XVIII: 2021 nr 1
Krakowskie Studia Międzynarodowe
KRAKOW INTERNATIONAL STUDIES
e-ISSN 2451-0610
ISSN 1733-2680
DOI: 10.48269/2451-0610-ksm-2021-1-006

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THE TRUMP PRESIDENCY, FEDERAL JUDGES, AND AMERICAN LAW

Introduction

The election of Donald Trump as US president – a populist-nationalist sharply at odds with elite opinion in the United States – was a shocking event. There were many people (some conservatives, as well as liberals) who believed that Trump was extreme, dangerous, and utterly without the necessary qualities to make an acceptable, much less a good, president. (His election in part reflected that not a few people on the other side viewed Hilary Clinton much the same way, though perhaps with less emphasis on personal psychology.)

This paper will not provide an overall evaluation of President Trump, his person, and his policies. It will focus, rather, on one area of American political life: the judiciary. It will become clear that, in this area at least, Trump is anything but extreme, and that he has, in fact, done an unusually fine job in his selection of judges, with a view to re-orienting constitutional law in important and necessary ways.

The Trump Judicial Selection Process

The first thing to note about Trump's judicial selection process is that he has relied to a great extent on expert opinion, rather than simply relying on himself.

These experts are not, however, from mainstream law schools and legal scholarship. They are from a group of people who constitute a distinct minority in legal academia, but whose legal qualifications and understanding are excellent.

In particular, President Trump has relied on two groups: the Federalist Society (and especially its Executive Vice President, Leonard Leo) and the Heritage Foundation. They have thoroughly vetted possible candidates for judicial appointments, especially for the most influential courts, the Supreme Court and the Courts of Appeal.[1]

During his presidential campaign, Trump had done something unprecedented: he publicly announced a list of 21 potential Supreme Court nominees (in two stages), and committed himself to choosing one of those names to fill the position left vacant by the death of Justice Antonin Scalia (whom Trump praised as a "great judge"). The list had been compiled by the Federalist Society and Heritage Foundation, and it contained people of undoubtedly high legal qualifications.

Trump's list was attacked for being "ideological". This is a key issue. To understand this charge, it is necessary to provide some extensive background about the history of the modern Supreme Court in American politics.

A Thumbnail Sketch of Modern Supreme Court History

From the end of the 19th century until 1937, the Supreme Court was dominated by justices committed to the protection of economic and property rights. To achieve this protection the Court gave a broad reading to the Due Process clause – one that went far beyond legal procedure (its original meaning) and focused on the substantive content of the law. The Court frequently held that various forms of state legal regulation of economic matters were "arbitrary" and therefore unconstitutional under the "substantive due process" doctrine.

In 1937, the Court switched its position on economic regulation, and subsequently upheld virtually all regulations of economic affairs for at least the next generation or two. The Court's new deference, paradoxically, reflected the dominance in legal scholarship and practice of legal realism – the view that judges make law, rather than simply interpreting it. This legal realism, born and nurtured in the late 19th and early 20th centuries, under the guidance of Justice Oliver Wendell Holmes, Jr., held that courts inevitably legislated "in the gaps of the law" and it viewed the evolution of the law, through "judicial statesmanship", to fit the changing circumstances of new times as both inevitable and desirable.

[1] L. Bauman, N. Devins, "Federalist Court: How the Federalist Society became the de facto selector of Republican Supreme Court justices", *Slate*, January 31, 2017, https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html [accessed: 4.06.2021].

While the Roosevelt Court (Franklin Delano Roosevelt had eight appointments to the Court between 1938 and 1944) undid economic due process and adopted a completely deferential stance on economic regulation, it began to expand Court supervision of laws touching on civil liberties. In the 1940s, the Court expanded its First Amendment jurisprudence, adopting a more separationist position on Church and State, expanding protection of religious minorities and widening the scope of freedom of speech. In the 1950s, the Court decided *Brown v. Board of Education*, which helped to begin the process of undoing legal segregation, especially in the South, and resulted in a significant increase in the Court's prestige and its confidence that it could lead important social reform movements. In the 1960s, the Warren Court engaged in wide-ranging judicial activism, including criminal justice reform, court-mandated reapportionment of federal and state legislative districts, the prohibition of prayer in the public schools, the evisceration of obscenity regulation, and the invention of a new constitutional privacy right.

