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THE 2020 U.S. SUPREME COURT AND POLITICAL IDENTITY¹

ABSTRACT This article aims to determine current political identity of the U.S. Supreme Court by analyzing the process of appointment of its recent Justices and their ideology. The Author claims that ideology and politics play decisive role on Court's jurisprudence, but that it was Anthony Kennedy's retirement in 2018 which defined the direction of Court's adjudication for years to come. The analysis shows important role of the President and Senate in the process of indirect interpretation of the Constitution by the appointment of Justices representing certain ideology.

Keywords: political identity, U.S. Supreme Court, constitutionalization, judicialization, political justice

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INTRODUCTION

Although the term identity is usually referred to individuals or social groups,² it is important to acknowledge the existence of identity of institutions, or, in other words, institutional identity. There have been studies discussing the impact of institutional identity on the functioning of political, economic, and legal systems, including the impact of institutional identity on social relations and other aspects of social and political reality for which a particular institution has been established.³ Political identity seems to be a natural element of every institution which is, in its nature, political. In that respect, all government institutions seem to have their identity rooted in the powers derived from the law, but also resulting from the practice of their everyday functioning, including the political processes affecting their operation. Thus, in order to determine the real nature and role of a particular institution, it is important to look at it from two perspectives: of its powers as provided by law, and political practice. Generally, identity of all government institutions may be derived from their operation in the realm of political process, however, the judicial branch seems to be the most independent from direct politicization, which does not mean that political pressures on courts and judges take place rarely.⁴ Still, the role of the judiciary may be determined by the position of courts in the political and legal system of a country, theoretically different in the civil law and common law systems, which should be analyzed by reference to legal provisions organizing the court system, the relations among the judiciary and other political institutions, as well as the nature of the decisions undertaken in judicial adjudication.

The analysis of courts' functioning often employs another term related to the issue of identity, *identity politics*, which has become popular in the late 1970s and refers to different forms of struggle for identity by social groups and individuals fighting for their recognition and acknowledgment of their rights and freedoms.⁵ Undoubtedly,

² Most common approaches define individual and collective identities of persons. On a discussion about concepts and constructs of identity see: K.A. Cerulo, "Identity Construction: New Issues, New Directions", *Annual Review of Sociology*, vol. 23 (1997), pp. 385-409; J. Goldstein, J. Reyner, "The Politics of Identity in Late Modern Society", *Theory and Society*, vol. 23, no. 3 (1994), pp. 367-384.

³ See: N.G. Jesse, K.P. Williams, *Identity and Institutions. Conflict Reduction in Divided Societies*, New York 2005; B. Benwell, E. Stokoe, *Discourse and Identity*, Edinburgh 2013.

⁴ For examples of debates on the level of politicization of justice systems and judiciary see: F. Zoll, L. Wortham, "Judicial Independence and Accountability: Withstanding Political Stress in Poland", *Fordham International Law Journal*, vol. 42, no. 3 (2019), pp. 875-948; D.L. Weiden, "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia", *Political Research Quarterly*, vol. 64, no. 2 (2011), pp. 335-347; M. Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*, New York 2012; G. Estrada, "The Politicization of Justice in Latin America", *Open Democracy*, 19 June 2018, at <<https://www.opendemocracy.net/en/democraciaabierta/politicization-of-justice-in-latin-america/>>, 20 November 2020.

⁵ Identity politics, which is connected to the idea of multiculturalism, refers to minorities' movements, or to collective identity in societies struggling for their rights and freedoms. See: M. Bernstein, "Identity Politics", *Annual Review of Sociology*, vol. 31 (2005), pp. 47-74. On the difference between politics

among all government branches, the judiciary has been the most common addressee of identity claims by certain groups, often deciding about the scope and nature of their rights. However, these issues are not the main subject of this analysis, which aims at a more general discussion about institutional identity of the judiciary, focusing on the U.S. Supreme Court from the perspective of its role in the American political system. Determining the political identity of the Court may lead to a better understanding of certain political and social processes in the United States, especially in recent years, marked by growing ideological tensions between Republicans and Democrats.

The recent nomination of Amy Coney Barrett by President Donald Trump for the post of Supreme Court Associate Justice, approved by the Senate in a speedy confirmation process, ignited a discussion concerning the role and position of the Court in American political and legal system. Numerous experts focused on Barrett's jurisprudence as a circuit judge on the U.S. Court of Appeals for the Seventh Circuit underlining her conservative ideology as a decisive factor which made the President and the Republican majority in the Senate determined to appoint her to the highest court in the U.S.⁶ Typically for an appointment process to the Supreme Court, party affiliation and/or political views of various commentators reflected their attitude towards Barrett's candidacy and her potential impact on the future of the Court's adjudication in socially and economically important issues. Democrats warned about a dramatic shift to the right affecting the future of the rights of women and certain minorities, whereas Republicans were applauding the President for his consequence in nominating a candidate who would provide proper interpretation of the Constitution and bring back integrity to the Court.⁷ The debate also focused on the appointment process, which was highly politicized and affected by the presidential election clock, as Barrett's nomination came soon after the death of Ruth Bader Ginsburg and just a few weeks before the election day.⁸

of identity and identity politics see: J.D. Hill, T.M. Wilson, "Identity Politics and the Politics of Identities", *Identities: Global Studies in Culture and Power*, vol. 10 (2003), pp. 1-8.

⁶ See: J. Toobin, "There Should Be No Doubt Why Trump Nominated Amy Coney Barrett", *The New Yorker*, 26 September 2020, at <<https://www.newyorker.com/news/daily-comment/there-should-be-no-doubt-why-trump-will-nominate-amy-coney-barrett>>, 20 November 2020; A. Thomson-DeVeaux, L. Bronner, A. Wiederkehr, "How Conservative is Amy Coney Barrett?", *FiveThirtyEight*, 14 October 2020, at <<https://fivethirtyeight.com/features/how-conservative-is-amy-coney-barrett/>>, 20 November 2020; E. Dias, R.R. Ruiz, S. LaFraniere, "Rooted in Faith, Amy Coney Barrett Represents New Conservatism", *The New York Times*, 11 October 2020, at <<https://www.nytimes.com/2020/10/11/us/politics/amy-coney-barrett-life-career-family.html>>, 20 November 2020.

