MY OBJECTION TO CONFIRMING JUSTICE BARRETT

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Just over a week ago, the United States Senate confirmed Justice Amy Coney Barrett's position on the Supreme Court of the United States. By that point, most Americans had decided that the seat should be filled. Nevertheless, a significant minority believed otherwise, many of us for reasons unrelated to the qualities of then-Judge Barrett. You've probably heard the reasons why, in the form of a conclusory sentence or question-begging rant, but I think it would help to re-state the explanation in more detail.

The commonly given short version is "the Republicans stole this seat from Merrick Garland." That is not illuminating. A slightly fuller account would be that Republicans refused to fill a seat during an election year when they wanted the seat to remain empty, whereas they had no qualms about doing so when they wanted to fill it. That's more helpful but still misses the full picture. A more accurate statement would be that, frankly, this was the latest step in a conservative march to seize power through politicising the courts.

"But what about what the Democrats' attempts to seize power through politicising the courts?" We'll get to the Democrats, don't worry, but we need to explore what happened before we can get into whether it was justified.

The Accusation: Republicans Have Consistently Attempted to Pack the Courts

Let's start with the assumption that the Supreme Court, like any court, should be staffed by impartial judges who interpret the law to the best of their ability. That might seem simplistic, even unrealistic, given the current state of the federal judiciary in general and the Supreme Court in particular. I doubt I could believe it had I been brought up in the United States. Nevertheless, if it is a fiction, it is a fiction that most Americans accept (or pretend to accept). More importantly, if the Supreme Court has become the ultimate political body that many now believe it to be, we need to decide how to change the structure of the Court to reflect that. Currently, we persist in treating it as a court, so I will do so the same.

Now, some context. First, we have to consider the nature of the Supreme Court itself. The framers of the Constitution considered a body that "[could] take no active resolution whatever [and could] truly be said to have neither FORCE nor WILL, but merely judgment.[1]" That is not an accurate description of the current Court. The Supreme Court of the United States is able to choose which of the litigation submitted to it to hear. Most political issues are now litigated and most of that litigation is submitted for consideration by the Supreme Court. It would be an exaggeration to say that the Supreme Court can involve itself in whichever political issues it pleases but not much of an exaggeration. For what follows, it is worth bearing in mind that much of this litigation is brought by Republican politicians or causes aligned with the Republican Party (as is also true of the Democrats but, I repeat, we need to assess what the Republicans did before we evaluate whether it was justified as a response to the Democrats' actions).

[1] THE FEDERALIST NO. 78 (Alexander Hamilton)

Second, we need to consider Republican Senators' approach to the federal judiciary in general. When Republicans took control of the Senate, it began to block President Obama's judicial nominees to an unprecedented extent.[2] It confirmed none of the seven circuit court judicial nominations in 2015 or 2016, none of the 23 district court judicial nomination in 2016, and only nine of the 28 district court judicial nominations in 2015.[3] In total, the Senate returned 54 nominations.[4] Perhaps the refusal to consider any of these nominees was based on legitimate concerns about their judicial philosophies but, so far as I am aware, many (perhaps most) of the candidates were intentionally non-controversial. This is also consistent with comments made by senators at the time.[5] Indeed, at least ten judicial candidates nominated by President Obama were later re-nominated by President Trump and confirmed by a Republican Senate![6] The Republicans also rejected proposed legislation that would have increased the number of federal judgeships (which would presumably enable President Obama to appoint more judges).[7] The severe need to increase the number of federal judges was known at the time.[8]

Now we reach the nomination of Judge Merrick Garland to the Supreme Court. Returning to our assumption about the nature of the Court, it should be clear what was appropriate for the Senate: if the Senate deemed him fit for the Court, it should have confirmed him; if it found him insufficiently qualified, or had insurmountable concerns about his judicial philosophy, it should have rejected him so that the President could propose another candidate. In fact, the Senate never even considered his qualifications. Before President Obama had put forth a nominee, Republican members of the Senate had committed to leaving the seat empty, saying that the candidate should be (indirectly) decided in an election that was then nine months away.

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[2] *See* Burgess Everett & Seung Min Kim, *Judge Not: GOP Blocks Dozens of Obama Court Picks*, POLITICO (July 6, 2016), https://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743; Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump*, BROOKINGS (June 4, 2018), https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/.

[3] Wheeler, *supra* note 2.

[4] AM. BAR ASS'N, STATUS OF FEDERAL JUDICIAL VACANCIES, NOMINATIONS AND CONFIRMATIONS (2018), *available at* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/statusofvacsnomscons.pdf.