The 1960s Warren Court decisions led to a political backlash, and Richard Nixon had the opportunity to appoint four Supreme Court justices between 1969 and 1972. These new justices were generally more conservative (especially on the criminal justice decisions Nixon was most interested in), but it did not overturn many Warren Court decisions. Its conservatism was manifested as much in its adherence to precedent as in its frequent refusal to extend the logic of those precedents. At the same time, it was the more "conservative" Burger Court that handed down the notorious abortion decision in *Roe v. Wade* in 1973.

Since the 1970s, Supreme Court jurisprudence has been an eclectic mixture of conservative, liberal, and mixed decisions. It has outraged conservatives by reaffirming the core of the abortion right in 1992 (while allowing some regulation at the margins) in *Planned Parenthood v. Casey*, by imposing gay marriage on the entire country in 2015 in *Obergefell v. Hodges*, by continuing a constitutional ban on school prayers, and by upholding local government power to condemn property and give it to private companies for economic development. It has outraged liberals by reinstituting some limits on Congress' powers under the commerce clause in *U.S. v. Lopez* in 1995, by expanding property rights protections under the takings clause, by upholding bans on certain late-term ("partial-birth") abortions, by striking down campaign finance regulations of corporate contributions in *Citizens United v. FEC*, and by striking down certain federal and state gun control laws. The Court has displeased both liberals and conservatives by mixed decisions on racial voting cases, in its affirmative action decisions, and by expansive free speech decisions that limit regulation of both online obscenity and hate speech.

Most political observers look at this pattern (and perhaps lack of a pattern) of cases and see it as confirmation that the Supreme Court is indeed

a political body that advances, within certain political limits, its own conceptions of good public policies.

There is another way of looking at the Court's more recent history, however – one that focuses not on the policy implications of Court decisions, but rather on the conception of constitutional interpretation and judicial review on which justices' decisions are based.

From 1937 on, the Court has been dominated by justices who have reflected the dominant legal realism of the law schools. Even the appointment of more "conservative" justices in the Nixon years made no significant change of this situation. With the possible exception of Justice William H. Rehnquist, the Nixon appointees (Warren E. Burger, Harry A. Blackmun, and Lewis F. Powell Jr.) were not originalists – justices who sought to return to a form of constitutional interpretation that focused on the actual meaning of its provisions, as understood by those who wrote and ratified them, and to a form of judicial review that was limited to striking down acts contrary to the (original public) meaning of the Constitution. They were legal realists who were somewhat more conservative politically, and reluctant to extend activist precedents and reluctant also to overrule them. They were "modern" justices, who were judicially and politically moderate.

The appointment of Justice Antonin Scalia in 1986 by President Ronald Reagan was a major event. That appointment was the result of a significant reform movement in the legal profession: the re-birth of originalism. Reagan's Attorney-General, Edwin Meese, in a series of speeches had called for a "Jurisprudence of Original Intention".[2] The Federalist Society, established by law students at Chicago, Harvard, and Yale in the early 1980s, became an organizational center for conservative law faculty and students and gave a secure platform to originalist thinkers in the legal community for the first time in generations.[3]

Rather than being another innovative "ism", originalism was simply a return to the interpretive principles of the common law and early American history.[4] It wasn't so much an "ism" as it was simple, straight-forward

[2] "A Speech by Attorney General Edwin Meese III before the American Bar Association on July 9, 1985", [in:] *The Great Debate: Interpreting Our Written Constitution*, The Federalist Society, https://www.ruleoflawus.info/Constitutional%20Interpretation/Federalist%20Soc.-Great%20Debate-Interpreting%20Our%20Constitution.pdf [accessed: 4.06.2021].

