

On Kavanaugh and the Supreme Court's Future

by Conrad Black



The Court's ideological majorities are always apt to evolve.

Now that the dust is settling on the Kavanaugh affair, it is well to remember that much of the concern over the stance he may take as a judge could be unjustified. These are life appointments, and judges' views change once they are installed. The calculation of a solid conservative majority is apt to be fragile in fact.

There was a great liberal bench installed by Franklin D. Roosevelt, after he terrified the Supreme Court with his legislative effort to pack the court in 1937, yet it approved the detention without trial and confiscation of the property of approximately 120,000 Japanese-American citizens in the western states after the attack on Pearl Harbor. Nothing was done of that kind in the Hawaiian Islands, where people of Japanese extraction were too numerous to enable the large navy and air bases there to function without them. The interned Japanese, whole families, were housed and fed adequately and the families were kept together, so the camps were certainly

not concentration or labor camps, but it was a shameful incident and there was no due process at all – merely the ethnic identification of citizens.

Two of America's most renowned liberal justices, William O. Douglas and Felix Frankfurter, were in the majority when the issue reached the Supreme Court. The Reagan administration disbursed \$1.6 billion in reparations to 82,000 surviving internees. The chief objector to the rounding up of the Japanese Americans at the time was J. Edgar Hoover, who was ignored when he told President Roosevelt that his FBI had honeycombed every Japanese-American organization and there was not a jot of evidence of any espionage, much less sabotage, by any of them. This fact has been air-brushed out of American history by liberal historic censorship, as the FBI (which Hoover directed for 47 years, counting its predecessor organization) is wracked by scandalous revelations of improper conduct. Hoover is referred to as "not even" having stooped to such improprieties as James Comey, Andrew McCabe, and others. The attorney general in 1942, Francis Biddle, also objected, but he too was ignored and did not see fit to resign. Even the normally glacial General George C. Marshall, Army chief of staff and holder of the formidable title of chairman of the combined allied military chiefs, for a time believed the Japanese had overflowed California and were supported by cells of civilian sympathizers.

Some allowance must of course be made for the tensions of wartime, especially in the frenzy after the completely unannounced Japanese attack on Pearl Harbor. It is hard to imagine the wave of outrage and paranoia that seized the country. The response to the 9/11 terrorist attacks replicated some of it, but in that event, there was no powerful nation proudly attached to the wicked deeds, and almost all the countries of the world joined the United States in condemning the attacks, however disingenuously. In any case, 9/11 did not threaten the national life of the U.S. itself, as the

concerted attack of a great power such as Japan did.

John F. Kennedy appointed Byron White to the Supreme Court, as a university friend who would be a reliable liberal, and he proved to be rather conservative. Richard Nixon appointed Harry Blackmun, on the advice of Chief Justice Burger, whom he had also appointed, and Burger vouched for his old friend as reliably conservative. Blackmun soon proved to be rather liberal. President Ford named John Paul Stevens to the Court as a reliable conservative, and he stayed for 35 years, and for most of that time was very liberal, and in the last ten years was probably the most liberal justice the Court has ever seen. He virtually denounced the 2000 election as a coup d'état by the Republican-appointed justices (the majority was composed of Nixon, Reagan, and Bush appointees). Justice Anthony Kennedy, named by President Reagan as a replacement for Robert Bork who had been disgracefully attacked and demonized by Edward Kennedy and Joe Biden (both perfect liberals), was seen as a conservative and appointed as one, but he proved to be a swing voter.

When George W. Bush proposed John Roberts as chief justice of the United States, it is unlikely that he would have imagined that his nominee would provide the deciding vote in approving the constitutionality of a national health-care plan because it qualified as taxation, as he did in the vexed constitutional arguments over Obamacare. With the widespread discussion of Justice Kavanaugh being a fifth solid conservative assuring a durable conservative majority, there is no assurance that any of these justices will be permanently and exactly as perceived when they are confirmed. Stephen Breyer has voted unpredictably, though he is generally somewhat liberal.

The real kernel of the argument is the Left's fear about *Roe v. Wade*, which in 1973 effectively permitted abortion almost unlimitedly. The basis of that fear is that every sensible person now knows it is bad law, not necessarily because of the

decision but because of the stated reasoning. The issue isn't, as that judgment found, the right of a woman to control everything within her own body; it is the point at which the unborn attain the rights of a person and supersede the right of the mother to dispose of them without incurring the penalties for extinguishing even an unborn life. There is a very sensible argument that can be made for every answer from conception to birth, but that is the argument.

The Left is taking the wrong stand. They are hiding behind a dogmatic view of the law, when few judges who are considered for high courts are so predictable and inflexible. And instead of standing at the barricades over *Roe v. Wade*, and smearing Roman Catholic judges such as Robert Bork, Clarence Thomas, and Brett Kavanaugh, or Miguel Estrada when he was proposed for the D.C. Circuit Court of Appeals (although he is not, in fact, a person of strong known religious convictions), the Left should reformulate its pro-abortion argument to a pro-choice argument.

Since abortions occur and those that occur should be sanitary and unstigmatizing, they should stop being champions of an infanticidal factory at Planned Parenthood and advocate abortions permissible up to five months, and thereafter only with some plausible medical or circumstantial explanation. The Left has created this venomous debate over abortion by trying to protect the indefensible. It should allow the process of elevating high-court judges to go back to the relatively meritocratic basis it had until the liberal Democrats tried to politicize the courts because they stopped winning the White House, as they had become accustomed to doing in the 20-year incumbency of Roosevelt and Truman.

Not since the disastrous and shameful *Dred Scott* decision of 1857, supporting slavery and repealing the Missouri Compromise, has the Supreme Court tried to retard American progress. When it looked like it might, FDR frightened it into a more flexible view. When the executive branch lagged on

segregation, the Supreme Court of Earl Warren, whom President Eisenhower had appointed as a moderate three-term governor of California and former Republican nominee for vice president, ordered desegregation. Eisenhower followed the Court's order and deployed the legendarily battle-hardened 101st Airborne Division to desegregate the schools of Little Rock, Ark. The "Screaming Eagles" had no trouble snapping the flabby and all-white Arkansas National Guard into shape.

There are obviously other questions besides abortion, though that is the particular fetish of the Left. The Supreme Court has evolved, at least as well as have the Congress and the presidency, to the requirements of American public policy. If both parties would nominate the best judges, with natural policy preferences, the justices will evolve and serve the national interest faithfully. The system will work if allowed to do so.

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