



BY KENNETH A. PRICE
BARRISTER & SOLICITOR

EDITORIAL

Ken Price has practiced in a variety of areas for almost forty years. For thirty of those he has practiced tort law. He is a past president of this organization, and is a founding member of TLABC. He has worked for years providing counsel to several social and legal agencies, and has been a regular contributor to TLABC and CLE legal education programs. He has also worked to keep lawyers vigilant in their duty to represent citizens against oppression by the state.

The United States has a new Supreme Court Justice. Despite the debacle which unfolded in the Senate confirmation hearings, little attention will ever again be paid to Justice Brett Kavanaugh by the people of the United States. He is now safely ensconced in the tranquil cocoon of the United States Supreme Court, replete with his law clerks, large salary, three month annual vacation, and a pension *not* to die for. Assuming good health and happiness with the job, the judge should be around for about 40 more years. For all but 39 of those years, the manner of his nomination and ultimate appointment to the high court bench will seldom if ever grace the memories of all but a few historians of American judicial history.

Clarence Thomas took his elevation to the high court in similar fashion, complete with allegations of sexual harrassment, rivetting television coverage, and the skewering of the complainant who confronted him in the senate. Justice Thomas, like Kavanaugh, weathered the storm and quickly ran for cover to the courthouse.

I dare say that no one under the age of 50 would casually recognize Clarence Thomas's name today. He has already served on the U.S. Supreme Court for 27 years, having been appointed at the young age of 43. Conceivably, he can sit for another 10 or 20 years, unless incapacitation of one form or another intervenes. He may even get to say something in open court, a potential source of notoriety for the man, as he has apparently yet to speak a word in the hallowed chamber for nearly 30 years.

The circumstances of Thomas's and Kavanaugh's appointments to the court were remarkably similar in terms of tone and partisan acrimony. In terms of juridical content, the lasting conservative bent of the two appointees will likely follow the same predictable path. Unlike Thomas, however, who had little individual influence on judgments of the Court, Kavanaugh will actually have a vote that counts. While Thomas comfortably settled into his pre-ordained role as a deeply conservative non-thinker, reliably parroting the views of his mentor, Antonin Scalia, Kavanaugh's influence and energy will actually count. Barely a year after his appointment was confirmed, Thomas joined Scalia's

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FROM PAGE 4 minority dissent in the case of *Planned Parenthood v Casey*, arguing that the legal right to abortion established under *Roe v Wade* (1973) should be reversed. He was, however, joining a minority of the court in his opinion. Kavanaugh, on the other hand, will be in a totally different position. Thomas earned his stripes as a predictable and unwavering conservative on the bench, just as the Bush Republicans predicted he would. He followed a predictable pattern in his decisions, making him one of the most reliable conservatives ever appointed by the Republicans. But his opinions were mostly rendered moot because of the makeup of the court. Kavanaugh will not have this problem.

For the Republicans, nominating Thomas was not rocket-science. Simply go back and peruse his career history before his appointment to the Supreme Court. (Ironically, his judicial history is of little importance, as he served only two years as a Federal Judge before his nomination to the Supreme Court.) Only ten years before his appointment to the Supreme Court, Thomas was working as a Republican legislative assistant to Missouri Republican Senator John Danforth. He had brief stints as an assistant attorney general in Missouri, and he worked for Monsanto as in-house counsel. Apart from those singularly undistinguished jobs, Thomas worked in various roles in the Reagan and George H.W. Bush administrations where he honed his conservative views, including his ongoing distaste for school desegregation in the United States. (These views would later be repeated in Thomas's dissenting opinion in several cases in the Supreme Court.)

Had Thomas been a contributor to the majority in most of his Supreme Court opinions, the American social landscape would today be jarringly different than it is. On almost every potentially landmark issue before the high court, Thomas essentially voted the Republican party position right down the line. Only the majority opinions and consequent judgments kept a leash on Thomas's doctrinal leanings.

Unfortunately, the judicial world will unfold in a radically different manner for the new Justice Kavanaugh. Recent history has shown the U.S. Supreme Court to be uncannily divided along political lines, so much so that one can legitimately question the independence and impartiality of the institution. It now comes down to a pseudo-political balance, and Kavanaugh, unlike Thomas over the past 27 years, will not find himself in the judicial wilderness.