[3] Justice requires the acknowledgment that a key figure in the resuscitation of originalism in American law was Raoul Berger, whose *Government by Judiciary: the transformation of the Fourteenth Amendment*, Harvard University Press, Cambridge, MA–London 1977, was a strong call for interpretation based on original intent – in this case, the original intent of the framers of the Fourteenth Amendment. Berger's original intent, however, in the opinion of many later originalists, was too grounded in historical research, using sources extrinsic to the constitutional text, into the specific intentions in the minds of those who wrote the document, rather than the text of the document itself.

[4] For a detailed account of the transformation of constitutional interpretation and judicial review in American history, see Ch. Wolfe, *The Rise of Modern Judicial Review: From Judicial*

interpretation of legal documents. The originalist/non-originalist distinction is actually the successor to an earlier distinction in modern legal literature: namely, "interpretivism"/"non-interpretivism". But originalists rightly rejected the characterization of their position of an "ism", arguing that what they espoused and practiced was simply interpretation, rather than some other sort of act. (I would characterize the alternative to interpretation as "specification of allegedly vague constitutional generalities".)

Scalia was the first clear-cut originalist justice on the modern Court (though Justice Rehnquist often, but less consistently, used originalist principles in his jurisprudence). He was followed by others who shared an originalist approach: Justices Clarence Thomas, Samuel A. Alito, and Neil M. Gorsuch. (Chief Justice John G. Roberts is at least sympathetic to originalism in many ways, but his stronger commitment to precedent, to deciding cases on as narrow a ground as possible, and to overarching political considerations seem to limit the applicability of that term to him.) And, as others have noted, Scalia's emphasis on originalism has had an impact even on the Supreme Court's non-originalists and legal scholars more generally. The textual original intention of constitutional provisions became a much more central issue to modern Supreme Court constitutional interpretation because of Scalia's articulate and powerful arguments for its priority.

Against this background, what does it mean when political liberals (e.g., Democrats, or political scientists, who are overwhelmingly politically liberal) argue that conservative (Republican) court appointments are "ideological"? For example, well-known judicial scholars Lawrence Baum and Neal Devins argue that President Barack Obama's nomination of Merrick Garland "[…] reflects the practice of recent Democratic presidents to balance ideology with other goals by appointing moderate liberals. In sharp contrast, our research shows that Republican presidents over the past 25 years have put ideology first by appointing strong conservatives to the court".[5]

What does "ideology" mean here? On the one hand it means that Republicans have generally aimed (not always successfully) to appoint justices who are strongly committed to originalism, that is, not legislating from the bench. Republicans have not aimed to appoint "moderates", that is, judges who only legislate somewhat, or do so in politically moderate ways. They are said to have been ideological, because they have not sought to appoint judges who are willing to bring their political ideology to bear on their judicial

Interpretation to Judge-Made Law, revised and expanded edition, Rowman and Littlefield, Maryland–London 1994.

[5] B. Lawrence, N. Devins, "Ideological Imbalance: Why Democrats usually pick moderate-liberal justices and Republicans usually pick conservative ones", *Slate*, March 17, 2016, https://slate.com/news-and-politics/2016/03/democrats-always-pick-moderates-like-merrick-garland.html [accessed: 4.06.2021].

decision-making. They are ideological, because they have sought to appoint non-ideological judges.

Democrats, on the other hand, are said to have appointed "moderates" such as Ruth Bader Ginsburg, Stephen G. Breyer, Elena Kagan, and Sonia Sotomayor – justices whose votes in controversial cases have been consistently liberal, e.g., pro-gay marriage, pro-abortion, strongly separationist in Church-State issues, pro-campaign finance regulation (which reliably benefits political liberals, especially due to the differential treatment of unions), pro-gun control, and so forth. It is true that Democrats could have appointed judges who were even more liberal and more political, but that doesn't make the ones they have appointed politically "moderate".