⁷ Typically, liberals criticized President's nomination, whereas conservatives praised Trump for a very wise choice. See: O. Hatch, "Amy Coney Barrett Deserves to be Confirmed, She's One of the Most Impressive Nominees I've Ever Seen", *Fox News*, 26 October 2020, at <<https://www.foxnews.com/opinion/amy-coney-barrett-confirmed-nominee-orrin-hatch>>, 20 November 2020; E. Isaac-Dovere, "Cory Booker on Why Democrats Haven't Stopped Barrett", *The Atlantic*, 23 October 2020, at <<https://www.theatlantic.com/politics/archive/2020/10/cory-booker-amy-coney-barrett/616834/>>, 20 November 2020.

⁸ M.J. Buchanan, "Trump's Ideological Judges Have Led to Politicized Courts", *Center for American Progress*, 23 October 2020, at <<https://www.americanprogress.org/issues/courts/news/2020/10/23/492268/trumps-ideological-judges-led-politicized-courts/>>, 20 November 2020.

Supreme Court scholars have often raised the issue of politicization of the appointment process of justices, arguing that candidates' ideology was a crucial factor for both presidents and senators in their decisions whether to support a particular person for the post of associate or chief justice.⁹ The so-called "nomination game" between the chief executive and the upper house of Congress was usually characterized by politically-driven choice of the president who weighed the possibility of carrying out the candidate through Senate hearings given the level of party support from senators.¹⁰ Having that in mind, and looking closer into recent Trump's appointments to the Court, it is interesting to find out how they may affect political identity of the institution which plays a double role in the U.S. political system: as the court of last resort establishing binding precedents, and as the final interpreter of the letter and spirit of the Constitution. I argue that ideology and politics are still the main determinants of the Court's jurisprudence, which can be observed not only in the recent Barrett's appointments, but also in the nominations of Neil Gorsuch and Brett Kavanaugh made by Donald Trump during his tenure in the White House. However, in contrary to many researchers, I believe that the fundamental change in the future political identity of the Court took place in 2018, when Justice Anthony Kennedy retired, enabling the President to nominate a more conservative candidate and thus significantly diverting the ideology of the Court to the right. By analyzing the case law of Kennedy Court, I want to underline how serious to the future understanding and interpretation of the Constitution the appointments of Gorsuch, Kavanaugh and Barrett are. At the same time, I want to stress the importance of ideology in both the nomination process and the Court's decision-making, explaining how it affects American democracy and rule of law, including the conducting of electoral process and its outcomes. A reference to the 2020 presidential campaign from the perspective of Trump's Supreme Court nominations is necessary, as it may reveal one of the key factors influencing the decision to support the Republican or Democratic presidential candidate by the voters.

THE SUPREME COURT'S POLITICAL IDENTITY

For readers not acquainted with U.S. political system it may seem quite surprising to realize how political the Supreme Court can be. The Framers of the Constitution imposed the tripartite form of government, dividing the federal and state authorities into three separate branches – the legislative, executive, and judicial – which were to play distinct roles in the system. Despite equipping the government institutions responsible for creating, executing and interpreting the law in controlling tools which ensured theoretical

⁹ See H.J. Abraham, *Justices, Presidents, Senators, Revised: The History of the U.S. Supreme Court Appointments from Washington to Bush II*, Lanham 2007; C. Nemacheck, *Strategic Selection: Presidential Nominations for Supreme Court Justices from Herbert Hoover through George W. Bush*, Charlottesville 2008.

¹⁰ P. Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki*, Kraków 2011, pp. 142-174; C.R. Shipan, M.L. Shannon, "Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations", *American Journal of Political Science*, vol. 47, no. 4 (2003), pp. 654-668.

balance, politics was to be made in the first two, with Congress as a legislative body and president as the head of state and chief executive, who represented the people of the United States.¹¹ Courts, on the other hand, were to solve legal disputes by adjudicating in cases and controversies stemming from federal and state statutory law.¹² Among the people who determined the form and contents of the U.S. constitution, no one envisioned that judges could be put in the middle of political processes, although there were Framers who mentioned the necessity to expand the controlling powers of the judiciary.¹³

Today, more than 230 years later, there is not a single expert in U.S. government who would not perceive the political role of the Supreme Court. The power of judicial review, exercised along with the possibility to create binding legal norms having the character of precedents gives the Court the potential to influence the issues which are fundamental to the operation of the U.S. political and legal system. That potential had been established and re-established numerous times by the Court itself, either by statements made by the justices in their jurisprudence, or by concrete decisions which affected everyday life of millions of Americans. From the initial argument by John Marshall that *it is emphatically the province and duty of the judicial department to say what the law is*, to the famous quote from another Chief Justice Robert Jackson stressing that *judges are infallible only because [they] are final*, it seems obvious that the Court always saw its role as more than just an institution which would answer legal questions.¹⁴ Such an observation is even more accurate when one realizes that “the law” reviewed by the justices is usually the federal constitution, which, typically for a document granting the powers to the government and the people, is highly political in nature. Therefore, any constitutional interpretation, even done by judges without any ideological and political affiliation, concerns the very essence of political, social, and economic relations of a state, thus making the judicial branch sensitive to political pressures and expectations.

These expectations are often met by the Court which has actively pursued the process of constitutional interpretation, focusing on almost all provisions of the document, or even expanding its original meaning, referring to the scope and character of constitutional principles, such as democracy and rule of law, separation of powers, checks and balances, federal-state relations, and the scope of the rights of the people. Importantly, since the beginning of the 20th century, the Court has evolved from an institution imposing judicial restraint to a very active participant of constitutional adjudication, especially during the process of incorporation of Bill of Rights on the states.¹⁵ It often positioned the justices in the center of politics, such as during the duel between President

¹¹ *The Constitution of the United States*, Articles I-II.

¹² *Ibid.*, Article III.

¹³ See: A. Hamilton, “Federalist 78”, in *The Federalist Papers*, New York 1999.

