Independent® Women's Voice

How to Talk About:

THE SUPREME COURT AND THE BARRETT NOMINATION

Independent® Women's Voice

Table of Contents

Fast Facts: Amy Coney Barrett

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BORN

January 28, 1972, New Orleans, Louisiana

CURRENT POSITION

Circuit Judge, United States Court of Appeals for the Seventh Circuit (2017 through present)

EDUCATION

Rhodes College (B.A., 1994), magna cum laude; first in her class at Notre Dame Law School (J.D., 1997)

CLERKSHIPS

Judge Laurence Silberman, United States Court of Appeals for the District of Columbia (1997-98); Justice Antonin Scalia, Supreme Court of the United States (1998-99)

PRIVATE PRACTICE

Miller, Cassidy, Larroca & Lewin, Washington, D.C. (1999-2002)

ACADEMIA

Professor of Law, Notre Dame (2002-17); Visiting Associate Professor of Law, George Washington Law School (2001-02)

Five Key Points About the Supreme Court

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1 **The Supreme Court is supposed to be above the political fray.** Unlike the president or members of Congress who serve for fixed terms, federal judges (including Supreme Court justices) serve for life. This allows them to render impartial decisions on the basis of law and fact, rather than politics.

2 **Although justices are not supposed to rule on the basis of politics, the nomination and confirmation processes are inherently political.** The genius of this system is entrusting this part of the process to elected officials to ensure that the American people have a say in who nominates justices.

3 **It's routine for the president to nominate a justice for the Court whenever a vacancy arises.** Under the Constitution, the president nominates a justice whenever a vacancy occurs. The Constitution makes no exception for an election year. In fact, on 29 occasions, presidents have nominated justices during presidential election years or lame duck sessions. President John Adams nominated John Marshall to be Chief Justice during the lame duck period *after Adams lost his re-election bid* but before he left office.

4 **The Senate has the power of advice and consent.** This power includes the power to confirm, reject, or take no action on the nomination at the Senate's discretion. The Senate may begin the confirmation process any time after receiving the nomination from the president.

5 **During an election year or lame duck session, when the same political party controls both the White House and the Senate, confirmation is the norm.** Out of the 29 Supreme Court nominations made during election years or lame duck sessions, 19 were made when the president's party controlled the Senate. The Senate confirmed 17 of these 19 nominees. Ten of the 29 election year/lame duck nominations were made when the opposing party controlled the Senate. Only one of these ten nominees was confirmed prior to election day.

Five Key Points About Judge Barrett

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1 **Judge Amy Coney Barrett is eminently qualified for the Supreme Court.** As a judge on the prestigious U.S. Court of Appeals for the 7th Circuit, Barrett has authored more than 100 opinions. She has a keen legal mind and, according to Harvard Law Professor and progressive political commentator Noah Feldman, "was legally prepared enough to go on the court 20 years ago."

2 **Judge Barrett will interpret the law as written, not as she wants it to be.** Judge Barrett is a strong constitutionalist. She understands that it is the role of the political branches, not the courts, to rewrite federal statutes or update the Constitution.

3 **The nomination of Judge Barrett to the Supreme Court is a fitting tribute to Justice Ruth Bader Ginsburg.** Like Justice Ginsburg, Judge Barrett is a respected scholar and jurist. It is true that Judge Barrett does not share the same judicial philosophy as Justice Ginsburg. But Justice Ginsburg looked forward to the day when there would be more women on the Court—women who were "not shaped from the same mold."

4 **Judge Barrett is an incredible role model for women and girls.** Judge Barrett is a highly accomplished professional woman who has found a way to balance work and family life. She is an inspiration to the many young women and girls who hope someday to raise a family while also meeting the demands of a job.

