

## **Conservatives' takeover of Supreme Court stalled by John Roberts-Brett Kavanaugh bromance**

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WASHINGTON – The conservative takeover of the Supreme Court that was anticipated following President Donald Trump's two selections has been stalled by a budding bromance between the senior and junior justices.

Chief Justice John Roberts and the court's newest member, Brett Kavanaugh, have voted in tandem on nearly every case that's come before them since Kavanaugh joined the court in October. They've been more likely to side with the court's liberal justices than its other conservatives.

The two justices, both alumni of the same District of Columbia-based federal appeals court, have split publicly only once in 25 official decisions. Their partnership has extended, though less reliably, to orders the court has issued on abortion funding, immigration and the death penalty in the six months since Kavanaugh's bitter Senate confirmation battle ended in a 50-48 vote.

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Roberts and Kavanaugh have obvious reasons for their reluctance to join the court's three other conservatives in ideological harmony. The chief justice has voiced concern about the court being viewed as just another political branch of government. Kavanaugh, a former top White House official under President George W. Bush who was accused of a 1980s sexual assault during his confirmation, may just be laying low.



Chief Justice John Roberts administered the constitutional oath to Associate Justice Brett Kavanaugh in the Justices' Conference Room of the Supreme Court in October, with Kavanaugh's wife and daughters looking on.

Fred Schilling, Collection of the Supreme Court of the United States

"Justice Kavanaugh seems to share some of the chief justice's institutional concerns, but I think he also cares about his own perception as an even-handed judge," said Amir Ali, a civil rights lawyer who won a 6-3 decision in February when Roberts and Kavanaugh joined the four liberal justices to uphold a criminal defendant's appeal rights.

### The chief's wingman

Similarities between the two men are striking, despite their decade apart in age. Roberts, 64, is earnest and soft-spoken, but pointed in his questions to both sides during oral arguments. Kavanaugh, 54, is more demonstrative, but he tempers that with an inquisitive, open-minded manner.

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Whatever their reasons, the chief justice and the newest justice together have provided ballast for a court in transition. Following Kavanaugh's replacement of retired Associate Justice Anthony Kennedy, Roberts has become the court's swing vote, and Kavanaugh often appears to be his wingman.

Examples include the court's action last October giving those challenging a citizenship question in the 2020 census access to additional information about the plan; its refusal in December to consider Republican-led states' efforts to defund Planned Parenthood; and its ruling in February that Texas cannot execute a prisoner who claims to have an intellectual disability.

In all three of those actions, Associate Justices Clarence Thomas and Neil Gorsuch dissented; Associate Justice Samuel Alito made known his opposition in two of them. Roberts and Kavanaugh appear to have voted with the court's liberals, though the breakdown was not made public.

Their differences have been rare but noteworthy. In addition to one public vote in a criminal procedure case, Roberts sided with the liberals in temporarily blocking Louisiana abortion restrictions, while Kavanaugh would have let them go into effect.

And while they refused to hear a New Jersey county's effort to include churches in a historic preservation program and a Washington state high school coach's plea to conduct prayers on the football field, Kavanaugh warned of the need to protect religious liberty.

## Kavanaugh v. Gorsuch

Kavanaugh, perhaps in seeking a low profile, has voted with the majority in almost every case so far. Unless he is the author, that usually means just signing on to the opinion. But he often writes separately to explain his vote – a habit he picked up at the U.S. Court of Appeals for the District of Columbia Circuit.

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“Kavanaugh always had more of a moderate streak, even on the D.C. Circuit,” said Josh Blackman, a South Texas College of Law associate professor who follows the Supreme Court closely. “He feels the need to explain himself, that he’s not that right-wing.”

The Roberts-Kavanaugh bromance stands in stark contrast to the differences evident to date between Trump's two nominees. While Kavanaugh seems eager to be a team player – he touted the court's "team of nine" during his confirmation hearing – Gorsuch dissents often.

The two newest and youngest justices served together as Supreme Court law clerks a quarter century ago, but they have been on opposite sides six times already this term in cases dealing with workers' rights, consumers' rights, American Indian rights and more.

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Their differences were on display last month, when Kavanaugh wrote the court's 6-3 ruling that said Navy contractors must warn about asbestos exposure even if they didn't add the asbestos to their products. Gorsuch penned a pointed dissent.

"Maritime law has always recognized a special solicitude for the welfare of those sailors who undertake to venture upon hazardous and unpredictable sea voyages," Kavanaugh said in summarizing his opinion from the bench.

Gorsuch's dissent reasoned that "a home chef who buys a butcher's knife may expect to read warnings about the dangers of knives but not about the dangers of undercooked meat."

The two were on opposite sides again when Kavanaugh and Roberts agreed with the court's liberals that a criminal defendant was mistreated when his lawyer failed to appeal a conviction, even though the defendant had waived his right to appeal. Gorsuch signed on to Thomas's dissent, which went so far as to question whether the Constitution requires taxpayer-funded lawyers for those who cannot afford one.



Supreme Court Associate Justices Neil Gorsuch and Brett Kavanaugh, here listening to President Donald Trump's State of the Union address in February, have disagreed in a half dozen cases already this term.

MANDEL NGAN, AFP/Getty Images

"You couldn't imagine a bigger shakeup for the criminal justice system," said Ali, whose client won the case.

"Justice Kavanaugh has not taken the bench aiming to rewrite every area of law," Ali said. "Justice Gorsuch's philosophy, however, has led him to advocate some momentous change."

## Left-right splits the exception



Former California Gov. Arnold Schwarzenegger speaks outside the Supreme Court in March as justices heard arguments about partisan gerrymandering, the practice of political parties crafting congressional districts that unfairly benefit one party over another.

Carolyn Kaster, AP

It's still relatively early in the court's term, with more than half the cases to be decided, so trend lines among the justices may not hold through June.

The biggest cases – on the census citizenship question, partisan gerrymandering of congressional districts, the constitutionality of a mammoth Latin cross honoring deceased veterans, and others – likely will tell more about the Roberts-Kavanaugh alliance and the Gorsuch-Kavanaugh division.

Next term, beginning in October, might include major cases on abortion and immigration, gay rights and gun control, and the court's third debate over Obamacare. And for justices in their 50s and 60s with lifetime appointments, there will be many years or even decades in which to evolve or stand firm.

What's clear after Kavanaugh's first six months is that traditional left-right splits are more the exception than the rule.

The court has divided 5-4 along ideological lines just twice in merits cases, on detaining noncitizens with criminal records and executing prisoners with rare medical

conditions. The same lineup also allowed the administration's partial ban on transgender troops to take effect while challenges continue and denied a Muslim prisoner's request to have his imam in the execution chamber.

For now, Kavanaugh and Roberts "are just treading carefully," said Lisa Blatt, who has argued more cases before the Supreme Court than any other woman and was a character witness for Kavanaugh during the confirmation process.

When the subject turns to abortion, guns, race or religion, Blatt said: "Then call me back up. That's where they throw down a marker."