The Contemporary Judicial Selection Process

What I have described so far makes it clear that the politicization of the judicial selection process is virtually inevitable. If many judges rather self-consciously view themselves (and others view them) as having the legitimate authority to determine significant swaths of public policy, then it is only natural that their selection will occasion political divisions.

Supreme Court Nominations

In the modern era, the first major political battle over Supreme Court nominations came in the late 1960s, when Chief Justice Earl Warren retired and President Lyndon Johnson nominated Abe Fortas to be his successor. Fortas had been an active member of the Warren Court's liberal activist majority for several years and had been a political advisor to President Johnson. The end of the decade saw a political backlash against the Warren Court, and Republicans made the Fortas nomination an occasion to attack some of the Warren Court's decisions. Moreover, as is typical, a presidential judicial nomination in the last year of a president's final term faces an uphill struggle in the light of the opposition's hope to win the next presidential election and obtain that Court appointment for itself. Republicans filibustered the nomination successfully, in part because of some questions about the ethical propriety of some of Fortas' financial activity. (Similar questions the following year led him to resign from the Court.)

Democrats got some payback when they rejected Richard Nixon's nominations of G. Harrold Carswell and Clement Haynsworth, Jr. (for Justice Fortas' seat) in 1970, before the appointment of Justice Harry A. Blackmun (who was initially conservative in various ways, but eventually joined the Court's liberal wing).

But the event that transformed the modern Supreme Court nomination process was the battle over Judge Robert Bork's nomination by President Reagan in 1987. Bork was a leading conservative legal scholar and an originalist, and it was recognized on both sides that his nomination could have great impact on the Court (at that time dominated by swing-vote justices who were political moderates on many issues, but still committed to a non-originalist approach to constitutional adjudication). Democrats had recently taken control of the Senate and a sophisticated and powerful campaign against Bork was organized by a variety of political groups. In the end, due especially to an article he had written much earlier that was critical of the Civil Rights Act of 1964 on constitutional grounds (which mobilized black southern voters to put pressure on Southern Democrat Senators), Bork's nomination was defeated. This was a turning point, as it turned out, in the history of the modern Court, since Justice Anthony M. Kennedy, nominated in the wake of Bork's defeat, went on to become a non-originalist swing vote that preserved many important liberal Court decisions (most notably, *Roe v. Wade*, the abortion decision) and authored new ones (e.g., in the area of gay rights).

Justice Clarence Thomas' nomination to the Supreme Court in 1991 was similarly controversial from the start, perhaps especially because Thomas was a black conservative who was sceptical of affirmation action and other liberal jurisprudence. But the nomination debate reached a new level of acrimony when leaking of an FBI interview led to public allegations of sexual harassment by a former staff person, Anita Hill, which Thomas vociferously denied. After a bitter debate, Thomas was narrowly confirmed by the Senate.

Subsequent judicial confirmations (Ginsburg, Breyer, Roberts, Alito, Sotomayor, Kagan, and Gorsuch) have not been as heated, but there has been frequent strong opposition, and often high numbers of dissenting votes (e.g., the vote on Trump's nomination of Neil M. Gorsuch was 54–45). In addition, the Republican-controlled Senate simply refused to act on President Obama's nomination of Merrick Garland, in view of the impending presidential election and its hope (which was realized) to reserve the nomination for a new Republican president, who turned out to be Donald Trump.

Lower Court Nominations

Presidential nominations to lower federal courts are complicated by the historical practice of "Senatorial courtesy" and by modern "blue slip" policies.

