

Statement of
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Senate Judiciary Committee
Nomination of the Honorable Amy Coney Barrett to be an
Associate Justice of the Supreme Court of the United States
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Thank you, Chairman Graham, Ranking Member Feinstein, and members of the Judiciary Committee for inviting me to share my thoughts on the possible elevation of Judge Amy Coney Barrett to the U.S. Supreme Court. I speak without reservation in favor of Judge Barrett's elevation to the Court. Of course, these are my personal thoughts, ones not to be attributed to my employer, the University of Virginia.

The American Bar Association has declared that Judge Barrett is "well-qualified" for the Supreme Court. Forgive me, but this is something an understatement. It is a bit like saying that George Washington was "well-qualified" to be our first president. Amy Coney Barrett is uber qualified. You have seen that in ample measure over the past three days. In fact, I would say that Judge Amy Coney Barrett is a five-tool nominee. She's a brilliant scholar, a terrific educator, an institutionalist, a role model, and to top it all off, an originalist. She is tailor-made for this job.

As a scholar: Judge Barrett's scholarship is enviable. Her articles are nuanced, careful, and principled. She is respectful of other points of view and gives air to them. She mixes deep theoretical insights with the grounded realities of how institutions actually work. Read her work on the Supervisory Power of the Supreme Court, where she says that the Supreme Court likely does not have constitutional power to prescribe procedural and evidentiary rules for the lower courts. She argues that being "Supreme" does not necessarily encompass the power to dictate such rules. I find it refreshing that she examined the existing practice of the Court claiming a general supervisory power over lower-court rules, unpacked its relatively recent history, and then interrogated the practice. She is one of the few nominees to the Supreme Court to have probed and questioned the current supremacy of the Court.

Or take her many articles on precedent. These are nuanced considerations of a challenging topic. She describes the tension caused by two tendencies: First is the text and original meaning and getting the Constitution right. Second are judicial precedents. She reduces the tension by observing that Justices have no obligation to reconsider the continued wisdom of precedents. Parties typically control the arguments presented to the court and most of the time, parties do not seek the overturning of precedents. Given this, the Supreme Court will never be engaged in a relentless reconsideration of its precedents. In fact, many precedents will never be questioned, much less touched. This practical point weakens the concern that courts will overturn precedent willy-nilly.

I could go on, but my point is made. Judge Barrett is "brilliant," as Harvard Law Professor Noah Feldman has observed in one of his Bloomberg columns. This praise befits a person who graduated number one in her Notre Dame law school class. That brilliance continues in her scholarship. And that brilliance will serve her and the nation well once she is on the Court.

As an educator: As a professor, Judge Barrett professed an openness and a lack of dogma. On three separate occasions, she received the Distinguished Professor of the Year award from the graduating class. This alone would make her the envy of every law school professor. For my part, I have never even been the Professor of the Week. These awards speak to her evident care attentiveness, and

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even-handedness to her students. As one student said, “She never brought up politics in her classroom.” Sound professors know that teaching students is not about indoctrination. Terrific professors give their students the tools so that they can make up their own minds.

A Justice Barrett would continue to teach by example. Justices write opinions that speak to lawyers but also to ordinary Americans. They give speeches to civic groups and participate in law school moot courts. A Justice Barrett would do this with aplomb, because teaching is in her bones. She knows how to convey information clearly and allow us to decide whether she and her colleagues are doing their job well and getting the Constitution and laws right.

As an institutionalist: In these fraught times, the Supreme Court must keep itself above politics and partisan passions. It must decide based on the law and, importantly, be seen as resolving cases based on the law and not the personal preferences of the Justices or who sits in the White House. Judge Barrett is an institutionalist. She is someone who cares about the reputation of institutions, the way they work and the way they function. She will not criticize Congress or the President, even if criticism is richly deserved. She will not dress-down her colleagues, in her opinions or while on the bench, because she is unfailingly polite and respectful. She has the welcome ability to disagree agreeably, something in short supply in Washington and the nation.

