

The ultra-right background of Supreme Court nominee Amy Coney Barrett

By Alan Gilman
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On September 26, 2020 President Donald Trump nominated circuit court judge Amy Coney Barrett to the US Supreme Court to fill the vacancy created by the death of Justice Ruth Bader Ginsburg, who died eight days before at the age of 87.

Barrett is a protégée of the late Justice Antonin Scalia, the longtime leader of the court's right wing. In the likely event she is confirmed by the Senate this month, Barrett would serve to fundamentally shift the Supreme Court's ideological balance much further to the right.

Barrett's nomination must be confirmed by a majority in the US Senate. The Republicans now hold a 53-seat majority in the 100 member Senate. Fearing the loss of the Presidency, as well as their majority in the Senate in the upcoming November election, the Republicans intend to ram through her confirmation before the election takes place, or if need be, before many of their terms expire in January.

Barrett was born and raised near New Orleans, the eldest of seven children from a devout Catholic family whose father was an attorney for Shell Oil. She graduated from Notre Dame Law school in 1997 and then spent the next two years as a law clerk, first for Judge Laurence Silberman of the US Court of Appeals for the Washington, D.C. Circuit and then for Justice Antonin Scalia of the US Supreme Court, the judge whose deeply reactionary judicial philosophy she had adopted.

From 1999 to 2002 she practiced law in Washington, D.C. at a firm that merged into Baker Botts. This firm's senior partner was James Baker, who was treasury secretary under Ronald Reagan and secretary of state under George H. W. Bush, and who subsequently served as the lead attorney for George W. Bush in the contested 2000 presidential election that culminated in the infamous *Bush v. Gore* decision.

As a junior lawyer at Baker's firm, Barrett provided research and briefing assistance in the litigation that culminated in the 5-4 Supreme Court decision to permanently halt the vote count in Florida, preserving Bush's 537-vote lead and thereby giving him the presidency. Barrett's mentor Justice Scalia was the organizer of that majority.

From 2002 to 2017 Barrett worked as a law professor at Notre Dame teaching constitutional law and statutory interpretation. As a Scalia follower, she emphasized *originalism* in her academic work and in numerous articles that appeared in various law journals. Her work caught the attention of arch-conservatives who would promote her publications and provide platforms for her to espouse her originalist views as well as her provocative view of *stare decisis*, the principle that courts should be guided by legal precedent, one of the primary obstacles in overturning *Roe v. Wade*, the landmark abortion rights case.

Originalism, the basis of ultra-right legal theory for the last 40 years, holds the view that the Constitution does not evolve. Instead judges should decide constitutional questions based solely on the drafters' original intent. This position began to emerge in the 1980s and corresponded to the beginning of the social counter-revolution.

The preceding two decades had seen the Supreme Court validate social reforms through such decisions as *Brown v. Board of Education*, which

effectively outlawed school segregation, as well as rulings affirming such principles as "one person, one vote" in legislative apportionment, the famous Miranda rule limiting police questioning, and decisions affirming an implied "right of privacy" in the Constitution, which culminated in *Roe v. Wade*.

Courts became the instrument of instituting reforms in response to bitter struggles of the working class, under conditions where American capitalism was wealthy enough to afford them, but the political system of two right-wing pro-corporate parties was incapable of enacting them. This period lasted less than 20 years, before the courts resumed their accustomed role as the bulwark of reaction.

By the 1980s, the postwar dominance of US capitalism was in decline, and there was a sweeping turn to the right by the ruling class and all its institutions. As the Reagan Administration began its direct political assault on the working class, the undermining of the legal framework that had justified social reform came under attack by the "originalists" who rejected the "activist judges" who were supposedly responsible for these reforms by going outside of the intent of the authors of the constitution. They also hoped to utilize this view to counter the "activist" courts' expansion of reproductive rights, enforcement of Church-state separation, and protection of the rights of criminal suspects.

Antonin Scalia emerged as one of the principal ideologues for this emerging originalist view. In 1982 Ronald Reagan appointed him to the highly influential US Court of Appeals for the D.C. Circuit and in 1986 to the US Supreme Court. Once on the court, Scalia quickly became its most influential conservative. He was an opponent of gay rights, affirmative action and abortion rights, and said that the landmark case of *Roe v. Wade* was wrongly decided.

For all its pretensions of consistency and legal reasoning, the originalist view is just a legal façade to rationalize preconceived legal conclusions. As with many judges in the capitalist courts, Scalia would quickly abandon his judicial philosophy whenever it came into conflict with the social interests he represented.

The most egregious example of this was Scalia's decision in *Citizens United v. FEC*, which struck down the McCain-Feingold Act's restraints on electoral expenditures by corporations. Scalia's originalism was thrown overboard when he held that corporations have free speech rights under the First Amendment, just as people do, even though corporations as legal "persons" in control of vast economic assets were hardly envisioned when the Constitution was written.

Scalia was instrumental in forming the Federalist Society in 1982, to which Barrett was to later become a member. The Federalist Society serves as an organization of conservatives and libertarians that advocates for a textualist and originalist interpretation of the US Constitution.

It has now evolved into the de facto gatekeeper for right-wing lawyers aspiring to government jobs and federal judgeships under Republican presidents. The Federalist Society has vetted all of Trump's list of potential Supreme Court nominees. As of March 2020, 43 out of 51 of

Trump's appellate court nominees were current or former members. Of the current eight members of the Supreme Court, five—Kavanaugh, Gorsuch, Thomas, Roberts, and Alito—are current or former members, along with nominee Barrett.

Scalia's widow attended Barrett's nominating ceremony where Barrett made special mention to her most important mentor. "I clerked for Justice Scalia more than twenty years ago, but the lessons I learned still resonate," she said. "His judicial philosophy is mine, too."