¹⁴ John Marshall in *Marbury v. Madison* 5 U.S. 137 (1803) and Robert Jackson in *Brown v. Allen* (concurring) 344 U.S. 443 (1953).

¹⁵ The process of incorporation of the Bill of Rights to the states is connected with the Court’s interpretation of the Due Process Clause of the Fourteenth Amendment. Active involvement of liberal Justices in that process have determined the fundamental character of certain rights and freedoms of individuals. See: P. Laidler, *Sąd Najwyższy...*, pp. 303-308.

Franklin D. Roosevelt and the conservative majority in the Court over the constitutionality of the New Deal legislation, or, when the Court determined the winner of the 2000 presidential election by plunging into the very center of electoral process, or, when it defined the content of political campaigns by allowing for the flow of big money in the electoral process.¹⁶ Significantly, the Court has been constantly serving as a “national policy-maker,” strengthening the legitimacy of government policies both in foreign affairs and domestic issues, especially in the times of “emergency.”¹⁷ Therefore, the early powers of the Supreme Court as an institution co-leading the federal government, accompanied by active interpretation of the constitution over the last century, shaped it as a body having significant political identity.

The issue at stake could also be analyzed from the perspective of individual justices and their political and ideological affiliations. Although the theoretical aspects of the appointment process of federal judges do not consider direct involvement of political factors, the mere fact of equipping the president and Senate, definitely political subjects, in determining who becomes a justice brings strong argument in favor of politicization of that procedure. Of course, the Framers secured the independence of the judicial branch by granting the nomination power to the executive and the appointment power to both executive and legislative, as well as by diversifying the tenure of members of all three branches of government,¹⁸ the history of Supreme Court appointments clearly presents a direct impact of political factors on the choice of candidates by the presidents and the approval of these candidates by senators.¹⁹ Almost all Republican presidents chose more or less conservative candidates to the Court, whereas Democrats supported liberal nominees, being able to determine their ideology by the analysis of their prior jurisprudence in lower courts or by their earlier party affiliation and government service.²⁰ Historically, there were justices who, despite being chosen for ideological reasons, changed their approach towards particular social and economic issues, but it happened rarely, so the most common repetitive pattern was that Republican nominees supported conservative interpretation of the Constitution, contrary to their liberal counterparts nominated by Democrats.²¹

¹⁶ On the FDR-Supreme Court duel see: W.E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal: 1932-1940*, New York 2009. For the legal and political aspects of *Bush v. Gore* see: C. Rountree, *Judging the Supreme Court: Constructions of Motives in Bush v. Gore*, East Lansing 2007. For the challenges of the campaign finance rulings see: R.J. Mutch, *Buying the Vote: A History of Campaign Finance Reform*, New York 2014.

¹⁷ Especially national security became an important paradigm determining Court's adjudication in times of emergency, including the Cold War era and contemporary War on Terror. See: D. Farber (ed.), *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History*, New York 2008.

¹⁸ *The Constitution of the United States*, Articles I-III.

¹⁹ See: H.J. Abraham, *Justices...*; C. Nemacheck, *Strategic Selection...*

²⁰ P. Laidler, *Sąd Najwyższy...*, pp. 158-162.

²¹ See: *Ibid.*

PRE-2018: THE KENNEDY COURT?

The usual mode of referring to different Supreme Courts in history takes into consideration the special role of chief justices as the highest-ranking officers of the U.S. federal judiciary and formal leaders of the Court.²² From that perspective, there have been seventeen different Supreme Courts up-to-date, with the current Roberts Court functioning since 2005, although some chief justices did not play a significant role as leaders of the top judicial institution in the country.²³ Others, like for example John Marshall, Roger Taney, Robert Jackson, Earl Warren, or William Rehnquist marked their leadership from both formal and substantive perspectives, determining the character of the Court's jurisprudence during the time of their chief justiceship.²⁴ It would be highly improper to try to define the political identity based only on the direct impact of chief justices, as history remembers outstanding and influential associate justices, such as Oliver Wendell Holmes, John Marshall Harlan, Louis Brandeis, Felix Frankfurter, Hugo Black, or, more recently, Antonin Scalia and Ruth Bader Ginsburg. Even if there is no practice of referring to Brandeis Court or Frankfurter Court, I believe that, apart from focusing on the Court's leadership, it is possible to define a particular period of the Court's functioning by the analysis of the actual impact of a single justice on its jurisprudence. In that respect, both part of Rehnquist era and most of Roberts era were marked by jurisprudence of Justice Anthony Kennedy.

Kennedy was nominated to the Supreme Court by Ronald Reagan in 1987 in the aftermath of the unsuccessful appointment process of Robert Bork who was rejected by the Senate with the largest vote margin in history.²⁵ Due to political tensions over Bork's ultraconservative jurisprudence, the President was forced to present a more moderate candidate, and he decided to choose Kennedy, a Ninth Circuit judge, who was quickly approved by the unanimous Senate.²⁶ Despite his less conservative approach towards several important constitutional issues, Kennedy was considered an important player in Reagan's conservative revolution in the Supreme Court, which aimed at overturning precedents on abortion, affirmative action, school prayer, and procedural rights.²⁷ After the confirmation, Kennedy joined the conservative coalition

²² See: C. Tomlins (ed.), *The United States Supreme Court: The Pursuit of Justice*, Boston 2005.

²³ Especially the first chief justices, John Jay, John Rutledge and Oliver Ellsworth were not perceived as strong leaders of the Court, which could be attributed to the weak position of the federal judiciary in the early years of the United States.

²⁴ See: D.A. Cotter, *The Chief Justices. The Seventeen Men of the Center Seat, Their Courts, and Their Times*, New York 2019.

²⁵ For more on Bork's confirmation process see: P. Simon, *Advice and Consent: Clarence Thomas, Robert Bork, and the Intriguing History of the Supreme Court Nomination Battles*, Washington DC 1992.

²⁶ L. Greenhouse, "Senate, 97 to 0, Confirms Kennedy to High Court", *The New York Times*, 4 February 1988, at <<https://www.nytimes.com/1988/02/04/us/senate-97-to-0-confirms-kennedy-to-high-court.html>>, 20 November 2020.

