

Jack Goldsmith
1525 Massachusetts Avenue
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October 11, 2020

The Honorable A. Mitchell McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
290 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators:

I am a professor at Harvard Law School and a former Assistant Attorney General in the George W. Bush administration, and I write in support of Judge Amy Coney Barrett's nomination to be an Associate Justice on the Supreme Court of the United States.

I do not know Judge Barrett personally, though we have spoken a few times. She is obviously immensely qualified due to her manifest intelligence, her wide-ranging legal expertise, her legal and judicial experiences, and her thoughtfulness. I write simply to offer my thoughts on some elements of Judge Barrett's record as a legal academic that have not been highlighted in public debates, and that I believe speak to her qualifications for the Court. I focus in particular on two articles she wrote when she was a Professor at the University of Notre Dame Law School: *Procedural Common Law*, 94 Va. L. Rev. 813 (2008), and *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324 (2006).

These articles are about different elements of the federal courts' procedural lawmaking powers. In *Procedural Common Law*, Judge Barrett asked a question that had never before been comprehensively examined: What is the source of authority for federal courts to develop rules of procedural common law, such as *forum non conveniens* or *res judicata*? Neither federal statute nor constitutional text expressly confers such lawmaking power on federal courts. In assessing procedural common law, Judge Barrett looked to constitutional text and structure, to the implications of federal statutes, to the constitutional framing and ratification, to the early decades of judicial practice and commentary, and to the overall coherence between early and modern judicial practice. Her analysis drew a number of important analytical distinctions, including between procedural and substantive federal common law, and between local and supervisory

procedural common law powers. Judge Barrett concluded that federal courts possess a carefully defined authority to develop local procedural common law rules. In *The Supervisory Power of the Supreme Court*, Judge Barrett used a similar approach—examination of a wide range of textual, structural, and historical sources, and attention to a number of legally significant analytical distinctions—to ascertain the source and legitimacy of the Supreme Court’s power to impose procedural rules on inferior courts. The Article concludes that the Supreme Court does not possess supervisory power over lower courts by virtue of its Article III “supremacy,” and that the power must be justified, if at all, based on “modern assumptions about the Supreme Court's role in the federal judiciary.”

Both articles are excellent pieces of scholarship, and reflect a cast of mind that I believe will make Judge Barrett an outstanding Justice. The articles are highly intelligent and nuanced in their analysis and conclusions. They reveal an extraordinary breadth of knowledge about civil procedure, federal courts law, constitutional law, and constitutional history. They take legal doctrine and precedent seriously in examining the powers under consideration. And they show great care in examining numerous sources of law, in weighing the evidence for and against the questions under examination, and in not overstating conclusions. These are all qualities, I should add, that have been apparent in the handful of Judge Barrett’s judicial opinions that I have read.

When I testified in support of Justice Kagan’s nomination, I stated: “The President of the United States is entitled to choose a judicial nominee whom he believes reflects his judicial philosophy; and his decision to nominate a highly qualified individual who swims in the broad mainstream of American legal life – a description that Kagan easily satisfies – warrants deference from the Senate.” I believe that all of this is equally true as well of Judge Amy Coney Barrett’s nomination, and I urge the Senate to confirm her.

Sincerely,

A handwritten signature in cursive script that reads "Jack Goldsmith". The signature is written in black ink and is positioned above the printed name.

Jack Goldsmith