Barrett's judicial career began in 2017 when Trump nominated her to the US Court of Appeals for the Seventh Circuit, which covers Wisconsin, Illinois, and Indiana. Barrett has been on Trump's list of potential Supreme Court nominees since 2017, almost immediately after her court of appeals confirmation.

In July 2018, after Justice Anthony Kennedy's retirement announcement, she was reportedly one of three finalists that Trump considered before he ultimately nominated Brett Kavanaugh. Reportedly, although Trump liked Barrett, he was at the time was concerned about her lack of experience on the bench. He reportedly told aides that he was "saving" her for the Ginsburg seat, so that a woman would replace a woman.

In a 2013 law review article Barrett examined the role of the doctrine of *stare decisis*, which is Latin for "to stand by things decided" and is shorthand for respect for precedent. The doctrine is, Judge Barrett wrote, "not a hard-and-fast rule in the court's constitutional cases," and she added that its power is diminished when the case under review is unpopular.

Barrett then listed seven cases that should be considered "superprecedents," cases the court would never consider overturning. The list included *Brown v. Board of Education*, but not *Roe v. Wade*. In explaining why the abortion ruling was excluded, Barrett referenced scholarship agreeing that in order to qualify as "superprecedent," a decision must have widespread support from not only jurists but politicians and the public at large, to the extent of becoming immune to reversal or challenge.

Michael Gerhardt, a University of North Carolina law professor who has written frequently on *stare decisis*, told the *Washington Post* that Barrett's approach to overturning precedent was "radical." If Barrett puts her academic views into action and four other justices go along, he said, "it will produce chaos and instability in constitutional law."

In a 2017 law review article written before she joined the appeals court, Barrett was critical of Chief Justice Roberts's 2012 opinion sustaining a central provision of the health care law. "Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute," she wrote. On November 10, 2020, one week after the election, the Supreme Court is scheduled to hear another case attacking the constitutionality of the Affordable Care Act.

Barrett has also emphasized how she relies deeply on her strict adherence to her Catholic faith, even as she stresses that it does not affect her judicial decisions.

She is a member of a predominantly Catholic group called People of Praise. It promotes charismatic Catholicism, a movement that grew out of the influence of Pentecostalism, which emphasizes a personal relationship with Jesus and can include baptism in the Holy Spirit and speaking in tongues. The group upholds the primacy of male authority within the family—as it is in the Roman Catholic hierarchy.

Ahead of her upcoming Senate confirmation hearings, Barrett's advocates are now trying to smear questions about her involvement in People of Praise as anti-Catholic bigotry. Asked about People of Praise in a televised interview last week, Vice President Mike Pence responded, "The intolerance expressed during her last confirmation about her Catholic faith I really think was a disservice to the process and a disappointment to millions of Americans."

Pence's statement referred to Barrett's 2017 confirmation hearing to the appellate court when Senator Diane Feinstein questioned Barrett's cult-like devotion, saying, "The dogma lives loudly within you."

Barrett directly addressed the issue of judges influenced by their faith in a 1998 paper she co-wrote titled "Catholic Judges in Capital Cases," which has since become one of the most scrutinized works of her career. Barrett co-wrote that Catholic judges are obligated to follow the law but also "to adhere to their church's teachings on moral matters."

In this article Barrett wrote that Catholic judges opposed to the death penalty on religious grounds should recuse themselves from cases that would require sentencing someone to death.

At her 2017 confirmation hearing, however, she noted that as a law clerk she had assisted Justice Scalia, a conservative Catholic and staunch advocate of the death penalty, in capital cases. Once having been confirmed to the appellate court, any lingering moral qualms Barrett may have had about the death penalty quickly dissipated as she has rejected requests to delay executions.

Barrett's "moral" bearings quickly reemerged, however, when any cases before her related to abortion. She has twice dissented to the majority's opinion holding laws restricting abortion as unconstitutional. She also was in the minority who wanted the full court to rehear a decision by a three-judge panel that ruled that Indiana laws requiring that funerals be held for fetal remains after an abortion or miscarriage and banning abortions because of the sex, race or developmental disability of a fetus were unconstitutional.

As to the poor, Barrett wrote a 40-page dissent from the majority's decision to uphold a preliminary injunction on the Trump "public charge rule" that would jeopardize permanent resident status for immigrants who use food stamps, Medicaid and housing vouchers.

Although every Supreme Court nomination is important because justices serve for life and decide issues that impact the lives of hundreds of millions of people, Barrett will be the first Scalia clerk to be appointed to the bench, and the first confirmation since 1993 when a seat will shift from the "liberal" side of the court to the "conservative" side.

These terms should be used with caution, however. While Ginsburg was a liberal on gender issues, and to some extent on race and democratic rights, she was just as firm an upholder of capitalist property rights as any of her colleagues.

During the past several decades, major cases have been decided by 5-4 votes with Ginsburg in the majority. These decisions include striking down restrictions on abortion, recognizing same-sex marriage, striking down the death penalty and life without parole sentences for juveniles, limiting the death penalty to only crimes involving murder, and the right to judicial review for Guantanamo detainees. With Barrett replacing Ginsburg, all these cases would likely have gone the other way.

Moreover, with the likelihood of a contested presidential election occurring and perhaps once again being decided by the Supreme Court, Barrett's accession to the court will give Trump three justices named by him, joining Alito, Thomas and Roberts, in a 6-3 pro-Republican majority, to back an electoral coup d'état.

In the event Trump is defeated and removed, Barrett would be part of a 6-3 right-wing majority, which a President Biden could use as an excuse every time he rebuffed popular demands to reverse the ultra-right policies of his predecessor and undo their reactionary consequences.

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