²⁷ See: J. Ehrman, M.W. Flamm, *Debating the Reagan Presidency*, Lanham 2009.

of justices appointed by Republican presidents, including the Chief Justice William Rehnquist, Antonin Scalia, John Paul Stevens, and Sandra Day O'Connor. It soon turned out that even if Kennedy assured conservative adjudication in economic matters, his approach towards the scope of constitutional freedoms, including right to privacy was closer to the views of the liberal bloc of justices.

For the first time, Kennedy introduced his broad understanding of constitutional protection of rights of individuals in the abortion case *Planned Parenthood v. Casey*, in which he wrote the majority opinion joined by O'Connor and other liberals. Rejecting the possibility to overrule the *Roe v. Wade* precedent which was criticized by Republicans, Kennedy outlined the fundament of his future jurisprudence by arguing that *[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.*²⁸ Time showed that, although the Justice manifested conservative interpretation of the economic issues, such as the commerce clause,²⁹ in cases regarding minorities he clearly supported the plaintiffs in their search for a broader constitutional protection. Especially the LGBT community could count on Kennedy's understanding in its fight for the right to privacy which took place in the period between two contrary precedents, *Bowers v. Hardwick* and *Lawrence and Garner v. Texas*. In the latter case, the majority opinion written by Kennedy established constitutional right to privacy of homosexuals, paving a path for same-sex marriage. As he pointed out, the Constitution assured that *persons in every generation can invoke its principles in their own search for greater freedom.*³⁰

By 2005, the Supreme Court consisted of two ideological wings: conservatives, including the new Chief Justice John Roberts, Jr., and Associate Justices Samuel Alito, Clarence Thomas, and Antonin Scalia, and their opposites, liberals Ruth Bader Ginsburg, Stephen Breyer, David Souter, and John Paul Stevens whose jurisprudence occurred more liberal. In 2010, Souter and Stevens were replaced by Sonia Sotomayor and Elena Kagan, thus confirming the ideological status quo until the beginning of Donald Trump's presidency. During that period, Anthony Kennedy proved to be very centrist, responsible for the most narrow-margin decisions undertaken by the Court in the said period. Despite strong leadership of Rehnquist (pre-2005) and Roberts (post-2005), it was Kennedy who cast the decisive vote in many crucial cases decided by the highest judicial instance. His majority opinions in *U.S. v. Windsor* and *Obergefell v. Hodges* broadened the meaning of constitutional right to privacy for LGBT community, and recognized the right to same-sex marriage across the entire country.³¹ The latter decision ignited social and political tensions, with some justices openly criticizing the Court for *diminishing its reputation* and making one of the worst decisions in its history.³² It was Kennedy who voted for liberalization of death penalty measures in

²⁸ 505 U.S. 833 (1992).

²⁹ *United States v. Lopez* 514 U.S. 549 (1995) and *United States v. Morrison* 529 U.S. 598 (2000).

³⁰ 539 U.S. 558 (2003).

³¹ *United States v. Windsor* 570 U.S. 744 (2013) and *Obergefell v. Hodges* 576 U.S. 544 (2015).

³² See: dissenting opinion by Antonin Scalia in *Obergefell v. Hodges*.

Roper v. Simmons and wrote the opinion in which he argued for the unconstitutionality of capital punishment for the minors thus raising the minimum age for the execution in the United States to the age of 18.³³ Similar division of votes occurred in cases granting the right of habeas corpus to Guantanamo prisoners, concerning the effort to impose prayers at official public school ceremonies, as well as when the Kennedy-led liberal majority forced a state court judge to recuse himself from a case involving a party which financially supported that judge in his campaign to the state supreme court.³⁴ In all of these cases, the four conservative justices wrote dissenting opinions arguing against the Court's liberal decisions.

On the other hand, Kennedy joined forces with the conservatives and wrote a majority opinion in *Citizens United v. F.E.C.* supporting the notion that independent corporate funding of candidates in elections could not be limited due to the free speech protection, which led to the uncontrolled flow of money in campaigns for presidency and to Congress.³⁵ Kennedy was also responsible for conservative majority opinions in cases concerning the status of Miranda warnings,³⁶ or the issue of racial gerrymandering which promoted racial minorities,³⁷ as well as for several other decisions referring to the scope of federal-state relations, in which he voted along with other conservatives in limiting the rights of the federal government.³⁸ Accordingly, Kennedy joined conservative justices in their dissents over affirmative action policies (*Grutter v. Bollinger*), or the legal status of the Affordable Care Act (*National Federation of Independent Business v. Sebelius*).³⁹

Apart from the above-mentioned examples of significance of Kennedy's jurisprudence for the direction of Court's adjudication, it is important to acknowledge that in the 21st century, the Reagan-nominee became the most crucial swing voter.⁴⁰ Taking into consideration that in the said period it was the most centrist Court in history, becoming a swing voter meant having a direct impact on the character of judicial jurisprudence in the United States. For several years, Justice Kennedy determined the political identity of the Court, as an institution protecting the rights of individuals, on the one hand, and promoting conservative approach towards economic matters, on the other. Despite being chosen for the post by a Republican President who had a vision to impose a conservative revolution in the Court, Kennedy proved the final safeguard

³³ 543 U.S. 551 (2005).

³⁴ *Boumediene v. Bush* 553 U.S. 723 (2008), *Lee v. Weisman* 505 U.S. 577 (1992), and *Caperton v. Massey Coal* 556 U.S. 858 (2009).

³⁵ 558 U.S. 310 (2010).

³⁶ *Berghuis v. Thompkins* 560 U.S. 370 (2010).

³⁷ *Miller v. Johnson* 515 U.S. 900 (1995)

³⁸ *United States v. Lopez* 514 U.S. 549 (1995) and *United States v. Morrison* 529 U.S. 598 (2000).

³⁹ *Grutter v. Bollinger* 539 U.S. 306 (2003) and *National Federation of Independent Business v. Sebelius* 567 U.S. 519 (2012).

