



President Trump Nominates Judge Amy Coney Barrett: Initial Observations

September 28, 2020

On September 26, 2020, President Trump [announced](#) the nomination of [Judge Amy Coney Barrett](#) of the U.S. Court of Appeals for the Seventh Circuit to the U.S. Supreme Court to fill the vacancy left by the death of Justice Ruth Bader Ginsburg.

This Sidebar provides a few initial observations from Judge Barrett’s appellate decisions and academic writings, focusing mainly on her general judicial philosophy. CRS is preparing products that discuss Judge Barrett’s views on the law in greater detail, including her judicial opinions in cases involving such topics as the Second Amendment and immigration.

Who Is Judge Barrett?

Judge Barrett has been a circuit judge for the U.S. Court of Appeals for the [Seventh Circuit](#) since November 2017, having been [nominated](#) by President Trump and [confirmed](#) by the Senate earlier that year. Judge Barrett received her law degree from Notre Dame Law School, after which she clerked for [Judge Laurence H. Silberman](#) of the U.S. Court of Appeals for the D.C. Circuit and Supreme Court [Justice Antonin Scalia](#). Following two years in [private practice](#) in Washington, D.C., Judge Barrett taught as an adjunct faculty member at the George Washington University Law School. From 2002 to 2017, Judge Barrett was a [law professor](#) at Notre Dame Law School. Her scholarship has focused on topics such as [theories](#) of constitutional interpretation, [stare decisis](#), and [statutory interpretation](#). If confirmed, Judge Barrett would be the [fifth](#) woman to serve as a Supreme Court Justice.

During Judge Barrett’s September 26th Supreme Court [nomination remarks](#), she paid tribute to both Justice Ginsburg and her former mentor, Justice Scalia. “Should I be confirmed,” Judge Barrett [said](#), “I will be mindful of who came before me,” stating that Justice Ginsburg’s glass-ceiling-breaking career in the law “has won the admiration of women around the country, and indeed all over the world.” Judge Barrett also [described](#) the “incalculable influence” that Justice Scalia has had on her life, remarking: “His judicial philosophy is mine too. A judge must apply the law as written. Judges are not policy makers, and they must be resolute in setting aside any policy views they might hold.”

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What Would Judge Barrett's Appointment to the Court Mean?

History has demonstrated the difficulty of predicting how a Supreme Court nominee might affect the Court's jurisprudence based on his or her pre-confirmation writings and statements. As noted in a [previous post](#), Felix Frankfurter had a reputation as a "progressive" legal scholar prior to his appointment to the Court in 1939, but [disappointed](#) some early supporters because he advocated judicial restraint and caution when the Court reviewed laws that restricted civil rights and civil liberties during World War II and the early Cold War era. Harry Blackmun, whom President Richard Nixon [saw](#) as a "strict constructionist," authored the majority opinion in *Roe v. Wade*, holding that the Due Process Clause protected the right of a woman to terminate a pregnancy, and was generally [considered](#) one of the more liberal voices on the Court by the time of his retirement in 1993. Justice Anthony Kennedy, [appointed](#) by President Ronald Reagan, joined the more liberal wing of the Court to provide the [deciding vote](#) in many closely divided cases, including such decisions establishing the constitutional right to [federal](#) and [state](#) recognition of same-sex marriage and barring the use of capital punishment against [juvenile offenders](#).

Notwithstanding the difficulty of predicting how a nominee will vote, a judge's prior judicial decisions, writings, and statements may provide some insights into how the nominee will approach particular matters. Such assessments may prove particularly challenging with Judge Barrett: Because she became a judge in 2017, she has written fewer decisions, concurrences, and dissents compared to other recent nominees who served on the bench for several additional years. And although her scholarly publications expound theories of constitutional and statutory interpretation, her engagement with these topics from an academic standpoint does not necessarily predict whether she would adopt any particular methodology as a Supreme Court Justice. With those caveats, the discussion below provides initial observations on how Judge Barrett may approach matters involving constitutional interpretation, *stare decisis*, and statutory interpretation.

