



Amy Coney Barrett hearings shine a light on the differences between the two parties

October 15, 2020

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No real news came out of the three days of Amy Coney Barrett's Supreme Court confirmation hearings. As expected, Democrats focused on Obamacare and abortion, with a little bit on guns and voting rights. Also as expected, the nominee declined to discuss any pending or potential cases, or any legal issue on which she hadn't already opined in scholarly or judicial writings.

For their part, Republicans allowed Barrett to show her intellect and verbal facility by explaining such frequently used terms as "originalism" (interpreting constitutional provisions according to their original public meaning), "textualism" (interpreting statutes according to the plain meaning of their text as opposed to legislative purpose), and *stare decisis* (letting erroneous precedents stand because correcting them would cause more social harm than allowing the error to persist).

In all, no senator's vote was changed. However, the public, which according to a CNN poll last week was divided on Barrett's nomination, did get a chance to sympathize more with the judge, who showed grace and poise under pressure. Like it or not, she will be confirmed before the election, barring a black swan event, like a massive Covid-19 spread that prevents the Senate from meeting or some Kavanaugh-like post-hearing allegations.

Does that mean the hearings are pointless, a kabuki process that wastes everyone's time? Elsewhere I've written that they once served a purpose but have at best devolved into empty platitudes and gotcha games. I won't rehash those arguments here, other than to note that it may have served the Democrats better to parallel the Merrick Garland maneuver of four years ago by abstaining from what they consider to be a pointless exercise — refraining from attacking Barrett's views while making a process argument to the voters.

Of course, they didn't do that, so we've been treated to what then-professor Elena Kagan called a "vapid and hollow charade."

But even if we didn't learn anything this week, there was refreshing clarity on the parties' divergent judicial philosophies. By that I don't mean whether *Roe v. Wade* was correctly decided or the scope of the Second Amendment, but the difference between law and policy. To take two contrasting examples from Wednesday's session: (1) Republican Senator from Texas Ted Cruz discussed how he favours school choice — calling it "the civil rights issue of the next century" — but that it's not the place of a federal judge to impose it, while (2) Democratic Senator from

Hawaii Mazie Hirono called the distinction between law and policy "artificial" in arguing that the Affordable Care Act must be constitutional because so many people depend on it. Indeed, each of the Democratic senators had blown up pictures of constituents who would be harmed if Obamacare went away.

Now, emotional arguments are all well and good if you're trying to appeal to an electorate — as California Senator Kamala Harris used most of her time to do with regard to everything from health care to climate change, because she's the Democratic nominee for Vice President.

But judges are supposed to do something else: They're supposed to apply the law, which sometimes leads to unpopular outcomes. Judicial power is not a means to an end, but an enforcement mechanism for the strictures of a founding document intended just as much to curtail the excesses of democracy as to empower its exercise.

In a country ruled by law, the proper response to an unpopular legal decision is to change the law or amend the Constitution. Any other method leads to a sort of judicial abdication and the loss of those very rights and liberties that can only be vindicated through the judicial process.

Nevertheless, given the expansion of federal power, and then the shifting of that power away from the people's legislative representatives and toward executive branch administrative agencies, the judiciary affects public policy more than it ever did. And court decisions increasingly hinge on the partisan affiliation of the president who nominated the judges making them.

With the two parties adopting incompatible judicial philosophies, it's impossible to find an "uncontroversial" nominee. That's doubly so when a nominee's philosophy represents a big shift from that of the previous justice. As Democratic Senator from Delaware Chris Coons highlighted, Justices Antonin Scalia and Ruth Bader Ginsburg were often on opposite ends of close cases. Replacing Ginsburg with Scalia's former clerk Barrett would mean a bigger change than replacing the moderate Anthony Kennedy with his former clerk Brett Kavanaugh.

Those jurisprudential differences, and their alignment with ideologically distinct parties, are a relatively new phenomenon; in the grand sweep of American history, things didn't always line up so neatly. But regardless, the Barrett hearings showed that the parties do have different approaches to the law — and that Democrats don't see legal questions as divorced from political ones.

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