As a role model: I have seen Judge Barrett at various conferences and workshops. In one workshop, she seemed dubious about my work on Congress’s ability to delegate emergency authority to the President, a view born out in her article on Suspension and Delegation. Her thoughtful questioning was based on a sensible skepticism about delegating the power to suspend habeas corpus to the president. We have also been on conference panels together, where I have been impressed by her intellect, thoughtfulness, and refined thinking. Much later I learned about her seven children, one of whom has special needs and two of whom are adopted. She took an already full life and made it richer by choosing to adopt two children. She later assumed her job on the 7th Circuit and remained a part-time teacher at Notre Dame. I would not recommend this level of bustle, primarily because I could not see myself as able to pull it off. What is key is that Judge Barrett did it all, and did so all the while being an exemplar of decency, civility, and good humor.

As an originalist: Judge Barrett has stated that she is an originalist. This should give all Senators and all Americans great confidence. Originalists are committed to finding the meaning of texts, constitutional and statutory, and applying that meaning to real disputes. They seek the meaning attributable to the text at the time of enactment, what my colleague Larry Solum calls the Fixation Thesis. This is sound and honors the lawmakers.

If Senator Feinstein from the great state of California proposes a bill and shepherds it through the byzantine legislative process, it should not be given a novel meaning that suits the philosophy or policy principles of a later judge, whether she is conservative or liberal. Senator Feinstein voted for a bill in a particular context, and that context, and the words she choose, ought to be paramount.

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I am reminded of the “Biden Condition,” named after a certain Delaware Senator. You may have heard of him. The condition, first attached to the INF Treaty, provided that the “United States shall interpret” the INF Treaty “in accordance with the common understanding” of the Senate and the President at the time the Senate gave its consent to ratification. The Treaty could not be reinterpreted later by the executive, to give it a new meaning, one better suited to the policy impulses of a later president. The Biden condition was prompted by the Reagan Administration’s clever reinterpretation of the ABM Treaty. Going forward, creative reinterpretation was forbidden, or so said the Biden Condition. Living treaties, whose meaning would evolve over time, were inconsistent with the Biden Condition.

I fully endorse the Biden Condition and believe it to be implicit in every legal enactment. Every legislator enacts new law thinking that the original meaning ought to control and apply in the future. There is no point in carefully crafting text, marking it up in committee, debating it on the floor, and going through a painful conference committee with your House colleagues if future judges can ascribe some new meaning that better suits their policy preferences. A legal text is not a Rorschach test. It is not a creative mad libs, where judges fill in blanks and make witty sentences and superior policy. Your statutes are too important for that.

Needless to say, originalism is not always an easy inquiry. Making sense of texts, particularly old texts, can take a lot of work. But it does helpfully limit the universe of possible meanings. And it makes it possible to say that some claimed meanings are wrong because they are not plausible as a rendition of original meaning. Moreover, originalism clearly does not eliminate all disputes about legal meaning, as originalists are apt to disagree amongst themselves. But this too does not doom the originalist project, any more than it does the general enterprise of interpretation. That people debate about what Abraham Lincoln meant at Gettysburg or what George Washington meant in his farewell address does not make interpretation a fool’s errand.

The modern alternative to originalism is the theory of the Living Constitution. This theory posits that federal officials, perhaps especially judges, should understand and reinterpret the Constitution in light of modern morals and contemporary needs. But this theory is rightfully seen as an open invitation to judges to decide cases as if they were the lawgivers. Now you Senators are lawmakers. Which theory do you prefer? Do you want the conservative Justices, of which there are quite a few, to rewrite the Constitution to better suit their preferences? Do you want them to rewrite the law to further the Republican party platform of lower marginal tax rates, freer trade, and less regulation? Do we want conservative living constitutionalists to find a right to life in the due process clause, thereby reading the Constitution as if it forbade abortions?

It will be said that originalists are sometimes less than pure; they sometimes allow their policy preferences to influence their interpretations. “Nostra culpa,” I’ll say. Our fault. But you see we are human too. We have a theory which is quite good, but we are fallible, and we are apt to stumble here and there. Every pure theory will suffer when implemented by ordinary men and women.