⁴⁰ For more on Kennedy's jurisprudence and the role in the Court see: F.J. Colucci, *Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty*, Lawrence 2009; H.J. Knowles, *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty*, Lanham 2009.

for various minorities in their fight for constitutional protection. The essence of his approach towards constitutional interpretation was presented in 2003, when he underlined that *[t]he case for freedom, the case for our constitutional principles the case for our heritage has to be made anew in each generation. The work of freedom is never done.*⁴¹ In that perspective, Kennedy's decision to retire in 2018 seems even more fundamental for both the Court's political identity and for all of the generations of Americans looking at the top judicial institution as a safeguard of their rights and freedoms.

DONALD TRUMP AND THE SUPREME COURT

Months before Donald Trump's unexpected win in presidential election, the Supreme Court was already placed in the center of a political battle between the White House and the Senate. In February 2016, Antonin Scalia, one of the most famous justices in the Court's history, a declared conservatist and a strong proponent of originalist interpretation of the Constitution, passed away, leaving a vacant seat to fill in by President Obama's nominee. In the next months affected by presidential campaign, the Republican-majority Senate tried to convince the President about the necessity to wait until the outcome of November election, thus leaving the decision of who should nominate the justice to American voters.⁴² Obama, being aware of his constitutional duty, decided to nominate Merrick Garland for the vacant seat, but, despite his centrist views, the candidate was not even considered by the Senate which rejected the possibility to discuss and take a vote on the issue.⁴³ The political tensions over the Supreme Court nomination had an impact on the presidential campaign, during which both Hillary Clinton and Donald Trump underlined the significant role of judicial branch in the U.S. political system, and the importance of the nomination of Scalia's replacement.⁴⁴

Trump's success in 2016 election along with Republicans retaining the majority in the Senate allowed the President to nominate a conservative candidate without the fear of losing the battle in the appointment process. His choice, Neil Gorsuch, was chosen as a candidate who guaranteed similar approach to constitutional interpretation as his predecessor. During his career as a federal judge in a circuit court, he often applied textualism and originalism as the leading modes of understanding the letter of the law.⁴⁵

⁴¹ Anthony Kennedy speech at the American Bar Association meeting in 2003, at <<http://www.november.org/stayinfo/breaking/Kennedyspeech.html>>, 20 November 2020.

⁴² M.D. Shear, J.H. Davis, G. Harris, "Obama Pick Engages Supreme Court Battle", *New York Times*, 17 March 2016, p. A1.

⁴³ P.J. Eckerstrom, "The Garland's Nomination, the Senate's Duty, and the Surprising Lesson of Constitutional Text", *Journal of Constitutional Law*, vol. 21, no. 1 (2018), pp. 34-35.

⁴⁴ See: C.W. Schmidt, "The Supreme Court and the 2016 Presidential Campaign", *Chicago-Kent Law Review*, vol. 93 (2018), pp. 411-452.

⁴⁵ M. Alderman, D. Pickard, "Justice Scalia's Heir Apparent? Judge Gorsuch's Approach to Textualism and Originalism", *Stanford Law Review*, vol. 69 (2017), at <<https://www.stanfordlawreview.org/online/spotlight-textualism-originalism>>, 20 November 2020.

Analysis of Gorsuch's jurisprudence assured Republicans about his views on freedom of religion, commerce clause, criminal procedure, and campaign finance, despite the fact that during the confirmation process, he hesitated to answer directly all questions concerning his views on these topics.⁴⁶ After short hearings, Gorsuch was approved by the Senate Republican majority supported by three Democrats, and joined the Court just ten days after Trump's inauguration.

From the perspective of the ideological balance of the Court, Gorsuch's appointment did not bring any essential change, as one strong conservative was replaced by another. Scalia, as the most famous Justice promoting originalism in the process of constitutional interpretation, found a successor with similar potential to read and understand the principles and provisions of the supreme law of the land. Although the recent three years of Gorsuch's jurisprudence in the Court may not be enough to definitely determine his views on each single important constitutional issue, the new Associate Justice was able to prove his conservatism on several occasions. He voted with other conservative justices in cases concerning the scope of freedom of speech, the status of labor unions, the right to abortion, and the right to same-sex marriages.⁴⁷ Writing with the majority or as a dissenter, Gorsuch most often aligned with other strong conservatives, Justice Thomas and Justice Alito, proving that also in that respect he would follow the patterns paved by his great predecessor Antonin Scalia. Similar conclusions may be derived after analysis of the Court's opinion in *Trump v. Hawaii*, a case on the constitutionality of President's Proclamation no. 9645 imposing a travel ban on certain categories of nationals of eight countries and refugees without documents. Although a circuit court found the Proclamation unconstitutional, the conservative majority, including Gorsuch, overruled the lower court's decision and declared Trump's ban a valid exercise of his powers as the President of the United States.⁴⁸ Interestingly, in the dissent written by liberal justices, there was a reference to the infamous *Korematsu v. U.S.* precedent which confirmed the legality of internment camps for Japanese Americans during WWII, and which, according to the dissenters, introduced similar justification to the actions of the executive as in the case of Trump's travel ban.⁴⁹

Natural reasons (Scalia's death) and political factors (Republican opposition in the Senate to Obama's nomination of Garland) enabled Trump to appoint his first justice. After two years, the President had another opportunity to fill in the vacancy on the Court which occurred due to the retirement of Anthony Kennedy. Kennedy's decision happened in the middle of Trump's presidency, allowing the Republican President to

⁴⁶ *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, Senate Judiciary Committee, United States Senate, 20-23 March 2017, at <<https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf>>, 20 November 2020.

⁴⁷ E. Chemerinsky, "Justice Gorsuch Fulfills Expectations from the Right and the Left," *American Bar Association Journal*, 1 August 2019, at <<https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-fulfills-expectations-from-right-and-left>>, 20 November 2020.

⁴⁸ 585 U.S. 17-965 (2018).

