

Supreme Court Confirmation of Amy Coney Barrett

A “Blatant Act of Bad Faith”?

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In the Senate proceedings on Amy Coney Barrett’s nomination to the Supreme Court, Senate Democrats (and at least two Republicans) claimed that a confirmation of Supreme Court Justice in a presidential election year would be a break with Senate tradition—a violation of the mythologized “Thurmond Rule.” Named for Senator Strom Thurmond, the scope of the rule and its origins are murky. The rule likely originated in Thurmond’s campaign against President Jimmy Carter’s judicial nominees of 1980, when Thurmond served as ranking minority member of the Senate Judiciary Committee. This article discusses the Supreme Court confirmation process, Barrett’s background and nomination, the speed with which she was confirmed to the nation’s highest Court, and the conclusion of the nonpartisan Congressional Research Service on whether the Thurmond Rule truly exists. Senate Minority Leader Charles Schumer declared the Barrett confirmation a “blatant act of bad faith” by the Republican majority in the Senate, which in 2016 invoked the Thurmond Rule to defer Senate action on President Barack Obama’s nomination of Merrick Garland to the Supreme Court. As detailed by the Congressional Research Service, the Thurmond Rule has been invoked inconsistently by both parties at politically convenient times.

On October 26, 2020, the Senate voted fifty-two to forty-eight to confirm Amy Coney Barrett to the US Supreme Court to fill the vacancy created by the death of Associate Justice Ruth Bader Ginsburg on September 18, 2020.¹ All Democratic Senators voted against confirmation. The media noted the speed of Barrett’s confirmation and how close it occurred to an upcoming presidential election “just about a week before Election Day” on November 3, 2020.² In his remarks on the Senate floor immediately before the confirmation vote, the Senate minority leader, Charles Schumer (D-New York), described the confirmation vote as a “blatant act of bad faith” because it deprived voters of the opportunity to participate in the selection

of the next Supreme Court Justice through their votes in the upcoming presidential election.³ His assertion was based on an unwritten tradition in the Senate—known as the Thurmond Rule—that is sometimes invoked to defer Senate action on judicial nominations during a presidential election year. This article discusses the invocation of the Thurmond Rule with respect to the Barrett nomination.

Overview of the Supreme Court Confirmation Process

The “Appointments Clause” of the Constitution provides for the president to nominate Supreme Court Justices “by and with the Advice and Consent of the Senate.”⁴ Under this clause, the president selects a nominee and the Senate determines whether to confirm the nominee. Within the Senate, the Senate Judiciary Committee has come to play an important role in the confirmation process: “Specifically, the Judiciary Committee, rather than the Senate as a whole, assumes the principal responsibility for investigating the background and qualifications of each Supreme Court nominee, and typically the committee conducts a close, intensive investigation of each nominee.”⁵

President Donald Trump’s Nomination of Barrett

President Trump nominated Barrett to the Supreme Court on September 29, 2020.⁶ Born on January 28, 1972, Barrett is a graduate of Rhodes College and Notre Dame Law School. She served as a law clerk for Laurence H. Silberman of the US Court of Appeals for the District of Columbia Circuit and for the late Associate Justice Antonin Scalia, during the 1998 term of the Supreme Court. She taught as a faculty member of Notre Dame Law School before being selected for a seat on the Seventh Circuit Court of Appeals by President Trump in 2017.⁷

Barrett's confirmation to the Seventh Circuit in 2017 was contentious, as was her confirmation to the Supreme Court.⁸ As part of the pre-hearing stage of a federal judicial nomination, the American Bar Association's Standing Committee on the Federal Judiciary renders an impartial evaluation of each nominee's professional qualifications, including "integrity, professional competence, and judicial temperament."⁹ During both the 2017 and 2020 confirmation processes, a majority or a substantial majority of the Committee rated Barrett "Well Qualified" to serve as a federal judge.¹⁰ Despite this qualification from the American Bar Association, both of Barrett's confirmation hearings engendered significant controversy, with criticisms targeting her religious and political beliefs, as well as her personal life and education.¹¹

Barrett was confirmed to the Seventh Circuit on October 31, 2017.¹² Seventeen days later, on November 17, 2017, she was added to President Trump's "Supreme Court List" (along with Brett Kavanaugh).¹³ This early transparency in selecting Barrett as a potential Supreme Court nominee and the information that Senators already had about Barrett from her 2017 confirmation are factors that likely allowed Republican Senators to move quickly after the president announced on September 26, 2020 that he intended to nominate Barrett to the Ginsburg vacancy.¹⁴ The next day, the White House announced support for Barrett's confirmation from forty-eight Republican Senators, including all twelve Republican members of the Senate Judiciary Committee.¹⁵

One of the Fastest Confirmations in Recent History

Barrett was nominated to the Supreme Court on September 29, 2020 and confirmed on October 26—twenty-seven days from nomination to confirmation. Since 1975, only Justice Paul Stevens was confirmed in a shorter amount of time—nineteen days from nomination to confirmation.¹⁶ Barrett's confirmation was also eight days before Election Day on November 3, the shortest time period in history between a confirmation of a Supreme Court Justice and an upcoming presidential election.¹⁷

The reason for rushing the confirmation process seems obvious: The party in control of the Senate wanted to ensure the appointment of their nominee as the next Supreme Court Justice. With so much Republican support for the nominee early in the confirmation process (before Barrett was even formally nominated), perhaps the only strategy for those opposing the nomination to pursue was the Thurmond rule.

