

**CONSTITUTIONAL
ACCOUNTABILITY CENTER**

October 9, 2020

The Honorable Lindsey Graham
Chairman, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510-6275

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510-6275

Dear Chairman Graham, Ranking Member Feinstein, and members of the Senate Judiciary Committee,

On behalf of the Constitutional Accountability Center, I am writing to express concerns about Judge Amy Coney Barrett's nomination to the United States Supreme Court and the scheduling of her confirmation hearing.

The Constitutional Accountability Center ("CAC") was founded in 2008 as a public interest law firm, think tank, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests. As a law firm, CAC chooses cases that can move the law in a direction that comports with the Constitution's text and history. As a think tank, we produce original scholarship on the text and history of the Constitution, distilling the best legal and historical scholarship to help Americans better understand our Constitution and inform how modern debates about its text should be resolved. And, as an action center, we explain why the Constitution is, in its most vital respects, a progressive document, written by revolutionaries and amended by those who prevailed in the most tumultuous social upheavals in our nation's history— Reconstruction, Suffrage, and the Civil Rights movement. Through litigation, scholarship, and advocacy, we seek lasting victories rooted in the text, history, and values of the whole Constitution.

As an organization with deep interest in the legitimacy of the American judicial system, CAC must note the gravity of this hearing. In a democratic society, legitimacy and public confidence are critical to the foundation of a representative government. Public faith in the United States Supreme Court is of particular importance in order for the Court to properly fulfill its constitutional function. Much of the Court's power comes from the legitimacy of the justices, who must be seen as independent arbiters of justice. From the fact that this confirmation hearing is happening in the middle of an election, to President Donald Trump indicating his justices would provide guaranteed votes to dismantle the Affordable Care Act and overturn *Roe v. Wade*, to him openly stating his desire to have his nominee on the Court in time to help "look at the ballots" in the presidential election following his repeated false claims of mail-in ballot fraud, everything about this confirmation process taints the legitimacy of the Court.

In order to believe in and abide by the decisions handed down by the Supreme Court, the American people must believe that there are consistent standards when it comes to the consideration of Supreme Court nominees. During Senator Mitch McConnell's tenure as Senate Majority Leader, this Committee has failed to provide that much-needed, consistent standard. Confirmation hearings for a Supreme Court nominee during a

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presidential election year require not only time for proper vetting but also, if the Mitch McConnell of 2016 is to be believed, waiting for We the People to have their say at the ballot box.¹ However, the Senate majority—at the apparent behest of President Trump—is rushing the process for political reasons. There has not been sufficient time to examine Judge Barrett’s record and the rushed process has yielded an insufficient questionnaire by the nominee with missing—and possibly critical—information.²

Furthermore, we are not just in an election year—we are in the *middle* of an election. Early voting has begun in several states, with nearly eight million ballots already cast.³ The American people are considering whether they want leaders in the White House and Congress who will strengthen access to health care and preserve protections for those with pre-existing conditions, protect access to abortion care, and many other concerns. American citizens are voting for the presidential candidate they want to appoint the next Associate Justice and for Senate candidates whom they would like to confirm the next Associate Justice. To place someone on the Court as We the People grapple with these issues in the voting booth, when Judge Merrick Garland—the nominee of a President of a different political party to Senator McConnell—could not get a hearing over 150 days prior to Election Day 2016, would be a demonstration of brute political force rather than a sober commitment to democracy, consistency, and the will of the People.

President Trump has also tainted this process and damaged the legitimacy of the Supreme Court by suggesting guaranteed legal outcomes via his appointments to the bench. During the first presidential debate of the 2020 election, Trump admitted he is “counting on” a Justice Amy Coney Barrett on the Supreme Court “to look at the ballots” in this election.⁴ He has promised to appoint justices who will dismantle the Affordable Care Act⁵ and overturn *Roe v. Wade*.⁶ What we need instead are fair-minded justices who will serve independently, even if it goes against the policy preferences of the President who nominated them. But President Trump is looking for a justice who will turn a blind eye to his corrupt threats to democracy and support his draconian policies by turning their back to the Constitution’s progressive promises for all—including LGBTQ+ individuals,

¹ See 162 Cong. Rec. S1523-24 (daily ed. Mar. 16, 2016) (statement of Sen. McConnell). (“Mr. President, the next Justice could fundamentally alter the direction of the Supreme Court and have a profound impact on our country, so of course—of course the American people should have a say in the Court’s direction. ... As Chairman Grassley and I declared weeks ago and reiterated personally to President Obama, the Senate will continue to observe the Biden rule so that the American people have a voice in this momentous decision. The American people may well elect a President who decides to nominate Judge Garland for Senate consideration. The next President may also nominate somebody very different. Either way, our view is this: Give the people a voice in filling this vacancy. ... As we continue working on issues like these, the American people are perfectly capable of having their say on this issue. So let’s give them a voice. Let’s let the American people decide. The Senate will appropriately revisit the matter when it considers the qualifications of the nominee the next President nominates, whoever that might be.”)

² Marianne Levine, *Dems ask DOJ for answers over Barrett’s abortion ad omission*, Politico (Oct. 6, 2020), <https://www.politico.com/news/2020/10/06/amy-coney-barrett-abortion-doj-426883>.

³ Michael McDonald, *2020 General Election Early Voting Statistics*, U.S. Elections Project (last updated Oct. 9, 2020, 11:39 AM EST), <https://electproject.github.io/Early-Vote-2020G/index.html>.