⁴⁹ *Ibid.* (dissenting opinion by Sonia Sotomayor).

nominate and Republican Senate to approve the nomination of a new associate justice.⁵⁰ Regardless of their affiliation, politicians and commentators realized how important the nomination would be for the future of the Supreme Court's adjudication. Senate minority leader Chuck Schumer argued that it was *the most important Supreme Court vacancy . . . in a generation* and it would have a direct impact on health care issues, as well as reproductive rights.⁵¹ Several constitutional scholars stressed the strong legacy of Anthony Kennedy for a broad interpretation of the First Amendment's freedom of speech or the Fourteenth Amendment's equal protection of law.⁵² The Supreme Court was, again, in the very center of politics.

As a Justice appointed by the Republican president, Kennedy definitely believed it would be right to retire when the White House was in the hands of a conservative politician. Still, his strong legacy for expanding the constitutional rights of individuals, and numerous cases in which he supported a liberal interpretation of the law, led to a conviction that Trump got a chance to turn the Court into a more conservative direction for the years to come. President's choice of Brett Kavanaugh for Kennedy's seat proved that Trump was not only fully aware of the uniqueness of the situation, but that he planned to use it without hesitation to strengthen the conservative wing on the Court. Even before announcing his choice for the vacant seat, the President clearly stated who should replace the retiring Justice Kennedy. During a meeting with his supporters in mid-2018, he referred to the Court's decision in *Trump v. Hawaii*, by saying that *[t]he travel-ban ruling underscores just how critical it is to confirm judges who will support our constitution*.⁵³

Brett Kavanaugh seemed well-suited for the job, having experience in serving as a circuit court judge and earlier as a government lawyer. What seems important, he was engaged in the work for the former Republican President George W. Bush, including his role in the Republican legal team during the 2000 presidential election in Florida, which led to the Court's decision in *Bush v. Gore*. On the other hand, he was the main associate of independent counsel Kenneth Starr who held investigation against Bill Clinton's sexual harassment allegations, thus influencing the impeachment process of the President.⁵⁴ Kavanaugh's jurisprudence in circuit court proved his adherence

⁵⁰ J. Pramuk, M. Steinberg, "Anthony Kennedy Retiring from Supreme Court", *CNBC*, 27 June 2018, at <<https://www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html>>, 20 November 2020.

⁵¹ "Schumer Floor Remarks on the Supreme Court Vacancy", *Senate Democrats*, 27 June 2018, at <<https://www.democrats.senate.gov/newsroom/speeches/schumer-floor-remarks-on-the-supreme-court-vacancy>>, 20 November 2020.

⁵² "Did Anthony Kennedy Just Destroy His Legacy?", *Politico Magazine*, 27 June 2018, at <<https://www.politico.com/magazine/story/2018/06/27/anthony-kennedy-legacy-supreme-court-218900>>, 20 November 2020.

⁵³ "Anthony Kennedy: U.S. Supreme Court Justice to Retire", *The Guardian*, 27 June 2018, at <<https://www.theguardian.com/law/2018/jun/27/anthony-kennedy-us-supreme-court-justice-to-retire>>, 20 November 2020.

⁵⁴ C. Woodward, "Supreme Court Nominee Brett Kavanaugh and His Carefully Constructed Life", *Chicago Tribune*, 1 September 2018, at <<https://www.chicagotribune.com/nation-world/ct-supreme-court-nominee-kavanaugh-profile-20180901-story.html>>, 20 November 2020.

to conservative approach towards constitutional interpretation, especially in cases on health care, criminal procedure, gun rights, and abortion.⁵⁵ With such a political experience and staunch conservative ideology, he seemed a perfect candidate for the position of Associate Justice and, despite his reluctance to openly admit his approach towards important social and political issues, as well as regardless of allegations of sexual misconduct, Kavanaugh was confirmed by the Senate by a close vote of 50-48.⁵⁶

Another challenge to the Supreme Court appointment process came in the final months of Trump's presidency, after the death of Justice Ruth Bader Ginsburg. Ginsburg, appointed to the Court by Bill Clinton, served for twenty-seven years, becoming one of the most powerful and influential liberal justices in the modern history of that institution. During her tenure, Ginsburg proved an active defender of the rights of women, including the right to abortion, and a strong advocate for same-sex marriages, affirmative action programs, and rights of immigrants. She always voted with the liberal bloc, and is better known for strong dissents against conservative interpretation of economic issues, campaign finance laws, and gun rights, rather than majority opinions in cases won by liberal justices.⁵⁷ Despite her unequivocal support for unincorporated rights and criticism of originalist doctrine of constitutional interpretation, Ginsburg was able to build respect among all members of the Court, and established a long friendship with her strongest judicial opponent, Antonin Scalia.⁵⁸ Although her death showed that, despite political affiliation, everyone praised her for professionalism, devotion and integrity which she demonstrated during her judicial service, the clash of ideological interests between Republicans and Democrats was just a matter of time.

Similar to 2016, the 2020 presidential campaign became an arena for political debate concerning the moment and character of the appointment process to the Court. The vacancy which occurred just two months before the election raised political tensions between Democrats who were appealing to the President to wait for the election results, and Republicans pushing for a quick and successful appointment of Trump's nominee. The ideological duel was even stronger than four years earlier, because Republicans were aware of the possibility to lose the White House and the majority in the Senate, which would give Democrats the chance to nominate a liberal justice. On the other hand, the Democratic Party realized that if Trump's candidate would win, one of the most important bastions of liberalism in the Court would fall, giving the possibility

⁵⁵ "Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court", *Congressional Research Service*, 21 August 2018, at <<https://www.everycrsreport.com/reports/R45293.html>>, 20 November 2020.

⁵⁶ C. Trautwein, *Inside the Kavanaugh Hearings: An Oral History*, 21 May 2019, at <<https://www.pbs.org/wgbh/frontline/article/supreme-court-kavanaugh-collins-flake-heitkamp-blasey-ford/>>, 20 November 2020.

⁵⁷ See: S. Dodson (ed.), *The Legacy of Ruth Bader Ginsburg*, New York 2015.