But compare those inevitable human frailties to the drawbacks of a theory that positively encourages judges to indulge their policy preferences, to smuggle them into the law. The theory of

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the Living Constitution does not have right or wrong answers, only the answers that the living constitutionalist is willing to impose. You can say that someone has the wrong morals or wrong policy, but if you say the Constitution's meaning mutates, you cannot really say that any constitutional reading is wrong, much less unconstitutional. The meaning just changed more than you had hoped and in a direction you disfavor.

I should add that The Living Presidency, something I have written about, is perhaps the apotheosis of the living constitution. Our modern president has powers that the Founders never granted the presidency. Presidents, by waging war, have declared it, essentially wresting it away from you. Go back and read Washington, Hamilton, and Jefferson and you will be amazed by what they said, especially when you juxtapose it the actions of our modern presidents. Or take your role in making treaties. Your treaty power is shadow of its former self, as presidents have made treaties while wholly bypassing the Constitution's supermajority requirement. Think of NAFTA or USMCA. Finally, presidents are twisting your statutes with alarming frequency, to delay the employer insurance mandate, subsidize insurance companies without an appropriation, and build beautiful border walls. If you favor a living Constitution, you must come to grips with the poster child of living constitutionalism, the maximal, imperial presidency of today, one that knows no permanent limits and one that gradually creeps over time.

Thankfully, Judge Barrett is no living constitutionalist. She will not resist temptations to read her preferences into the Constitution. When I think of Judge Barrett, she brings to mind Judge Laurence H. Silberman. She and I both clerked for the judge, albeit in different years. The Judge is pugnacious and smart as a whip. He is a judge's judge. He is independent to his core and approached cases from a stance of neutral principles, to be applied without fear or favor.

I remember one case, where the Democratic majority in the House had granted a vote to the territorial and DC delegates. The Republicans were apoplectic and filed suit arguing that it was unconstitutional. I was convinced they were right. No one could be given a right to vote in the House. Only real members could vote.

The Judge was not swayed by partisan considerations. He had been appointed by Ronald Reagan and had served with distinction under Richard Nixon and Gerald Ford. But none of that mattered. In his panel opinion, the Judge noted that the delegate's votes were symbolic. If their votes ever mattered, they were backed out of the final tally. Moreover, the delegates had been given votes only in the Committee of the Whole. So, delegates could not cast a vote on any final bill. The Judge approached the question dispassionately, without an agenda, and came to the right conclusion. The granting of a right to vote in the Committee of the Whole was constitutional.

I happy to say that I see Judge Silberman in Judge Barrett. I believe that she will not decide cases on the basis of some party platform or a missive from this President or some future president. She is a serious person who takes her oath seriously. She will, as her oath requires of her, administer justice without respect to persons and she will faithfully and impartially discharge the office.

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Let me end with some caution and hope. Judge Amy Coney Barrett will disappoint some originalists. She will reach results that some of us will criticize, maybe even disdain. We have seen this before, and we will see it again. As I said originalists do not always agree with each other. Given this, we cannot expect that she will read the Constitution and laws as we do. I can assure you that she will disappoint President Donald J. Trump. Justices are independent and do not take marching orders or tweeting orders from the White House. She is not a poodle and if others expect her to be, be wary of her bark and bite.

The fond hope is that Justice Barrett continues to practice what she has long professed. She will delight some progressives because some parts of the Constitution are quite progressive and because many federal statutes are as well. We say this recently in *Bostock*, where two Justices long thought conservative, voted in ways that many would regard as “progressive.”

But that is what commitment to a neutral methodology means. You should be reaching results that are at variance with your religion, your morals, and your policy perspective. And you should be doing so quite often.

That is precisely what Judge Amy Coney Barrett has done and that is what Justice Amy Coney Barrett will continue to do.

Thank you for the opportunity to testify and I welcome your questions.