Kavanaugh's appearance at his confirmation hearings was sensational, to say the least. He put on the performance of a lifetime, complete with railings against the left-wing conspiracy he claimed was responsible for the attempts to assassinate his character and fitness for high judicial office. Many who watched were, to say the least, startled by his demeanor. He displayed outbursts of emotion and intemperance not usually seen in a courtroom, especially the highest court in the land. But demeanor was not the real issue in those confirmation hearings. Judge Kavanaugh's masterful obfuscation of the sexual assault claims against him deflected the focus of the hearings away from a careful examination of the essence of his judicial and academic history.

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Whether by design or happenstance, Kavanaugh was carried to the Supreme Court on the wings of reasonable doubt about his participation in the assault complained of by Dr. Ford. Ironically, there can be no such doubt, reasonable or otherwise, about his social and legal biases. Like Scalia and Thomas before him, Kavanaugh got the top job through the operation and machinations of hard ball politics. There was no search for a man with the qualities of wisdom, temperament and open mindedness so clearly demanded in judicial character. The nomination was made on the basis of an unblemished record of ultra-conservative academic, vocational and judicial leanings all crafted to safely breach the gap between a Supreme Court clerkship and a seat on the high side of the bench.

Brett Kavanaugh, like Clarence Thomas, worked only about four years in private practice. Despite his clerkships at the Appellate and Supreme Courts, he argued only one case before the Supreme Court. Otherwise, he worked in a variety of government departments. Notably, Kavanaugh worked for the Office of Independent Counsel under the infamous Kenneth Starr. He was a principal author of the Starr Report, which urged Clinton's impeachment. (Ironically, apparently against the better judgment of his mentor, Judge Starr, Kavanaugh wrote the report providing extensive and very explicit descriptions of President Clinton's sexual encounters with Monica Lewinsky, indicating that the details were essential to the case against Clinton.)

When the infamous Bush/Gore election was stalemated in December, 2000, Kavanaugh jumped on the Bush bandwagon, working to stop the vote recount in Florida. On his ultimate success, Bush hired Kavanaugh as an assistant White House Counsel, and later promoted him to White House Staff Secretary. His rather meteoric rise continued when Bush nominated him to the U.S. Court of Appeals for the D.C. circuit in 2003, barely 10 years after his call to the D.C. Bar. His confirmation hearings were contentious because of accusations of partisanship and took

three years before he was confirmed in 2006. Kavanaugh stayed on the court until his Supreme Court confirmation in 2018. A *Washington Post* analysis concluded that Kavanaugh had the second-most conservative voting record on the D.C. Court in every policy area, between 2003 and 2018.

When he was nominated to the Supreme Court in 2018 by President Trump, he had demonstrated consistent intellectual and practical leanings to the far right on most policy issues. More important than that, however, he had shown the one thing the Republicans most sought in their quest to control the Supreme Court: predictability.

Like Clarence Thomas before him, it is likely that Kavanaugh will never bite the hand that fed him. The manner in which he lashed out at the left during his confirmation hearings echoed his fervent and subjective evisceration of President Clinton in the Starr Report. Nothing in his social history reveals any empathy for anyone outside the Republican old boys' network. The import of his past legal writings and court judgments is certain to continue and expand into his new realm of influence. Clarence Thomas never once veered from his predictable path. Only the quasi-political balance of power on the Supreme Court kept Thomas and his single-minded conservative colleagues from influencing policy for much of the past 30 years. Now that Kavanaugh has taken his seat on the bench we don't need a mental giant to see where things are going.

In any democracy, the one branch of government we need sober impartiality from is the courts. Every country in the world with a dubious executive and dysfunctional legislature ends up with a court system that serves the whim of its masters. While we can never predict with 100% certainty, even in Canada, that judicial appointments will result in the selection of independent, reasonable and unbiased judges, we can surely start by withholding the golden ring from the likes of Clarence Thomas and Brett Kavanaugh. ✓



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