⁵⁸ R. Wolf, "Supreme Friends: Ruth Bader Ginsburg and Antonin Scalia", *USA Today*, 20 September 2020, at <<https://eu.usatoday.com/story/news/politics/2020/09/20/supreme-friends-ruth-bader-ginsburg-and-antonin-scalia/5844533002/>>, 20 November 2020.

to overturn the most fundamental liberal precedents since the 1960s.⁵⁹ Despite strong opposition and accusations of hypocrisy of Republicans who used opposite arguments in 2016 when blocking Garland's nomination, Donald Trump nominated U.S. circuit judge Amy Coney Barrett for the vacant seat.⁶⁰

The choice of Barrett was another proof for the ideological consequence in filling the vacancies in federal judiciary by Donald Trump. Like in two earlier cases, the President was convinced about the necessity to present a candidate whose views were conservative enough to guarantee a concrete direction of jurisprudence in the Court's adjudication. Showing respect to the seat occupied for twenty-seven years by Ginsburg, Trump decided to nominate a female justice, but that was the only aspect of the nomination which Democrats were not critical about. During confirmation hearings in the Senate Judiciary Committee, Barrett was trying hard to portray herself as a judge who follows the rule of law rather than an ideologically-driven person, but the analysis of her jurisprudence defines her as a clear conservatist with a well-established views on such issues as abortion, Second Amendment rights, affirmative action, or illegal immigration.⁶¹ During the confirmation process it became clear that the Republican Senators would vote in favor of Barrett, and that she was supported by Christian right and social conservatives, whereas Democrats, who boycotted the procedure in the Senate Judiciary Committee, openly objected to her candidacy.⁶² Having majority in the Senate, Republicans were able to collect the necessary support to confirm Barrett as the next Associate Justice, which happened just eight days before the general election, proving to be one of the fastest and most controversial appointment processes in recent decades.

As a result, during four years of his tenure, Trump succeeded in appointing three new justices to the Court, all representing conservative views on most important social, economic, and political issues, thus influencing the ideological character of that institution. The balance in the Court, when four liberals and four conservatives were reconciled by Kennedy as a swing voter, was disturbed by Trump who strengthened the conservative wing, which seems to have today a stable 6-3 majority, according to the predictions based on individual approach of Gorsuch, Kavanaugh, and Barrett towards the process of constitutional interpretation.

⁵⁹ A. Zurcher, "Ruth Bader Ginsburg's Death Sparks Political Firestorm", *BBC News*, 19 September 2020, at <<https://www.bbc.com/news/election-us-2020-54215483>>, 20 November 2020.

⁶⁰ "President Donald J. Trump Announces Intent to Nominate Judge Amy Coney Barrett to the Supreme Court of the United States", *The White House*, 26 September 2020, at <<https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amy-coney-barrett-supreme-court-united-states/>>, 20 November 2020.

⁶¹ M. Reynolds, A. Robert, "4 Major Takeaways from the Amy Coney Barrett Confirmation Hearings", *American Bar Association Journal*, 15 October 2020, at <<https://www.abajournal.com/web/article/four-takeaways-from-the-amy-coney-barrett-confirmation-hearings>>, 20 November 2020.

⁶² M. Levine, "McConnell, Schumer Trade Insults ahead of Barrett Confirmation", *Politico*, 22 October 2020, at <<https://www.politico.com/news/2020/10/22/mcconnell-schumer-barrett-sctus-confirmation-431240>>, 20 November 2020.

SUPREME COURT'S POLITICAL IDENTITY: 2020 AND BEYOND

The U.S. Supreme Court has its significant institutional identity which can be derived from its formal position as one of the three branches of the federal government, as well as from the appointment process of justices in which both the executive and legislative departments are involved. There is no doubt that politics have played a crucial role in the functioning of the Court as a national policy-maker, and with respect to the level of politicization of the nomination game between the president and the Senate. Furthermore, the character and identity of that institution has evolved from *the least dangerous branch* to a highly active and very influential political body, which has determined almost all crucial aspects of political, economic, and social relations within the United States. Even if there are times when the president and the Congress are not directly affected by a broader or limited interpretation of their powers by the Court, the potential to plunge into the redefining of federal-state relations, powers of the government, or the rights of individuals gives the justices an effective tool of continuous presence in the politics of the country. As President Woodrow Wilson once stated, the Supreme Court's work is *a constitutional convention in continuous session*,⁶³ correctly defining the never-ending process of reading, analyzing and interpreting the meaning of constitutional principles and provisions by the justices. In *Lawrence and Garner v. Texas*, Anthony Kennedy stated that *as the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom*,⁶⁴ and that search is made possible by the Court, regardless of the times of its adjudication.

Understanding such a unique position of the highest court in the U.S. political system makes it easier to realize how important it occurred for many chief executives to fill in vacancies on the Court with "proper" justices. Observing the tensions, both in 2016 and today, between Republicans and Democrats on the outcome of the appointment process, it seems natural that all subjects interested in the ideology of the Court will do everything to influence that process either during the nomination or confirmation phases. Several studies have shown a growing involvement of politicians, businesses, and interest groups lobbying for candidates for justices representing particular ideology.⁶⁵ And even if the justices who were chosen based on their ideology may surprise the presidents and Senators in future by shifting from the main course of their jurisprudence, such a situation occurred rarely during the 230 years of the Court's functioning.⁶⁶ That is why each vacancy is viewed as a chance for the presidents and Senators to determine the future of adjudication in the most crucial issues

⁶³ G.J. Jacobsohn, Y. Roznai, *Constitutional Revolution*, New Haven 2020, p. 184.

⁶⁴ 539 U.S. 558 (2003).

⁶⁵ See: P.M. Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*, New York 2008.

⁶⁶ See: P. Laidler, *Sąd Najwyższy...*

affecting everyday life of Americans, which may also become one of their best political legacies. In that respect, long after Donald Trump leaves the White House, the views of “his” justices may determine the character of U.S. political, economic, social and legal systems.

