sides wasted no time on Monday night issuing their predictable full-throated endorsements or scathing condemnations within minutes of Mr. Trump's televised announcement.

But if the president succeeds in confirming his selection, Judge Kavanaugh, who sits on the United States Court of Appeals for the District of Columbia Circuit, is expected to join Chief Justice John G. Roberts Jr. and Justices Clarence Thomas, Samuel A. Alito Jr. and Neil M. Gorsuch in forming a much more consistently conservative major-



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ity than before. The court has swung from left to right and back again throughout its history, of course, and other presidents tried to muscle their way to friendly majorities, most notoriously President Franklin D. Roosevelt's failed court-packing scheme in 1937. Never before, however, has an entire political apparatus arisen to systematically engineer a more dependable Supreme Court over the course of a generation.

Since the 1980s, a network of activists and organizations has worked assiduously to reach this point, determined to avoid the disappointment they felt after Republican appointees like Earl Warren, William J. Brennan Jr., David H. Souter, Sandra Day O'Connor and Justice Kennedy proved more moderate or liberal once they joined the court.

One of the leading figures behind the

effort was Ed Meese, who served as attorney general to President Ronald Reagan, two of whose appointees, Justices O'Connor and Kennedy, proved less conservative than supporters originally hoped.

Mr. Meese has made it a mission since then to advise subsequent Republican presidents on judicial nominations. In a nod to his central role, Mr. Meese was present in the East Room of the White House for Monday night's announcement, and Mr. Trump singled him out during his speech.

Inspired by Mr. Meese, groups like the Federalist Society, the Heritage Foundation, the Judicial Crisis Network, the Judicial Action Group and Mr. Levey's Committee for Justice have for years sought to develop a new generation of younger legal conservatives who would go into government and fill out lower

levels of the judiciary. "You have to have that army before you can credential them, and that army just didn't exist before Reagan," Mr. Levey said.

The idea was to vet and cull potential candidates for the Supreme Court long before vacancies even arose, so that Republican presidents could pick from rosters of would-be nominees whose records were known. No one wanted any more surprises.

"You're simply not going to get Souters anymore because no one will come up who nobody's interacted with," said Steven Teles, a professor at Johns Hopkins University and the author of "The Rise of the Conservative Legal Movement: The Battle for Control of the Law."

Indeed, the last time a Republican president even contemplated candidates from outside that known universe

of conservative talent, he paid a price. President George W. Bush's nomination of Harriet E. Miers, his White House counsel and longtime adviser, collapsed in 2005 amid a full-fledged revolt by conservative activists who did not consider her one of their own.

Among those who argued against her nomination from within the White House? Judge Kavanaugh, who at the time was serving as Mr. Bush's staff secretary and participated in some of the private sessions preparing Ms. Miers for confirmation hearings, sessions that did not go well. Mr. Kavanaugh instead favored the selection of Justice Alito, then an appeals judge and a known and trusted figure within the conservative legal community. Justice Alito eventually got the nod after Ms. Miers withdrew.

Mr. Trump, whatever his other devi-

ations from conservative orthodoxy, seemed to take a lesson from that. He has made it a top priority to restock lower-level courts with judges popular among legal conservatives, and for his two Supreme Court nominations stuck close to the options they presented to him. For Mr. Trump, it is an implicit bargain, a way of keeping his political base in his corner despite misgivings that many conservatives harbor over his other policies or various scandals.

The idea that Mr. Trump would pick from a list developed by conservatives has inflamed some Democrats, including Senator Bob Casey of Pennsylvania, who declared that he would vote against Mr. Trump's nominee even before the choice was announced Monday night.

"Any judge on this list is fruit of a corrupt process straight from the D.C. swamp," Mr. Casey said in a statement.

The political left, naturally, has its own advocacy organizations and lists of favored candidates when Democratic presidents have Supreme Court vacancies to fill. For the most part, in fact, the four-member bloc of Democratic appointees on the court — Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — has voted more in lock step than the Republican appointees.

But liberals lost their chance to solidify a left-leaning majority on the court when Senate Republicans refused to consider President Barack Obama's nomination of Judge Merrick B. Garland in 2016 after the death of Justice Antonin Scalia, the court's conservative stalwart. That seat ultimately went to Justice Gorsuch, keeping it in the court's right-leaning faction.