Under Senatorial courtesy, the Senate has traditionally voted against any presidential judicial nomination for a district court position that is declared "personally obnoxious" by a Senator of the president's party for that state. The willingness of the Senate to do this effectively gave each Senator (of the president's party) control over judicial appointments to district courts in his state. This was described by one Attorney-General (Robert F. Kennedy) as effectively creating

a reverse appointment process: Senatorial appointment with the advice and consent of the President.[6]

But the blue slip policy of the modern Senate has been even more consequential, because it is not limited to senators of the president's own party. The history of the practice is somewhat complicated, because it has changed over time, being modified by the chair of the Senate Judiciary Committee at the beginning of each session of Congress. But, in general, it states that the Committee usually will not go forward with a presidential nomination unless the Senators from the state for which the appointment is made return "blue slips" that are sent to them regarding the appointment. Different factors in application of the policy have included whether the president has consulted (seriously) with the senators involved before the appointment, whether both senators or only one senator from the state has failed to return a blue slip, and whether the absence of a returned blue slip is conclusive or only one factor to be considered by the chair in taking action on the nomination.[7]

In addition to Senatorial courtesy and the blue slip policy (in its various forms), judicial nominations have been greatly influenced by the Senatorial filibuster. This practice stems from the Senate's original policy of "unlimited debate". At one time, members of the Senate could prevent a vote on a matter simply by continuing to debate it indefinitely. In 1917, this practice was modified to permit a "cloture" vote to end debate. The requirement for cloture over time have been modified, and now is set at 60 votes. Even when a cloture vote passes, however, there are ways to draw out the debate and delay the vote.

In 2013, Senate Democrats, under the leadership of Harry Reid, passed a motion (often referred to as "the nuclear option") whose practical effect was to end the filibuster for lower court nominations. And in 2017, when Neil M. Gorsuch's nomination to the Supreme Court was filibustered by Democrats, Republicans likewise invoked the nuclear option to eliminate filibusters for Supreme Court nominations. But, again, it is necessary to remember that, even with the elimination of the filibuster as a weapon to kill nominations, the rules regarding post-cloture debate (which can continue for 30 hours) still make it possible to delay the pace of confirmations significantly.

The Trump Judges (So Far)

Trump's nominations of federal judges have to be considered by looking at the three different levels of federal judges.

[6] D.M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 8th ed., W.W. Norton, New York 2008, p. 40.

[7] M.A. Sollenberger, "CSR Report for Congress: The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present", updated October 22, 2003, https://sgp.fas.org/crs/misc/RL32013.pdf [accessed: 4.06.2021].

The Supreme Court

Trump has had two Supreme Court nominations. Neil M. Gorsuch was successfully confirmed for the first position, Brett M. Kavanaugh for the second one. The campaign to get Gorsuch's nomination through the Senate was well-run and successful. Due to the Democrat filibuster against the nomination, however, Republicans followed the lead of Harry Reid, who (as discussed above) had employed the nuclear option to eliminate filibusters for lower court federal nominations, and they eliminated the filibuster for Supreme Court nominations as well. That Democrats were so opposed to Trump's nominee was not surprising. Gorsuch is very much in the mold of the late Antonin Scalia, whom he replaced on the Court, and Democrats are deeply opposed to originalist judges, largely because of their refusal to produce activist decisions Democrats would like to see. Kavanaugh's nomination faced the same intense political opposition from Democrats, but was eventually successful.

The Courts of Appeals

At the Court of Appeals level (on which there are 179 judges, not including judges on senior status who are still working), Trump has had 22 nominations confirmed (approximately 12% of the total number of Court of Appeals judges). There are now 22 vacancies (14 current and 8 known future vacancies), for 12 of which Trump has nominated someone.[8] The confirmation process has moved very slowly, due to the effect of the blue slip policy (especially for nominees from states with Democrat senators) and routine use of the full post-cloture debate time of 30 hours by Democrats.

At the district court level (on which there are 677 judges, not counting judges on senior status), Trump has had much less success so far. He has had 20 nominations confirmed (less than 3% of federal district court judges). There are now 152 vacancies (129 current and 23 future), for 76 of which Trump has made nominations. Again, the confirmation process is moving very slowly, due to the higher priority accorded Court of Appeals nominations and due to the Democratic senators' use of the blue slip policy and routine filibusters with full post-cloture debate.

Trump has only been in office about 17 months, and so there is still considerable time left in his term, and he will have a greater impact on the courts than he has had at this point. How much is the question.