Mode of Constitutional Interpretation

In her scholarly writings, Judge Barrett has evaluated common critiques of originalism, seemingly exploring a [pragmatic, originalist](#) approach to constitutional interpretation. While originalism takes [different forms](#), Judge Barrett has described it as animated by "[two core principles](#)": (1) that "the meaning of the constitutional text is fixed at the time of its ratification"; and (2) that the "historical meaning of the text" is legally significant and generally "authoritative." Under this brand of originalism, the "[original public meaning](#)" of a constitutional provision is "the law." Using this [approach](#), one might first examine the text of the Constitution, followed by its structure, and then English, colonial, and Founding-era history.

Like Justice Scalia, however, Judge Barrett appears to believe that originalism must be tempered by [pragmatism](#). In a 2016 article co-authored with John Copeland Nagle, then-Professor Barrett argued that a "[commitment to originalism](#)" does not require judges and Members of Congress to "[strip every constitutional question](#) down to the studs" or revisit "[super precedents](#)" like *Marbury v. Madison* or *Brown v. Board of Education*, regardless of what conclusion an originalist approach might yield. As a practical matter, the authors wrote, the Supreme Court has institutional features that allow it to [avoid difficult constitutional questions](#) that an unwavering commitment to originalism may present: the Court can narrow the questions it will address in cases it chooses to hear. But acknowledging that the Supreme Court has authority to control its docket does not inform what kinds of cases Judge Barrett might vote to hear or which precedents she would consider sufficiently foundational to [avoid](#).

Judge Barrett once [observed](#) that however elusive a nominee's judicial philosophy may be "at the nomination stage, her approach to the Constitution becomes evident in the opinions she writes." Although Judge Barrett encountered constitutional questions on the Seventh Circuit (to be explored in more detail in later products), not all of her opinions involved a textual or historical analysis of the scope of the

constitutional provision at issue—though in some cases, this may have been a function of lower courts’ adherence to Supreme Court precedent. For example, Judge Barrett wrote the panel opinion in *United States v. Terry*, a case involving a warrantless search of a residence. In a three-page analysis based on Supreme Court and circuit precedent, she **concluded** that it was unreasonable for police officers arriving at the apartment of a man they had just arrested to assume that a woman who answered the door had authority to consent to a search of the residence. In another Fourth Amendment decision, Judge Barrett **applied** factors from the Supreme Court’s “most recent anonymous-tip case” to conclude that police did not have “reasonable suspicion” to stop a car with four men sitting inside based on “an anonymous 911 call” from a borrowed phone describing “‘boys’ ‘playing with guns’” near the car. She **opined** that, although the police “were right to respond” by coming to the location, neither the tip nor the individuals’ presence in the vehicle gave rise to a reasonable suspicion of criminal activity, **adding** that “citizens should be able to exercise the constitutional right to carry a gun without having the police stop them when they do so.”

Judge Barrett, however, used an originalist approach in her dissent to a Second Amendment decision in *Kanter v. Barr*. Two of the three judges on the Seventh Circuit panel **held** that a federal law and a state analog that prohibited felons from possessing firearms were constitutional as applied to the appellant, an individual convicted of mail fraud. Under the applicable Second Amendment test—which called for a “textual and historical inquiry”—the court **first asked** if “nonviolent felons as a class historically enjoyed Second Amendment rights.” Finding the historical evidence “**inconclusive**,” the majority moved on to the test’s second step, asking whether the law was “**substantially related** to an important governmental objective,” and **held** that the government met this burden.

In dissent, Judge Barrett **posited** that the “best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing—or explicitly authorizing the legislature to impose—such a ban.” While observing that “scholars ha[d] not been able to identify any such laws,” Judge Barrett did not end her analysis with that conclusion, proceeding to survey “**ratifying conventions**” and “**English and early American** restrictions on arms possession.” In Judge Barrett’s view, this historical evidence led to the **conclusion** that the government can disarm “a category of people that it deems dangerous.” She reasoned that the dispossession statutes at issue, however, were **not tailored** to this interest, and that “[a]bsent evidence that [the appellant] would pose a risk to the public safety if he possessed a gun, the governments cannot permanently deprive him of his **right to keep and bear arms**.”