⁴ Lisa Mascaró, *Trump thrusts Supreme Court pick into election turmoil*, The Associated Press (Sept. 30, 2020), <https://apnews.com/article/election-2020-virus-outbreak-joe-biden-donald-trump-voting-e7fa904df7e51320e154efd7c0d7fd2a>.

⁵ Donald J. Trump (@realDonaldTrump), Twitter (June 25, 2016, 12:38 PM), <https://twitter.com/realDonaldTrump/status/614472830969880576>.

⁶ Dan Mangan, *Trump: I’ll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

people of color, immigrants, women, workers, and people who struggle to make ends meet. Upon examining Judge Barrett's judicial record and scholarship, we are concerned she not only passes Trump's litmus tests, but will work to undo the legal legacy of Ruth Bader Ginsburg, move the Roberts Court further away from mainstream legal thought, and be a reliable vote for big business over the interests of all people.

Judge Barrett has been praised by conservatives for being an originalist, a jurist who resolves constitutional disputes by relying primarily on the text and history of the provision in question as understood at the time of its drafting.⁷ However, to be a true originalist, a jurist must demonstrate a commitment to the text and history of the *whole* Constitution, including the transformative Amendments passed in the wake of the Civil War, not just the parts they like. As explained in the CAC Issue Brief, "**Judge Amy Coney Barrett's Partial Constitution: A Review of Her Constitutional Jurisprudence**," Judge Barrett is, at best, an erratic originalist who is deeply committed to protecting some constitutional rights while turning a blind eye to other deeply-rooted constitutional guarantees and structural features of our Constitution.⁸ In particular, she would likely rewrite or overrule the Court's precedent regarding the right to abortion, the authority of the government to enact reasonable gun regulations, and the power of the federal government to solve national problems, such as health care. Furthermore, Judge Barrett's record indicates she would help solidify unjustified conservative dominance on a range of critical issues, including state violence and qualified immunity, criminal justice, the role of religion in American life, and immigration, with little respect for the whole Constitution's text, history, and values that point in a less conservative direction.

As a judge on the U.S. Court of Appeals for the Seventh Circuit, Judge Barrett's record has signaled that she can be a reliable vote for big business. While corporate interests should obviously prevail in cases where the law is truly on their side, judges should not put a thumb on the scale of justice to favor the powerful. Judge Barrett has authored opinions that demonstrate crabbed interpretations of laws protecting workers from discrimination, strongly favored arbitration beyond what is required by governing statutes, and made it more difficult for people to vindicate their rights in court against corporate defendants. These opinions, detailed in CAC Issue Brief, "**Will Supreme Court Nominee Amy Coney Barrett Be A Reliable Vote for Big Business?**,"⁹ help explain the praise from the corporate community upon the President's announcement of Judge Barrett's nomination to our nation's highest court.¹⁰ But to those of us who are focused on fair and equal justice for all, her support in the cases discussed in the report for corporate interests over the rights of individuals is concerning. This concern deepens when one considers that the Roberts Court, with the conservative Justices leading the charge, has ruled in favor of positions taken by the U.S. Chamber of Commerce 70 percent of the time.¹¹

⁷ Ed Whelan, *Judge Barrett on Textualism and Originalism*, National Review (Sept. 25, 2020), <https://www.nationalreview.com/bench-memos/judge-barrett-on-textualism-and-originalism/>.

⁸ David H. Gans, *Judge Amy Coney Barrett's Partial Constitution: A Review of Her Constitutional Jurisprudence*, CAC (Oct. 9, 2020), <https://www.theusconstitution.org/think-tank/issue-brief-judge-amy-coney-barretts-partial-constitution-a-review-of-her-constitutional-jurisprudence/>.

⁹ Becca Damante, *Will Supreme Court Nominee Amy Coney Barrett Be A Reliable Vote for Big Business?*, CAC (Oct. 9, 2020), <https://www.theusconstitution.org/think-tank/issue-brief-will-supreme-court-nominee-amy-coney-barrett-be-a-reliable-vote-for-big-business/>.

¹⁰ Press Release, U.S. Chamber of Commerce, U.S Chamber Supports President Trump's Nominee Barrett for Supreme Court (Sept. 26, 2020), <https://www.uschamber.com/press-release/us-chamber-supports-president-trump-s-nominee-barrett-supreme-court>.

¹¹ *Corporations and the Supreme Court*, Constitutional Accountability Center, <https://www.theusconstitution.org/series/chamber-study/>.

CONCLUSION

The legitimacy of the Court requires it to be perceived as a non-partisan institution. It is vitally important that we have consistent standards when it comes to putting justices on the highest court in the land because the legitimacy of the court and the important work that it does is at stake.

This hearing should not be happening now.

But since Senate leadership insists on going forward with this hearing, we urge Senators on the Judiciary Committee to rescue what they can of their constitutional advice and consent role and seriously examine the nominee's record before determining that the full Senate should vote on whether to confirm her to a lifetime seat on the Supreme Court. We call on you to scrutinize closely the record, scholarship, and judicial philosophy of Supreme Court nominee Judge Amy Coney Barrett, focusing on whether she would be faithful to the text, history, and values of the whole Constitution—including the transformative Amendments that made this country more democratic, equal, and free—or whether she would instead be a reliable vote for big business and conservative legal thought that is far from the mainstream.

If CAC can be of any help to your office during the evaluation of this nominee or if you have any questions about the contents of this letter, please contact CAC's Director of Policy, Kristine Kippins at kristine@theusconstitution.org.

Sincerely,



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cc: Members of the Senate Committee on the Judiciary