The Democrats and two Republican Senators urged the Senate to defer action on the Barrett nomination until after the presidential election, as was done in 2016 when President

Barack Obama nominated Merrick Garland to the Supreme Court.¹⁸ Garland was nominated on March 16, 2016 to replace Justice Scalia, who died a month earlier.¹⁹ Even before Garland was nominated, an opinion piece by Senators Mitch McConnell (R-Kentucky) and Chuck Grassley (R-Iowa) argued:

Rarely does a Supreme Court vacancy occur in the final year of a presidential term, and the Senate has not confirmed a nominee to fill a vacancy arising in such circumstances for the better part of a century. So the American people have a particular opportunity now to make their voice heard in the selection of Scalia's successor as they participate in the process to select their next president — as they decide who they trust to both lead the country and nominate the next Supreme Court justice. How often does someone from Ashland, Ky., or Zearing, Iowa, get to have such impact?

We don't think the American people should be robbed of this unique opportunity. Democrats beg to differ. They'd rather the Senate simply push through yet another lifetime appointment by a president on his way out the door. No one disputes the president's authority to *nominate* a successor to Scalia, but as inconvenient as it may be for this president, Article II, Section 2, of the Constitution grants the Senate the power to provide, or as the case may be, *withhold* its consent.²⁰

Ultimately, no Senate action was taken on the Garland nomination before Election Day in 2016.²¹ The Senate instead returned the nomination to the president on January 3, 2017.²² A Congressional Research Service report explains that the Thurmond Rule was the apparent reason for the deferral of Senate action on the Garland nomination:

No hearings were held on the nomination after the Senate majority leader [Mitch McConnell] and chairman of the Senate Judiciary Committee [Chuck Grassley] both took the position that the person to fill the Scalia vacancy be one selected by the next president taking office on January 20, 2017.²³

With respect to the Barrett nomination in 2020, Senate Minority Leader Charles Schumer called out the Republican majority for invoking the Thurmond Rule in 2016 but ignoring it in 2020. In his final remarks on the Senate floor before the Barrett confirmation vote, he stated: "After refusing

a Democratic nominee to the Supreme Court because an election was eight months away, they will confirm a Republican nominee before an election that is eight days away. . . . This hypocritical, 180-degree turn, is spectacularly obvious to the American people.”²⁴

Senate Majority Leader Mitch McConnell responded:

Our colleagues cannot point to a single Senate rule that has been broken—not one. . . . The process comports with the Constitution. We don’t have any doubt, do we, that if the shoe was on the other foot, they would be confirming this nominee? Have no doubt, if the shoe was on the other foot in 2016, they would have done the same thing. Why? Because they had the elections that made those decisions possible.²⁵

As a result of the Senate’s *inaction* on the Garland nomination in 2016 and the Senate’s *action* on the Barrett nomination in 2020, President Trump appointed three Supreme Court Justices during his term in office: Neil Gorsuch in 2017, Kavanaugh in 2018, and Barrett in 2020.²⁶ This is remarkable given that Supreme Court appointments “are usually infrequent, as a vacancy on the nine-member Court may occur only once or twice, or never at all, during a particular president’s years in office.”²⁷

Is There a Thurmond Rule?

The Thurmond Rule is sometimes stated as the principle that “the Senate, after a certain point in a presidential election year, would generally no longer act on judicial nominations, or act only on uncontroversial consensus nominees supported by the Senate leaders of both parties.”²⁸ However, it is not a written or established rule.²⁹ In fact, Senators disagree on what the rule says, when and how it originated, and whether it is a tradition or a practice that is to be followed today.³⁰ One account is that it originated in 1980 when former Senator Strom Thurmond, then ranking minority member of the Senate Judiciary Committee, insisted that judicial vacancies in the last year of a president’s term remain vacant in order to be filled with the nominations of the next president.³¹

The Thurmond Rule has been said to apply to all judicial nominations received by the Senate, not only Supreme Court nominations.³² Nominations to the Supreme Court are of particular significance, however, due to “the enormous judicial power the Supreme Court exercises as the highest appellate court in the federal judiciary.”³³

In 2008, the Congressional Research Service published an extensive report (the “2008 report”) discussing whether the

Senate customarily observes the Thurmond Rule with respect to judicial nominations to federal courts other than the Supreme Court.³⁴ The report concluded that “no bipartisan agreement has ever been reached, or any Judiciary Committee or Senate vote taken, regarding a Thurmond Rule or the practices for which it is said to stand.”³⁵ Rather, the report noted the following pattern during presidential election years:

Senators of the president’s party supported processing as many judicial nominations as possible in the year, and as late in the year as possible, and they looked for examples of earlier presidential election years when relatively large numbers of nominations were processed or when nominations were processed relatively late in the year. On the other hand, Senators of the opposition party cited other presidential election years when relatively few nominations were processed, or when the processing of nominations stopped relatively early in the year, to put a slowdown in the current Congress in a more favorable perspective. Examples of presidential election years, in other words, could be found helpful to either party, with or without reference to the Thurmond Rule.³⁶

This dynamic was in play in 2016, when Republican Senators—then *not of* the president’s party—were successful in their efforts to defer Senate action on the Garland nomination, and in 2020, when Republican Senators—now *of* the president’s party—insisted that the Thurmond Rule applied only when the Senate majority and the president were not of the same party.