Approach to Stare Decisis

With respect to **stare decisis**—the **doctrine** suggesting that courts should generally adhere to prior decisions—Judge Barrett has indicated in some of her writings that the Court does not have an unqualified duty to follow precedents that it thinks were wrongly decided. For the Supreme Court, deciding whether to overturn a prior decision involves consideration of **multiple factors**, including the “quality” of the opinion’s reasoning, the “workability of the rule it established,” and “reliance on the decision.” Judge Barrett has advocated for a “**flexible**” or “**relaxed**” approach to stare decisis in which “**reliance interests count**,” but hold less weight if a decision is inconsistent with the Constitution or a federal statute. In discussing competing views over the “legitimacy” of overruling precedent, Judge Barrett **wrote** in 2013: “I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.” The former professor has also **written** that one virtue of a “weak presumption of stare decisis in constitutional cases” is that it respects pluralism in society, allowing controversial disputes to “be aired” whether or not they “should succeed.”

Judge Barrett’s approach to stare decisis was a frequent topic of questioning by both Democratic and Republican Senators during her **2017 confirmation hearing**, with some Senators asking about her position on *Roe v. Wade* or substantive due process (the underlying constitutional doctrine in *Roe*). Judge Barrett

committed to following all Supreme Court precedents, including *Roe*, as an appellate judge, but did not comment further on whether she agreed with the Court's approach to substantive due process or whether any particular case should be overruled.

The Court's approach to *stare decisis* will be relevant across all areas of the Court's jurisprudence. The Court only issued [one decision](#) overruling a Supreme Court constitutional precedent last term, but in its October 2018 term, the Court [overruled](#) four cases spanning a variety of legal issues. This upcoming term, the Supreme Court is set to hear argument in *Fulton v. City of Philadelphia*. The *Fulton* appeal asks the Court to revisit *Employment Division v. Smith*, a foundational [free exercise](#) case that has, [in recent years](#), been applied by lower courts to reject claims by religious entities seeking religious exemptions from antidiscrimination laws. To take one more example, in recent Supreme Court terms, some Justices have called for the Court to reconsider administrative law cases instructing courts to defer to executive agencies' interpretations of [statutes](#) and [regulations](#) under certain circumstances.

Theory of Statutory Interpretation

Judge Barrett's scholarship includes a nuanced look at theories of statutory interpretation. She has [observed](#) that the two primary theories—textualism and purposivism—“have moved closer together in the decades since Justice Scalia launched his campaign for textualism,” resulting in a “[general consensus](#) that the text constrains.” [Textualist](#) judges rely primarily, if not exclusively, on a statute's language to discern its meaning, while purposivist judges may account for the law's purpose or history, in addition to its text, in seeking to determine Congress's goal in passing the law.

In a [2017 essay](#), Judge Barrett discussed how jurists' frame of reference may influence their decisions, with some accounting for “the realities of the [complex legislative process](#)” by placing themselves in the shoes of a “hypothetical legislator—a congressional insider,” and [others](#) “approach[ing] language from the perspective of an ordinary English speaker—a congressional outsider.” The former professor [cited](#) *King v. Burwell* as an example of the congressional insider approach. In that decision, a Court majority interpreted the Affordable Care Act's reference to health care exchanges “established by the State” as including federal exchanges, [observing](#) that the complexity of the act and “several features” of its passage produced a bill with “more than a few examples of inartful drafting,” making it difficult to rely solely on the text. Judge Barrett's article [concludes](#) that “textualists would reject” the “congressional insider” approach. According to Judge Barrett, textualists “consider themselves bound to adhere to the [most natural meaning](#) of the words at issue because that is the way their principal—the people—would understand them.” Asked during her 2017 confirmation hearing about her approach to statutory interpretation and when a judge should consult legislative history, she [testified](#) that “all nine justices are clear that you begin with the text of the statute, and when the text of the statute is clear, that the text of the statute controls,” and that “when the text is clear, I would see as a judge no reason to consult [legislative history].”

Judge Barrett has taken a textualist approach to interpreting and applying federal law as a circuit judge, which at times has resulted in vivid critiques of congressional enactments. In [one opinion](#), she remarked that the wording of a provision in the Telephone Consumer Protection Act was “enough to make a grammarian throw down her pen.” In a [2020 opinion](#), she analyzed whether employment contracts for “food delivery drivers for Grubhub” fell within the Federal Arbitration Act's residual exception for the contracts of “any other class of workers engaged in . . . interstate commerce.” The judge [began](#) by observing that the statute's reference to a “class of workers” meant that a driver might fall within the exception even if her individual routes did *not* cross state lines. The court ultimately [held](#) that the drivers in the case had not shown that “the interstate movement of goods” was “a central part of the job description.”

