

Princeton professors talk Amy Coney Barrett, future of SCOTUS

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The death of Supreme Court Justice Ruth Bader Ginsburg in September has made an already contentious election all the more polarized.

Republican party members argue that it is the President's constitutional right to appoint a justice to the Supreme Court. On the other side of the aisle, many Democrats criticized the alleged hypocrisy of those who now intend to vote on a nominee for the bench less than two weeks from a Presidential election, but refused to hold a hearing in 2016.

Allen Guelzo, Director of the James Madison Program Initiative on Politics and Statesmanship, and Associate Professor of History Matthew Karp sat down with The Daily Princetonian to discuss these topics and provide a historical frame for the court's current conflict. They considered whether judicial independence is attainable and explained how this moment could move politicians to question the relationship between the executive and judicial branches.

Below, we catalog a variety of University professors' opinions on the confirmation of Judge Amy Coney Barrett in particular, as well as what they think the future of the courts may look like.

The case for Barrett

In an article written for *Newsweek*, Professor of Politics Robert P. George, highlighted Judge Barrett's intelligence and character.

"[Barrett] is a noted legal scholar who graduated from Notre Dame Law School first in her class, and has taught, and continues to teach, at her alma mater," he wrote.

George said her "unquestionable integrity ... and evenness of temper" make her a likely unbeatable choice. He also commended Barrett's resolute conservatism, particularly as a conservative woman.

"For young women hoping to succeed in law—or in medicine, academia, the media or any other elite profession—Barrett would remind them that there is no one 'correct' way for a woman to think," George wrote. "Women are liberals, like Ruth Bader Ginsburg; moderates, like Sandra Day O'Connor; and conservatives."

"At the end of the day, it's politics all the way down," Ilya Shapiro '99, Director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, said in Madison's Notes, the official podcast for the James Madison Program, "It's not surprising that politicians would be hypocritical."

Shapiro pointed out that this is the 30th time that an election year vacancy has arisen. He explained that when there was a “united government,” 17 of 19 vacancies resulted in confirmations. Only 2 of 10 (including one after the election in question) resulted in confirmations under a “divided government.”

He added that he expected Democrats to more strongly resist the confirmation process, and is surprised they are not “boycotting it altogether.”

Still, like George, Shapiro finds Barrett an impressive choice for the country’s highest court, describing her as “a very thoughtful judge, not knee-jerk, not emotional, not result oriented.”

Both men denounced media rhetoric concerning Barrett’s religious faith, arguing that it has no bearing on her fitness to serve.

“A Barrett nomination, following so grotesque a display of anti-Catholic and anti-religious bigotry, could drive a stake through the heart of what has been called the ‘last acceptable prejudice among American elites’,” George wrote.

The case against Barrett

Politics professor Charles Cameron of the Princeton School of Public and International Affairs (SPIA) and Associate Professor of Politics John Kstellec examined Judge Barrett’s nomination in a Q&A with SPIA. In the Q&A, they considered the political implications for President Trump.

“For sure, shifting attention away from 200,000+ dead Americans and massive unemployment has to be an improvement for the President,” they wrote, “So, nominate someone really extreme and hope for the best – no Garland this time.”

In 2016, President Obama nominated Judge Merrick Garland to replace Justice Antonin Scalia after his death. Senate confirmation hearings were not held on the grounds that Justice Scalia should be replaced by the winner of the 2016 presidential election, rather than President Obama.

In an interview with the ‘Prince,’ Kstellec noted the uniqueness of the situation in 2016, remarking, “there are lots of instances of justices being confirmed in election years; you only have to go back to 1988 where Justice Kennedy was confirmed. You could also find examples of justices not being confirmed. What was unprecedented or unique about Garland was the outright refusal to even treat the nominee as a nomination.”

The precedent set in 2016 has led to criticism of Senate Majority Leader Mitch McConnell’s decision to push through Judge Barrett’s confirmation in 2020.

Kstellec and Cameron also expressed fears about increasing politicization of the courts, writing in a 2018 Vox article about the “litmus tests” faced by court nominees of both parties. They claimed that Republican party platforms included a slew of issues — six in the 2016 platform — ranging from healthcare to gun rights to gay marriage, and Democratic party platforms never including more than two issues in a litmus test.

These litmus tests have implications for the court’s ideological makeup, Kstellec and Cameron wrote.

“When one party has a laser-focus on judicial policy while the other doesn’t, and the first has a substantial advantage in controlling the Senate – well, you can see the consequences playing out before your eyes,” they wrote.

Karp echoed these fears in an [article](#) for Jacobin magazine, in which he quotes Abraham Lincoln: “[I]f the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made ... the people will have ceased, to be their own rulers.”

Karp looked further into the political implications of Barrett’s potential confirmation.

“In some ways, the Left today shares the position of antislavery forces in the 1850s,” Karp wrote, “It confronts a rich, well-organized sect, whose commitment to property far exceeds its belief in democracy, and which has made the Supreme Court a citadel of reaction.”

The future of the Court

Professor of History and Public Affairs Julian Zelizer told the ‘Prince’ that, given the 53-47 [Republican majority](#) in the Senate, Barrett will likely be confirmed.

“It’s a dramatic accomplishment for President Trump and conservatives. It’s shifting the Court to a 6-3 conservative majority, and that’s going to last for a long time — that’s a huge change. So, Democrats are going to feel angry and defeated,” he said.

Zelizer believes that there are three likely avenues that Democrats will consider after the election, depending on its results. The first option is one that has already bred political strife: [court-packing](#).

Kastellec told the ‘Prince’ that the court has not been “packed” (expanded in number of justices) since 1869, although President Franklin D. Roosevelt’s administration famously attempted to do so in the 1930s in response to the court’s opposition to the New Deal.

“One reason [the court-packing plan] failed,” Kastellec explained, “is because the court gave in. It stopped the opposition to the New Deal.”

In his view, court packing would only be possible if Biden wins the presidency and the Democrats take the Senate, but would still prove difficult.

“Court packing is tricky because the Constitution doesn’t say anything about the number of justices on the court,” Kastellec explained, “It’s been so stable for so long that it’s taken on this idea of a norm ... people are hesitant, even some Democrats, because you could get yourself in a tit-for-tat scenario where if I add two seats now, you’ll add two seats later, and soon the Court looks like a little legislature.”

Zelizer also noted that the Democrats could leave the Court as is and instead consider a long-term strategy modeled after that of the Republicans. He explained that in the 1980s, when Republicans lacked a “solid majority” on the Court, they built organizations and networks such as the Federalist Society that worked with law schools to nurture conservative-leaning talent.

“Over time, you’d have a team of justices that could be chosen to fill the courts with. That’s all come to fruition,” he said.

Zelizer said that creating “a network of liberal justices and organizations that would be comparable to the Federalist Society” is a plausible strategy for Democrats. Alternatively, he said, Democrats can “focus on policy issues.”

Zelizer added that in the past, Republicans have taken the Supreme Court more seriously than the Democrats, but that a 6-3 majority would compel them to change.

“The shift in the court is so dramatic,” he said. “It’s going to have repercussions to every issue [Democrats] care about, from voting rights to reproductive rights.”