The 2008 report also discusses policy reasons to follow or not follow the Thurmond Rule. For example, some Senators might view judicial nominations “as having less legitimacy to the extent that they were regarded as among the last acts of a departing administration.”³⁷ On the other hand, “[s]ome Senators might be inclined to regard their ‘advice and consent’ responsibility under the Appointments Clause of the Constitution as obligating them to consider a president’s judicial nominations whenever possible.”³⁸

With respect to Supreme Court nominations, the only nominations that were considered during presidential election years after 1980, when the Thurmond Rule may have first originated, were in 1988 with the nomination of Anthony Kennedy, in 2016 with the Garland nomination, and in 2020 with the Barrett nomination.³⁹ Kennedy was confirmed before Election Day in 1988 with “unanimous” support (fifty Democrats and forty-seven Republicans in favor and three Senators sitting out).⁴⁰ Because Kennedy had the support of both parties, the

Thurmond Rule might not have applied. Thus, his confirmation in 1988 does not tend to prove or disprove the existence of the Thurmond Rule or the extent to which it is followed.

Was the Senate Majority's Disregard of the Thurmond Rule during the Barrett Nomination a "Blatant Act of Bad Faith"?

Senator Schumer described the Senate majority's disregard of the Thurmond Rule with respect to the Barrett nomination as a "blatant act of bad faith."⁴¹ As described by the Congressional Research Service in the excerpt from the 2008 report above, however, the Thurmond Rule seems to be invoked by Senators of one party or another whenever it is politically convenient to do so.

In the 2020 Barrett nomination, the Senate proceedings and mainstream press appeared to focus on the Senate's apparent flip-flop on the Thurmond Rule (compared to the Garland nomination in 2016) and on Barrett's judicial philosophy and likely rulings on controversial social issues if appointed to the Supreme Court.⁴² This article does not attempt to debate or determine whether the Thurmond Rule was disregarded in bad faith during the Barrett nomination. This article also does not attempt to address Barrett's past rulings or how she would likely rule on social or other issues as a Supreme Court Justice. Those wishing to investigate those questions could begin with the Congressional Research Service reports on Barrett and her likely rulings.⁴³

As of December 9, 2020 (when this paper was originally written), Barrett had participated in one Supreme Court case so far—and hers was the deciding vote. In *Roman Catholic Diocese of Brooklyn v. Andrew M. Cuomo*, two religious organizations petitioned the Supreme Court to temporarily enjoin the Governor of New York from enforcing his Executive Order restricting in-person attendance at certain religious services due to the COVID-19 pandemic.⁴⁴ The petitioners argued that the restrictions violated religious freedoms protected under the Constitution and that the Supreme Court should grant the temporary injunction while the lawsuit proceeded in the lower appellate court. The Court ruled in favor of the religious organizations, with Barrett joining the five-Justice majority and four Justices dissenting. As expected, Barrett sided with the conservatives on the Court, at least on this issue.

It remains to be seen how Barrett will rule in cases dealing with other issues over the long term. In March 2021, the press reported that some conservatives were disappointed that Barrett "aligned herself more with the moderate Chief Justice John G. Roberts and Justice Brett M. Kavanaugh than with more conservative colleagues such as Justices Neil M. Gorsuch, Samuel

A. Alito Jr., and Clarence Thomas."⁴⁵ In May 2021, another news article discussed that Barrett "has aligned most often with Clarence Thomas and Neil Gorsuch in her first months on the bench," but noted that in one death penalty case, "Barrett broke from her colleagues on the right, as she signed an opinion by liberal Justice Elena Kagan that prevented Alabama from executing a condemned man without his pastor present."⁴⁶ In July 2021, Barrett was described as "blaz[ing] her own path during her rookie term on the U.S. Supreme Court," with her record on the Supreme Court at that time suggesting that "she has joined the center of a court with a 6–3 conservative majority rather than its right flank."⁴⁷

What is the Future of the Thurmond Rule?

Will Senators continue to invoke or disregard the Thurmond Rule when politically convenient to do so as they seemed to do in 2016 and 2020? Probably, but we can always hope for a future like the one that was expressed by the late Senator Arlen Specter (R-Pennsylvania) as follows: "We ought to try to move, I suggest, away from positions where we articulate a view when it suits our purpose and then articulate a different view later."⁴⁸

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