If Judge Kavanaugh follows Mr. Gorsuch's example so far, Chief Justice Roberts may become the major swing vote. He has surprised, and disappointed, conservatives on occasion, most notably when he voted to uphold the constitutionality of Mr. Obama's health care program. But Chief Justice Roberts has been much more reliably conservative than Justice Kennedy.

Still, some longtime legal scholars said it would be a mistake to assume that Judge Kavanaugh's appointment would change the court fundamentally for the foreseeable future. "The possibility of drift is always there," Mr. Levey said. And if a Democrat were to win the White House in 2020, a conservative vacancy could still swing the court back.

"People say this will cement a conservative court for a generation," said Michael W. McConnell, a former appeals court judge who was considered for the Supreme Court by Mr. Bush. "I don't think that's true. The court goes back and forth and, personally, I think it's rather a good thing that the court have solid representations from both perspectives. This is a divided country."

A conservative stalwart in political fights and on the bench

WASHINGTON

Judge's rulings and hostility to government regulations have strong partisan appeal

BY ADAM LIPTAK

Brett Michael Kavanaugh was just 38 when he was first nominated to a federal appeals court in Washington. But he had already participated in an extraordinary number of political controversies, attracting powerful patrons and critics along the way.

He served under Kenneth W. Starr, the independent counsel who investigated President Bill Clinton, examining the suicide of Vincent W. Foster Jr., the deputy White House counsel and drafting parts of the report that led to Mr. Clinton's impeachment. He worked on the 2000 Florida recount litigations that ended in a Supreme Court decision handing the presidency to George W. Bush. And he served as a White House lawyer and staff secretary to Mr. Bush, working on the selection of federal judges and legal issues arising from the Sept. 11, 2001, attacks.

He was "the Zelig of young Republican lawyers," Senator Chuck Schumer, Democrat of New York, said at Judge Kavanaugh's first confirmation hearing, in 2004. "If there has been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there."

But Judge Kavanaugh, 53, has also formed lifelong friendships with liberals, many of whom praise his intellect and civility. In his professional life, before he became a judge, he was often a moderating force.

Working for Mr. Starr, Judge Kavanaugh concluded that Mr. Foster had in fact killed himself. He opposed the public release of the narrative portions of Mr. Starr's report detailing Mr. Clinton's encounters with a White House intern. As staff secretary to Mr. Bush, he said in 2006, he strived to be "an honest broker for the president."

As a judge, though, he has been a conservative powerhouse, issuing around 300 opinions. His dissents have often led to Supreme Court appeals, and the justices have repeatedly embraced the positions set out in Judge Kavanaugh's opinions.

He has written countless decisions



Left, President George W. Bush watched as Brett Kavanaugh was sworn in as a judge for the United States Court of Appeals for the District of Columbia Circuit by Supreme Court Justice Anthony M. Kennedy in 2006. Judge Kavanaugh's wife, Ashley, held the Bible. Right, Judge Kavanaugh after President Trump announced his nomination on Monday.

applauded by conservatives on topics including the Second Amendment, religious freedom and campaign finance. But they have particularly welcomed his vigorous opinions hostile to administrative agencies, a central concern of the modern conservative legal movement.

In a dissent in January on a decision upholding the structure of the Consumer Financial Protection Bureau, he issued a ringing endorsement of executive power.

"To prevent tyranny and protect individual liberty, the framers of the Constitution separated the legislative, executive and judicial powers of the new national government," Judge Kavanaugh wrote. "To further safeguard liberty, the framers insisted upon accountability for the exercise of executive power. The framers lodged full responsibility for the executive power in a president of the United States, who is elected by and accountable to the people."

John G. Malcolm, a lawyer with the Heritage Foundation, a conservative group, said the decision was emblematic of a judicial career.

"He is a thoughtful, strategic judge who has, over time, moved the direction of the law in a conservative direction, and he has done it with scalpel-like precision," Mr. Malcolm said. "This is a conservative judge who has written textualist, originalist opinions in a whole host of areas."

Born in Washington, the son of two lawyers and the graduate of one of its elite private high schools, Georgetown Preparatory School, Judge Kavanaugh is in many ways a creature of the city Republicans like to deplore.

After seven years at Yale, where he went to college and law school, he returned to Washington for a varied career that included stints in the Justice Department, the independent counsel's office, a private law firm and the White

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House before joining the United States Court of Appeals for the District of Columbia Circuit. Along the way, he married the former Ashley Estes, who served as personal secretary to Mr. Bush. They have two daughters.