(After this article was originally written, Trump had many other opportunities to fill judicial appointments. For the US Supreme Court, he also successfully

[8] United States Courts, Current Judicial Vacancies, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies, and Future Judicial Vacancies, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies [accessed: 14.07.2018].

appointed Amy Coney Barrett. He finished by appointing 54 members of the federal Courts of Appeal and 174 district court judges.)

Future Prospects

Trump's judicial nominations will certainly transform the federal courts, especially due to his appointment of two Supreme Court justices, Neil M. Gorsuch and Brett M. Kavanaugh, (and, eventually a third, Amy Coney Barrett) and due to his appointment of a significant number of Appeals Court judges. How radical the transformation is will be determined by: first, the death or retirement of other Supreme Court justices, second, the future political complexion of the Senate, and third, whether Trump wins reelection in 2020.

First, Justice Anthony M. Kennedy's retirement was a very fortunate event for Trump, because of the possible future of the Senate (see below). Justice Ginsburg is 85 and has had health problems in the past – she will surely hang on as long as she can, to avoid giving Trump another nomination to the Court. (As Justice Thurgood Marshall said, during a Republican presidency, when he was asked whether he had any plans to retire, "I plan to serve out my term" – i.e., life.) Justice Breyer is 79, and Chief Justice Roberts is younger, but has had health problems in the past, but neither seems likely to leave soon. (Eventually, Justice Ginsburg did pass away, and this gave Trump the opportunity to appoint Amy Coney Barrett.)

Second, what will happen in the 2018 elections, especially for the Senate? The Republicans currently hold a narrow 51–49 edge in the Senate (with a few Republicans who are less reliably conservative and are by no means "automatic" votes for a Republican president's court nominees; and with Senator John McCain not in Washington, due to brain cancer).

The landscape of the Senate elections in November, 2018 seems, on its face, to favor the Republicans: there are 35 elections, and 26 of them are currently Democrat seats (including two independents who caucus with the Democrats), 10 of which are in states carried by Trump in the 2016 election. (There are only nine currently Republican seats and only one of those is in a state won by Hillary Clinton.) But 2018 is an off-year election and the president's party usually does poorly in such elections. And Trump's current popularity ratings are unusually low for a first-term president.

On the one hand, should the Democrats pick up two Senate seats, the entire nomination process would change dramatically. With Democrats controlling the Senate Judiciary Committee, it would probably slow down even further the already very slow pace of the confirmation process for judges. And a Democrat chair of that committee might apply the blue slip policy in ways that prevent committee consideration of more nominees, and a Democrat Senate

Majority Leader would likely slow down floor action on judicial nominations. And, most important, any Supreme Court nomination would likely not be acted on in 2019, unless Trump were to choose a person unusually acceptable to Democrats (unlikely), and a vacancy in 2020 would almost certainly not be acted on at all (just as Republicans refused to act on Merrick Garland's nomination in President Obama's last year in office). These results of Democrat control of the Senate would minimize the likelihood of Trump nominations transforming the judiciary.

On the other hand, if Republicans hold the Senate in 2018, and especially if Trump wins re-election in 2020 (and Republicans keep the Senate – though that is a year when Republicans will have 22 currently Republican seats at stake, while Democrats will only have 11), the likelihood of an even more profound transformation of the US judiciary is great.

(As it turned out, in 2018 the Republicans did retain control of the Senate, which is key, in light of Justice Ginsburg's subsequent death and Trump's appointment of her successor, Justice Barrett. But Trump lost the election of 2020.)

Implications of Trump Nominations for Judicial Review

The first thing that needs to be emphasized is the enormous importance of Trump because he is not Hillary Clinton. A Clinton victory in the 2016 election would likely have led to a dramatic shift of the Supreme Court, and to a new round of judicial activism similar to the Warren Court activism of the 1960s. The replacement of Justice Scalia by a Democrat appointment, who would almost certainly have had a more liberal activist vision of judicial power, would have swung the balance of the Court toward such a vision. The implications of that would have been extraordinary, including dramatic reversals of important Supreme Court precedents in many areas – precedents that have served as a limit on judicial intervention into many public policy issues. So, irrespective of Trump's own nominations, at least in the short run, Trump's election had profound consequences for American constitutional jurisprudence.