5 **Judge Barrett has received wide praise from both sides of the political aisle.** A group of 450 former students, with diverse political viewpoints, signed a letter supporting Barrett's nomination to the Court of Appeals, as did the entire full-time faculty of the Notre Dame Law School. Every living Supreme Court law clerk from the 1998 October Term, including Justice Ginsburg's clerks, praised Barrett's nomination. Barrett was confirmed to the Court of Appeals by a vote of 55 to 43, with the votes of three Democratic senators—her home state senator, Joe Donnelly; Tim Kaine of Virginia; and Joe Manchin of West Virginia.

Misperceptions About the Confirmation Process

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1. MISPERCEPTION: President Trump has no right to fill the vacancy created by the death of Justice Ruth Bader Ginsburg.

FACT: The United States Constitution states that the president "shall nominate" justices of the Supreme Court "with the Advice and Consent of the Senate." The Constitution makes no exception for an election year.

FACT: There have been 29 Supreme Court vacancies during election years or during lame-duck sessions before the next presidential inauguration. In each case, the president nominated someone to fill the vacancy.

FACT: When Chief Justice Roger Taney died, President Lincoln did not fill the vacancy until after his re-election **because the Senate was in recess**. He nominated Salmon P. Chase for Chief Justice the day after the Senate came back in session. Lincoln would likely have filled the post even if he lost the election. There is no evidence that Lincoln would have allowed his successor to fill the spot.

2. MISPERCEPTION: There is not enough time to conduct a thorough confirmation process before election day.

FACT: In 1981, Justice O'Connor was confirmed just **33 days** after her nomination.

FACT: In 1993, Justice Ginsburg was confirmed just **42 days** after her nomination.

3. MISPERCEPTION: Republicans who opposed Judge Garland are hypocrites.

FACT: When President Obama, a Democrat, nominated Judge Merrick Garland, the Republicans controlled the Senate. Today, the same party controls both the Senate and the White House. The principle involved is consistent: When one party controls both the White House and the Senate, the Senate ordinarily confirms a qualified nominee.

FACT: Many conservative Senators, including Mitch McConnell and Chuck Grassley, voted to confirm Ruth Bader Ginsburg when the Democrats controlled both the White House and the Senate.

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4. MISPERCEPTION: The Republicans have rendered the entire process illegitimate.

FACT: The 2016 Republican Senate majority's decision not to move forward with President Obama's nomination of Judge Garland was in accordance with the Constitution and historical precedent.

FACT: Republicans have never "Borked" a Democratic nominee to the Supreme Court. ("Borking" refers to the tactic of personally attacking a nominee, viciously smearing his or her name, and running negative ads against the nominee, as Democrats did to Judge Robert Bork in 1987.)

- Although Republicans "blocked" the Garland nomination, they never attacked him personally or disparaged his name.
- Republicans also treated previous Democratic nominees with respect. Justice Sonia Sotomayor was confirmed 68-31 (with 9 Republicans votes, including those of Sens. Susan Collins of Maine, Lamar Alexander of Tennessee, and Lindsey Graham of South Carolina); Justice Elena Kagan was confirmed 63-37 (with 5 Republican votes, including those of Sens. Susan Collins of Maine and Lindsey Graham of South Carolina); Justice Ruth Bader Ginsburg was confirmed 96-3; Justice Stephen Breyer was confirmed 87-9.

FACT: While Republicans have abided by the rules with respect to Supreme Court nominations, Democrats have turned the confirmation process into a three ring circus.

- They launched vicious smear campaigns against Judge Robert Bork, Justice Clarence Thomas, Justice Samuel Alito, and Justice Brett Kavanaugh. In fact, this treatment has become a pattern and a Democratic Party "norm."

Misperceptions About Amy Coney Barrett

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1. MISPERCEPTION: Amy Coney Barrett is an insult tothe legacy of Ruth Bader Ginsburg.

FACT: Judge Barrett is the living embodiment of all of the things that trailblazers like Ruth Bader Ginsburg fought so hard for.

FACT: Like Justice Ginsburg, Judge Barrett is a scholar, a mother, a jurist, and an incredible role model for women.

FACT: If confirmed, Barrett will be the first mother with school-aged children to serve on the Court. As such, Judge Barrett will bring to the Court unique perspectives, not shared by other justices.