Paradoxically, it was Ronald Reagan who announced the conservative revolution in the 1980s aiming at limiting the impact of liberals on determining the meaning of the Constitution, but the revolution became only possible when one of Reagan’s nominees was replaced by a justice appointed by another Republican president more than thirty years later. Having impact on three appointments to the Supreme Court, Donald Trump placed himself close to the top presidents in history with regard to the highest rate of nominations per tenure.⁶⁷ But it is not the number of appointments, but their quality, or, rather, the ideology of appointees that really matters here. Both George W. Bush and Barack Obama had the opportunity to nominate two justices each, but these nominations did not make any difference in the ideological dimension of the Court’s adjudication. Bush replaced conservatives with conservatives similarly to Obama who appointed liberals to the seats held by liberal justices. Meanwhile, two out of three Trump’s nominations have potential to directly affect the ideological structure of the Court. And, despite the fact that the clearest example of opposite ideologies could be seen between Ginsburg and Barrett, it is the replacement of Kennedy by Kavanaugh which affects political identity of the Court the most.

In recent years, American public has become more interested in the membership and functioning of the Supreme Court, which could also be observed during the 2020 presidential campaign. On the one hand, Donald Trump and Joe Biden have often referred to the appointment process to the Court, especially after the death of Ruth Bader Ginsburg, having opposite opinions about the time of possible presidential nomination, but raising similar arguments about the politicization of that process.⁶⁸ The hearings and confirmation of Amy Coney Barrett took place during the final stage of the campaign, forcing both parties to debate over the legality of presidential nomination and possible future outcomes of the appointment to the Court’s jurisprudence. The tensions even led to a discussion about potential future modifications in the number of justices or suggested limitations to judicial review.⁶⁹ Actually, such arguments occurred several times in U.S. history, especially in times of conflicts between the

⁶⁷ Importantly, Trump also nominated a large number of federal judges to district and circuit courts. See: J. Gramlich, “How Trump Compares with Other Recent Presidents in Appointing Federal Judges”, *Pew Research Center*, 15 July 2020, at <<https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>>, 20 November 2020.

⁶⁸ “Trump, Biden Debate Amy Coney Barrett Supreme Court Nomination”, *NBC News*, 30 September 2020, at <<https://www.nbcnews.com/video/trump-biden-debate-amy-coney-barrett-supreme-court-nomination-92820549541>>, 20 November 2020.

⁶⁹ J.S. Gersen, “What the Democrats Achieve by Threatening to Pack the Supreme Court”, *The New Yorker*, 28 October 2020, at <<https://www.newyorker.com/news/our-columnists/what-democrats-achieve-by-threatening-to-pack-the-supreme-court>>, 20 November 2020.

presidents or Congresses and the Court, but they never turned into a serious piece of legislation which would change the role of federal judiciary in the social and political life of Americans.⁷⁰

On the other hand, several months before Barrett's nomination, the Supreme Court had already been one of the major issues in the campaign. After economy and health care issues, the appointments of justices were the third most crucial topic of the campaign, even more important than the coronavirus outbreak. Interestingly, there was a bigger concern about the future of the Court among Democratic voters than among Republicans, but more than 60% of supporters of both parties saw the appointment of justices significant during the election campaign.⁷¹ Other polls revealed that the attitude of U.S. citizens towards concrete Supreme Court appointments was determined by the moment and character of a presidential nomination of a justice. According to Gallup, 23% of Americans had no opinion about the candidacy of Neil Gorsuch, 18,5% did not care about the nomination of Brett Kavanaugh, and only 4,5% of the respondents were not interested in Trump's choice of Barrett for the post of Associate Justice.⁷² Especially the last result seems unique compared to many other earlier presidential nominations to the Court, which strengthens the argument that the voters followed the confirmation process and considered it important in their final decision whom to support in the election. It would be difficult to argue that Joe Biden won the presidency due to his attitude towards Trump's appointments of justices, but the fact that the Supreme Court became very conservative could force the supporters of the Democratic Party to mobilize and vote.

In fact, it is also very hard to predict how the justices of the 2020 Court will vote in the future. It is even more difficult to guess which cases will be decided by the Court, as the justices have discretionary power to choose the most significant disputes for adjudication. A careful analysis of the cases pending in lower courts suggests the potential of the Court to determine such issues as the right to abortion, the future of same-sex marriages, the immigration laws, the scope of death penalty, and the constitutionality of Affordable Care Act.⁷³ Especially abortion seems to electrify American society, polarized over the issue since the 1970s, but it is more likely that the Court will first focus on the health care system, being strongly affected by the pandemic in 2020. Conservative justices have a potential to overrule both *Roe v. Wade* and *N.F.I.B. v. Sebelius*, provided none of them would want to show their more liberal face, which happened in 1992 with Anthony Kennedy and Sandra Day O'Connor, as well as in 2012 with John

⁷⁰ The best example of the court-packing plan occurred in the 1930s during the duel between President Franklin D. Roosevelt and conservative justices over the constitutionality of the New Deal legislation.

⁷¹ "Important Issues in the 2020 Election", *Pew Research Center*, 13 August 2020, at <<https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/>>, 20 November 2020.

⁷² "Supreme Court", *Gallup*, at <<https://news.gallup.com/poll/4732/Supreme-Court.aspx>>, 20 November 2020.

⁷³ See: C. Colby, "U.S. Supreme Court is Headed for Dramatic 2021. Here are 5 Things that May Change", *C-Net*, 12 November 2020, at <<https://www.cnet.com/how-to/us-supreme-court-is-headed-for-a-dramatic-2021-here-are-5-things-that-may-change/>>, 20 November 2020.

Roberts, jr. Although the conservative character of the current Supreme Court is undisputable, individual political identity of each justice cannot be easily defined, as there may always be a surprise in their adjudication.⁷⁴ Such a surprise could potentially happen if any of the conservative justices would decide to retire, which is possible in cases of Clarence Thomas and Samuel Alito. These two vacancies could bring the Court back to balance, as President Joe Biden would definitely appoint justices sharing liberal ideology. In that perspective, the fight for the last two seats to the Senate from Georgia, which shall be held in January 2021, may become crucial to the future appointment process of federal judges, including the Supreme Court justices. Once again, the political process may determine the character of the nomination game between the White House and the Capitol, placing the judicial branch in the center of partisan interests.

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⁷⁴ See: L. Tribe, J. Matz, *Uncertain Justice. The Robert’s Court and the Constitution*, New York 2014, p. 316.

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