It is unsurprising that Trump's judicial nominations have been condemned by his opponents (political and academic) as ideological appointments. If "ideological" means a commitment to judging without respect to political ideology, on the basis of the law's original public understanding (as it does in this somewhat Alice-in-Wonderland world we live in[9]), then Trump's appointments have indeed been ideological – because, with the assistance of the Federalist Society

[9] "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all."

and Heritage Foundation, Trump's appointments have been strongly originalist, which is to say, non-ideological.

Of course, another Supreme Court nomination would be the most important opportunity for the president, since the Court typically has the final say on constitutional questions. Trump's two appointments to the Supreme Court (assuming the Senate confirmation of Kavanaugh or someone similar to him), brings about a great change in the Court. The swing vote in the middle of the Court changes from Anthony M. Kennedy to Chief Justice John G. Roberts, which is a significant shift to the right – that is to say (in today's situation), a jurisprudence more closely tied to some form of originalism. But the impact will still be limited by the Chief Justice's strong preference for relatively narrow decisions. For example, he will be much more likely to write opinions narrowing *Roe v. Wade* rather than overruling it. (The eventual appointment of Justice Amy Coney Barrett was even more significant, since the swing vote on the Court is now someone more originalist than Chief Justice Roberts – there is a fairly solid majority of originalists on the Court after her appointment.)

If Trump were to get another nomination to the Supreme Court (replacing a more liberal justice), that would be transformational (assuming that Trump were to continue to follow his current policy regarding judicial nominations). Under those circumstances, the Court could have a genuine originalist majority for the first time since the 19th century. The key question would be the attitude of these originalists toward precedent. This is an issue on which Justices Scalia and Thomas sometimes parted company, with Justice Thomas giving much less weight to precedent than Justice Scalia. It is not easy to anticipate exactly how much a Court majority composed of Justices Thomas, Alito, Gorsuch, and Kavanaugh with one other Trump appointment (and with Chief Justice Roberts sometimes joining them), would be willing to uproot earlier Court precedents. Were they willing to do so, this would likely lead to significant shifts in Court doctrine on a variety of issues, including, for example, abortion rights, gay marriage, and the First Amendment Establishment Clause.

Lower court nominations, while not as important as the Supreme Court, are also very important. Many lower court decisions, after all, are never reviewed by the Supreme Court. And Courts of Appeals, in particular, hand down rulings covering significant parts of the country, and these courts are often the place to which presidents look for Supreme Court nominees.

Lessons for Poland?

The conflict over judges in Poland for the last several years has been an international news story. Unfortunately, the news coverage has been distressingly poor.

On the one hand, there is the portrayal that comes largely through the prism of the EU elites that are very hostile to actions in Poland regarding judges. There is a great deal of talk about the "rule of law" and "judicial independence". EU elites show striking similarities to American Progressivists (e.g., Woodrow Wilson), who view government as a largely technocratic undertaking best controlled by experts (namely, themselves[10]). But there is no apparent willingness to admit that the scope of legitimate judicial power – and how to enforce limits – might even be a legitimate question. The experience of the United States shows, in my opinion, that "judicial independence" is an equivocal term: it could mean a legitimate right of judges to decide cases according to law or it could mean an illegitimate power of judges to make the law themselves.