FACT: Judge Barrett's lived experiences—as a mother to two children adopted from Haiti and one with special needs—have imbued her with compassion, empathy, and an unyielding commitment to equal justice under law.

FACT: As demonstrated by her relationship with Justice Scalia, Justice Ginsburg did not let judicial philosophy stand in the way of collegiality and friendship. Had they served together, Ginsburg and Barrett might have become friends as well.

FACT: Justice Ginsburg looked forward to the day when there would be more women on the Court who were "not shaped from the same mold." Said Ginsburg in 2007, it's "good for the public to see that women come in all sizes and shapes, just as men do, and they don't necessarily look alike or think alike."

2. MISPERCEPTION: Amy Coney Barrett is a religious fanatic.

FACT: Like more than 70 million other Americans, Judge Barrett is Catholic.

FACT: Article VI of the Constitution specifies that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. A nominee's professional qualifications and judicial philosophy are appropriate considerations. A nominee's religious beliefs are not.

FACT: Judge Barrett has made clear that she will not allow her personal beliefs, religious or otherwise, to impact her judicial decision-making.

FACT: Republicans never questioned whether Justice Ginsburg's Jewish faith conflicted with her job as a justice.

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3. MISPERCEPTION: If confirmed, Amy Coney Barrett will strike down the Affordable Care Act, causing many Americans, including those with pre-existing conditions or coverage through the Medicaid expansion, to lose access to health insurance.

FACT: The Court is unlikely to strike down the law. Just last Term, seven justices agreed there is a "strong presumption" in favor of severing an unconstitutional provision from a statute and leaving the rest of the statute intact. When Congress reduced the individual mandate tax to $0, it deliberately left the rest of the law in place, indicating its intent to sever the mandate from the rest of the law. And, indeed, the ACA has continued to function after this change.

FACT: Even in the extremely unlikely event that the Court strikes down the entire statute, Congress and state governments will have time to act in response to this ruling. Insurance carriers are required by law to offer consumers ample notice to any change in coverage. There are bills pending in Congress to keep the ACA's rules on pre-existing conditions, which could be passed quickly in the event that SCOTUS overturns the full law. It is even more unlikely that SCOTUS would make any changes to the Medicaid expansion, given that the Court ruled on this issue in 2012, upholding the expansion as optional for states.

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4. MISPERCEPTION: If confirmed, Amy Coney Barrett will take away your reproductive freedom.

FACT: Amy Coney Barrett's personal views on birth control and abortion are irrelevant precisely because she is committed to upholding the law even when it conflicts with her personal views. This constitutional philosophy should give comfort to those who disagree with her personal or religious views.

FACT: Some Democrats will oppose any Supreme Court nominee who will not guarantee unconditional support for abortion on demand. Demanding guarantees from judicial nominees that they will vote a certain way on cases that may come before them violates the principle of impartiality that is the cornerstone of an independent judiciary.

FACT: It's important to remember that if the Supreme Court actually were to overturn *Roe v. Wade* or any other precedent related to abortion, this would not outlaw or restrict abortion, but would only allow state and federal elected officials to contemplate new laws related to these areas—and many states have already passed laws permitting abortion should state control of abortion law return.

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5. MISPERCEPTION: As a judge on the 7th Circuit, Barrett made it easier for rapists who are kicked out of school to then sue.

FACT: In *Doe v. Purdue University*, a unanimous three judge panel (consisting entirely of female judges) ruled that a student suspended by Purdue for allegedly committing sexual violence could sue Purdue for violating his right to due process in violation of the 14th amendment and discriminating against him "on the basis of sex" in violation of Title IX. The Court made no determination as to the merits.

FACT: Judge Barrett's opinion in the case has been cited favorably by courts across the country (including the Third Circuit, the Sixth Circuit, the Ninth Circuit, and the Tenth Circuit).

FACT: Campus kangaroo courts have been widely criticized by civil libertarians across the political divide, including several feminist law professors.