But people who have worked with Judge Kavanaugh say he has little use for Washington pomp. "Whatever the opposite of a Georgetown cocktail party person is, that's what Judge Kavanaugh is," said Justin Walker, a law professor at the University of Louisville who worked as a law clerk for both Judge Kavanaugh and Justice Anthony M. Kennedy. "He'd much rather have a beer and watch a

hockey game."

"I never see him prouder," Professor Walker added, "than when I see him talk about coaching girls' basketball."

After law school, he served as a law clerk to three judges: Judge Walter Stapleton of the Third Circuit, in Philadelphia; Judge Alex Kozinski of the Ninth Circuit, in San Francisco; and Justice Kennedy, whom Judge Kavanaugh hopes to replace.

During that last clerkship, Judge Kavanaugh overlapped with a young Neil M. Gorsuch, who had been hired by a retired member of the court, Justice Byron White, and also worked part time in Justice Kennedy's chambers.

No Supreme Court justice has had more than one former law clerk join the court. If Judge Kavanaugh's nomination is successful, two of Justice Kennedy's clerks from a single term will serve together, probably for decades. Judge Kavanaugh also showed his loyalty to another former Kennedy clerk, Richard Cordray.

Before he joined the bench, Judge Kavanaugh made around \$6,000 in contributions to political candidates, all but one of them Republican. The exception was Mr. Cordray, who received a \$250 contribution for his unsuccessful 1998 campaign to become Ohio's attorney general and \$1,000 for a failed bid in 2000 for the Senate. Mr. Cordray, who also worked with Judge Kavanaugh at

Kirkland & Ellis, went on to become the director of the Consumer Financial Protection Bureau, the agency Judge Kavanaugh later voted against, and is now running for governor of Ohio.

Judge Kavanaugh's only appearance as a lawyer before the Supreme Court was an attempt to obtain the notes of a lawyer for Mr. Foster. He argued that the attorney-client privilege had ended when Mr. Foster committed suicide, and lost by a 6-to-3 vote.

Judge Kavanaugh wrote large parts of Mr. Starr's 1998 report to Congress, though he has said that he did not draft its narrative portion, which included many explicit details of Mr. Clinton's sexual encounters with a White House intern, Monica Lewinsky.

He has acknowledged authorship of parts of the report that suggested possible grounds for impeachment, including "areas where the president may have made false statements or otherwise obstructed justice." Some of those grounds have echoes in Robert S. Mueller III's investigation of Mr. Trump.

After the Clinton investigation and impeachment proceedings concluded but before Mr. Trump entered politics, Judge Kavanaugh came to have doubts about the wisdom of criminal investigations of sitting presidents.

"Whether the Constitution allows indictment of a sitting president is debatable," Judge Kavanaugh wrote in a 1998

law review article. His later work as an aide to Mr. Bush also helped shape his views, he wrote in another law review article.

He concluded that sitting presidents should not be distracted by civil suits or criminal proceedings. "A president who is concerned about an ongoing criminal investigation," he wrote, "is almost inevitably going to do a worse job as president."

Judge Kavanaugh said the proceedings could resume after a president left office and that impeachment remained an option.

Judge Kavanaugh's first nomination to the United States Court of Appeals for the District of Columbia Circuit stalled in the Senate, but he was confirmed after Mr. Bush renominated him in 2006.

The court is considered the second most important, but its docket is idiosyncratic and heavily weighted toward administrative law, which can be extraordinarily complex. In his opinions, Judge Kavanaugh has been skeptical of government regulations, notably in the area of environmental law, and he has argued in favor of greater judicial power in reviewing the actions of administrative agencies on major questions.

In 2011, Judge Kavanaugh dissented from a decision upholding President Barack Obama's health care law, but he did so on jurisdictional grounds.

At a 2016 argument over Mr. Obama's climate change regulations, Judge Kavanaugh indicated that environmental policy should be decided by Congress rather than the courts.

"The policy is laudable," he said. "The earth is warming. Humans are contributing. I understand the international impact and the problem of the commons. The pope's involved. And I understand the frustration with Congress."

But he added: "If Congress does this, they can account for the people who lose their jobs. If we do this, we can't."

He has also been open to using the First Amendment to strike down government regulations. Dissenting from the full District of Columbia Circuit's decision not to rehear a three-judge panel's decision upholding the Obama administration's "net neutrality" regulations, he said the government can no more tell internet service providers what content to carry than it can tell bookstores what books they can sell.

"The net neutrality rule is unlawful," he wrote, "because the rule impermissibly infringes on the internet service providers' editorial discretion."