On the other hand, the Law and Justice Party in Poland, whose moves regarding judges on the Constitutional Court have created such controversy, has claimed the right of the current Parliamentary majority to control the appointment of judges, in the face of fears about potential obstruction of its program, invalidating judicial appointments by the previous government. And, in addition, it has taken steps to assert government regulation of the media and public gatherings that have spurred serious opposition. In ways that seem to me quite like some of the Trump administration's actions (e.g., its initial immigration ban on people from certain countries), some of its actions seem not to have been thought out or promulgated carefully.[11]

While a concern about judicial obstruction of legislation, based not on clear constitutional commands but rather the judges' broad policy views, is reasonable, one must ask whether direct measures to control judicial appointments is a prudent response. In this respect, one might recall an event in early American history, when President Thomas Jefferson, upset at the packing of the judiciary by the Federalist Party just before it left office in 1801, ultimately induced his allies in Congress to begin impeachment proceedings against Supreme Court Justice Samuel Chase. Although the House impeached him, the

[10] "Nowadays, when people say Europe, they do not mean Sophocles, or Descartes, or Bach, or Roman law", Mr. Ryszard Legutko said in a telephone interview. "What they mean is a very particular set of institutions," a self-perpetuating alphabet soup of bodies "more experienced in social engineering" than groundbreaking thoughts. Legutko, a member of the European Parliament and also the Law and Justice Party, as quoted in the A. Smale, "'We Don't Need to Be Alone': A Political Shift Has Poland Assessing Its Values", *New York Times*, August 10, 2016, https://www.nytimes.com/2016/08/11/world/europe/poland-debate-values.html [accessed: 4.06.2021].

[11] For example, "under [a] bill passed in early December [2016] by the lower house of Parliament, applicants could reserve a specific site for regular gatherings for up to three years while any counter-demonstrations had to be kept 100 meters away. In addition, government and church organizations were to be given priority for the use of any site". Only after protests at home and abroad was the measure amended by removing the provision giving the government and the Catholic Church priority at any protest site. R. Lyman, J. Berendt, "Protests Erupt in Poland Over New Law on Public Gatherings", *The New York Times*, December 13, 2016, https://www.nytimes.com/2016/12/13/world/europe/poland-protests.html [accessed: 4.06.2021].

Senate – controlled by members of Jefferson's Republican Party – balked at convicting him in the subsequent impeachment trial. The reason was not any sympathy for Chase himself (a rabid Federalist) but a fear that using impeachment for this purpose would set a precedent that would permanently and fatally undermine the legitimate independence of the judiciary. That example of resisting short-term (and even somewhat understandable) political passions, subordinating them to long-term, overarching considerations of principle, strikes me as an admirable example. (And the Republicans were, over time, able to moderate the judiciary through the appointment process.) Defensible ends don't always justify un-nuanced means.

Conclusion

The larger problem (both in the US and in Poland) is not the short-term question of judicial appointments, in my opinion. The key question is how to change the legal culture to establish norms of judicial action that confine the judges to judicial action, rather than permitting them to become actively involved in political or policymaking decisions. There are no easy answers to this question, I think, because the formation of that legal culture is dominated by legal elites, and re-establishing a legal culture that confines judicial powers is an example of asking a class of human beings to curtail their own powers. And, as the founders of American government rightly understood, that is no small task.

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The Trump Presidency, Federal Judges, and American Law

President Donald Trump's appointments to the US federal judiciary were a major accomplishment of his presidency (in particular, his three Supreme Court appointments). They are likely to have a significant impact on American political and legal life for a long time to come. The appointments have been criticized by some, on ideological grounds, but they represent a significant and beneficial return to the original understanding in American constitutionalism of the proper role of judges and judicial review.

Key words: Trump, judicial appointments, originalism, ideological criticism

Prezydentura Trumpa, sędziowie federalni i prawo amerykańskie

Nominacje sędziów federalnych dokonane przez prezydenta Donalda Trumpa były ważnym osiągnięciem jego prezydentury (w szczególności chodzi o trzy nominacje sędziów Sądu Najwyższego). Będą one miały znaczący wpływ na amerykańską rzeczywistość polityczną i prawną na długo. Nominacje te bywają krytykowane z pozycji ideologicznych, ale reprezentują znaczący i pozytywny powrót do oryginalnego rozumienia w amerykańskim konstytucjonalizmie właściwej roli sędziów i sądowej kontroli działalności agencji administracyjnych.

Słowa kluczowe: Trump, intencje twórców konstytucji, nominacje sędziowskie, krytyka ideologiczna