Judge Barrett has sometimes parted ways with her Seventh Circuit colleagues over matters of statutory interpretation. In *Cook County v. Wolf*, the panel majority upheld a preliminary injunction against a Trump Administration rule concerning the “public-charge” provision in the Immigration and Nationality Act (INA). (Circuit courts have divided over the validity of the rule, with some lower courts issuing preliminary injunctions that the Supreme Court or appellate courts have [stayed](#) pending resolution of the appeals.) The INA [provision](#) deems “inadmissible” “[a]ny alien” who, “in the opinion of the Attorney General at the time of application for admission or adjustment of status,” is “likely at any time to become a public charge,” based on a non-exhaustive list of factors. In 2019, the Department of Homeland Security (DHS) issued a [rule](#) defining “public charge” as “an alien who receives one or more” specified “public benefits,” including Medicaid and subsidized housing assistance, for “more than 12 months in the aggregate within any 36-month period,” with the receipt of multiple benefits in a single month counting as separate months.

Applying the Supreme Court’s two-step [Chevron framework](#) for analyzing agency rules, the circuit panel held that, although DHS was [authorized to interpret](#) “public charge,” its rule was not a [reasonable](#) interpretation of the INA. The majority [reasoned](#) that the rule “penalize[d] disabled persons in contravention of the Rehabilitation Act” and “conflict[ed] with Congress’s affirmative authorization for designated immigrants to receive the benefits the Rule targets,” [adding](#) that “it does violence to the English language and the statutory context to say that [public charge] covers a person who receives only *de minimis* benefits for a *de minimis* period of time.” Judge Barrett [dissented](#) from the panel opinion. In her [view](#), the majority understood “public charge” to “mean something only slightly broader than ‘primarily and permanently dependent,’” but her review of the provision’s history and the statutory scheme led her to conclude that it was “a much more capacious term”—broad enough to justify the rule’s definition.

Judge Barrett also dissented from an en banc opinion in *United States v. Uriarte*, involving what one judge later [described](#) as “a difficult question of statutory interpretation” about whether the revised penalties under the First Step Act apply to resentencing. Enacted in 2018, the First Step Act [provided](#) that contemporaneous convictions for using a firearm during a crime of violence no longer triggered a twenty-five-year mandatory minimum sentence. The amendment applied [retroactively](#) “if a sentence for the offense has not been imposed as of such date of enactment.”

A majority of the Seventh Circuit sitting en banc [held](#) that the defendant, who was initially sentenced before the First Step Act became law, was “entitled to be sentenced under the provisions of the Act” because he was awaiting resentencing on the date of enactment. Writing for the three dissenting judges, Judge Barrett [reasoned](#) that the “more persuasive” reading of Congress’s “use of the present-perfect tense in the phrase ‘has not been imposed’” was that a sentence is “imposed” when the district court hands down the initial sentence, even if that sentence is later reconsidered, vacated, or appealed. Judge Barrett relied on the “[specific words](#)” used in the statute, including its [reference](#) to “‘a sentence,’ not ‘the sentence.’” Judge Barrett also faulted the majority for leaning too heavily on its view of what Congress must have [considered](#) in passing the law, rather than “the [plain text](#) of the statute.”

Opinions such as these suggest that while Judge Barrett may consult history as part of a *constitutional* analysis (e.g., from the Founding-era or the relevant ratification period), she may take a more strictly textualist approach to *statutory* interpretation, focusing on the language and structure of the law at issue.

Additional CRS Resources on the Nomination

CRS is preparing additional products related to the nomination. For a discussion of Justice Ginsburg’s legacy and what her vacant seat could mean for the Supreme Court, see [this post](#), along with [this report](#) on cases where Justice Ginsburg cast a deciding vote for the majority in closely divided cases. Additional reports discuss the appointment process: in particular, the [President’s selection](#) of a nominee and

consideration by the [Senate Judiciary Committee](#), as well as [procedural issues](#) related to an eight-member Court.

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