FACT: Justice Ginsburg herself questioned the fairness of campus Title IX procedures, stating in a 2018 interview with the Atlantic, "There's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system, as you know, everyone deserves a fair hearing."

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6. MISPERCEPTION: If confirmed, Amy Coney Barrett will create a 6-3 majority for Republicans on the Court, throwing the Court wildly out of balance.

FACT: The Supreme Court is not supposed to operate, like some federal commissions do, with a "balance" of members from the two major political parties. Calls for "balance" on the Court falsely imply that the Court should behave as a political, policy-making body.

FACT: The best way to guarantee that the Court will not favor one ideological side or the other is the appointment of justices who will act with restraint, limiting their decisions to the cases and controversies before them, and tethering their rulings to the law rather than following the political or cultural trends of the moment.

FACT: Balancing the number of Republican and Democratic justices does not necessarily ensure ideological or jurisprudential balance. To cite recent examples, Republican nominees Anthony Kennedy, Sandra Day O'Connor, David Souter, and John Paul Stephens often voted in ways that produced outcomes that were applauded by progressives.

Quiz:
The Supreme Court

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1 What is the role of the Supreme Court in a democratic society?

A. The Court has limited power to interpret and apply federal law.
B. The Court has broad power to interpret and revise federal law as necessary..

2 True or False: The Court is almost always divided along ideological lines.

A. True
B. False

3 Is the Court supposed to be politically "balanced"?

A. Yes, balance is the goal, and there should be a relatively even number of Democratic appointees and Republican appointees.
B. No, political balance is irrelevant.

4 Was the Constitution designed to evolve and change over time?

A. The Constitution isn't supposed to change.
B. Judges are responsible for updating the Constitution as needed.
C. The Constitution can and does change, through the amendment process outlined in Article V.

Quiz Answers

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Q1 ANSWER: A

The role of the Court is to act as a neutral umpire and call balls and strikes, not to pitch or bat. The Constitution leaves it up to the people and their elected officials to make the law, and justices must follow it, regardless of their personal political beliefs.

Q2 ANSWER: B

False. Most Supreme Court cases are decided unanimously or by 7-2 or 8-1 majorities. In the 2016-17 term, for example, 57% of decisions were unanimous, while judgments with slim majorities (5 to 3 or 5 to 4) accounted for only 14% of all cases.

Q3 ANSWER: B

No, political balance is irrelevant on the Supreme Court. Calls for "balance" on the Court falsely imply that the Court should behave as a political body. But the judiciary is supposed to be above politics. Indeed, that is why judges wear black robes, not red or blue jerseys. The best way to guarantee that the Court will not favor one political side or the other is to support the nomination and confirmation of constitutionalist justices who will follow the law as written rather than the current political or cultural trends or their own personal preferences.

Q4 ANSWER: C

Article V of the Constitution creates a process so the Constitution can be updated as needed—but deliberately makes that process difficult to prevent the people from changing it rashly or without large supermajorities of support. An amendment to the Constitution requires support of two-thirds of Congress or a Constitutional Convention called by two-thirds of the states. A proposed amendment must then be ratified by three-fourths of the states. It is not the role of the Supreme Court to keep the Constitution up to date.

Social Media Kit

WHAT YOU CAN DO: Speak up! Post the below messages, videos, and graphics to social media and make your voice heard.

Tag us so we can RT/Share your post:

- @IWV (Twitter)
- @IndependentWomensVoice (Facebook)
- @IndependentWomensVoice (Instagram)

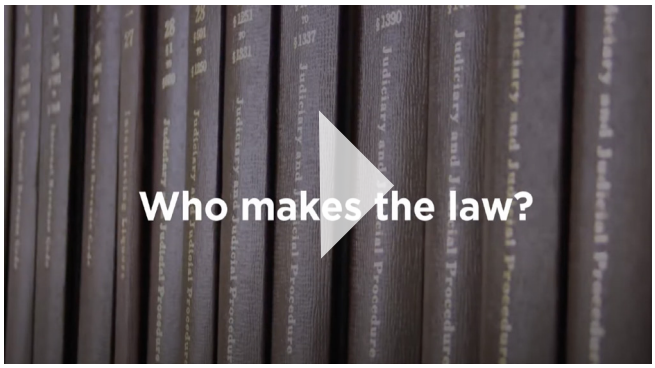
Hashtags to include:

#GloriousACB #ImWithHer #ConfirmHer #ConfirmBarrett #WeNeed9

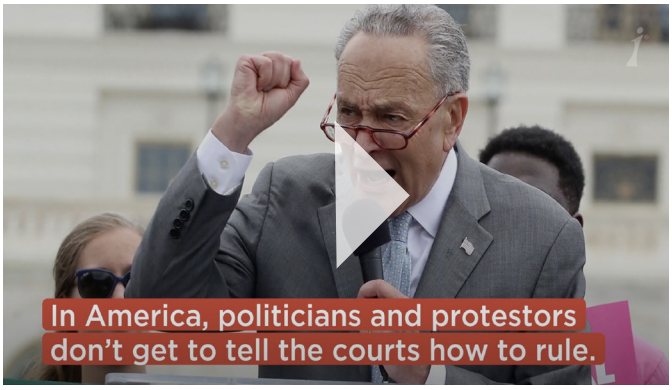
VISUALS: Include these visuals with any Twitter, Facebook or Instagram posts.

Videos:

Hypocrisy

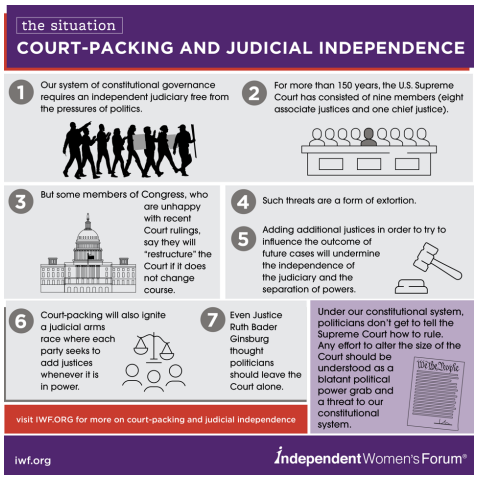


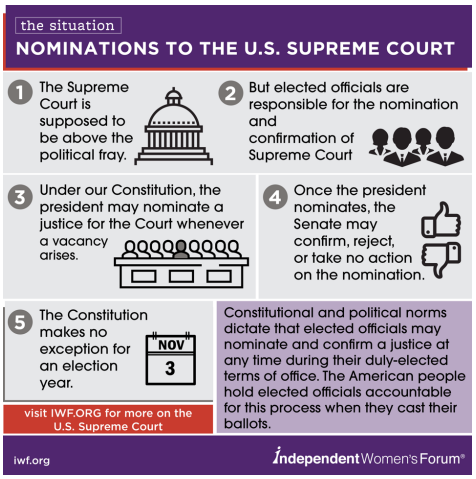
Who Makes the Law



Court-Packing and the Rule of Law

Graphics:





UNICORN FACT CHECK:

Are Republicans "Stealing" Supreme Court Seats?

SOCIAL MEDIA POSTS

- #AmyConeyBarrett is a wonderful role model for American women and girls. #ImWithHer #ConfirmHer #SupportWomen
- #RBG believed that Senators should evaluate a Supreme Court nominee on the basis of her qualifications, not politics. #HonorHerWish
- #TwoTruthsAndALie: #CourtPacking and Judicial Independence https://www.iwf.org/2020/05/05/two-truths-and-a-lie-court-packing-and-judicial-independence/
- This policy paper from @IWF explains why new #CourtPacking plans undermine the Court's institutional legitimacy and threatens the #SeparationOfPowers. https://www.iwf.org/wp-content/uploads/2020/04/legal-policy-focus-court-packing.pdf #IWLaw