[5] *See* Everett & Kim, *supra* note 2.

[6] Chris Cioffi, *The GOP is Confirming Trump Judicial Nominees It Stalled Under Obama*, ROLL CALL (Aug. 26, 2019), https://www.rollcall.com/2019/08/26/the-gop-is-confirming-trump-judicial-nominees-it-stalled-under-obama/; *see also Barrack Obama Judicial Appointment Controversies*, WIKIPEDIA https://en.wikipedia.org/wiki/Barack_Obama_judicial_appointment_controversies (last visited Nov. 2, 2020) (listing fifteen such nominees).

[7] Cara Bayles, *'In a Timely Manner': Three Decades of Judgeship Bills*, LAW360 (Mar. 19, 2019), https://www.law360.com/articles/1140612.

[8] *See, e.g.*, Sindhu Sundar, *'Judicial Emergencies' Near Breaking Point as Nominees Languish*, LAW360 (NOV. 27, 2016), https://www.law360.com/articles/864510; *see also* Cara Bayles, *As Judicial Ranks Stagnate, 'Desperation' Hits the Bench*, LAW360 (Mar. 19, 2019), https://www.law360.com/articles/1140100/as-judicial-ranks-stagnate-desperation-hits-the-bench (describing the extent of the problem); *Judicial Emergencies*, UNITED STATES COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (last updated Nov. 3, 2020) (listing judicial emergencies that date back to 2015).

Only three Republican Senators – Marco Rubio, James Risch, and Pat Toomey – unambiguously opposed Judge Garland based on his record.[9] That is their constitutional prerogative as United States Senators. Others met with Judge Garland (Mike Rounds, Ron Johnson, Kelly Ayotte, and Rob Portman) or expressed willingness to do so (James Lankford) but opposed his nomination, without criticising him.[10] A few Senators – Senators Chuck Grassley, Bill Cassidy, Roger Wicker, Roy Blunt, and John Hoeven – made ambiguous statements that could have been interpreted as opposition to Judge Garland specifically.[11] Some Republican Senators specifically praised Judge Garland, whether or not they thought the confirmation process should move forwards.[12] Most refused to address the merits of the individual nominee, either because of the upcoming election or because they were opposed to any judge nominated by President Obama.

In short, Judge Garland's nomination was not rejected because he was unsuitable for the Supreme Court. It was rejected to prevent President Obama from appointing another justice – any other justice – to the Court.

The rest is (recent) history. President Trump nominated candidates to fill the large number of judicial vacancies that his Party had created. In doing so he has referred to their opposition to abortion and their commitment to the right to bear arms, "public safety," "free speech," "religious liberty," and even to the integrity of elections.[13] The Republican controlled Senate did what it could to confirm as many of those candidates as possible, as quickly as possible. Although the latest vacancy on the Supreme Court also opened in an election year, significantly closer to election day than had the seat now occupied by Justice Gorsuch, Republican Senators did not leave the seat to be filled after the election.

Moreover, as I've objected before,[14] the process went forward with undue haste. The period between a nomination and confirmation hearings is typically a full month longer than it was in

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[9] *U.S. Senators on the Nomination of Merrick Garland*, BALLOTPEDIA, https://ballotpedia.org/U.S._Senators_on_the_nomination_of_Merrick_Garland (last visited Nov. 2, 2020); Pat Toomey, *Here's Why I'm Opposing Merrick Garland's Supreme Court Nomination*, PENN LIVE, Apr. 5, 2016, https://www.pennlive.com/opinion/2016/04/heres_why_im_opposing_merrick.html.

[10] BALLOTPEDIA, *supra* note 9.

[11] *See* BALLOTPEDIA, *supra* note 9; Kenneth Jost, *David Vitter, Bill Cassidy Criticize President Obama's Merrick Garland Nomination for Supreme Court*, THE ADVOCATE, Mar. 21, 2016, https://www.theadvocate.com/baton_rouge/news/politics/article_f02e34c9-3e31-5104-ab7a-45c8d2c47bbf.html.

[12] *See* BALLOTPEDIA, *supra* note 9; Thomas Ferraro, *Republican Would Back Garland for Supreme Court*, REUTERS, May 6, 2010 https://www.reuters.com/article/us-usa-court-hatch-idUSTRE6456QY20100506 (Senator Orrin Hatch believed that Judge Garland, then a candidate for nomination, would be "a consensus nominee. Senator Hatch stated that he had "no doubts that Garland would get a lot of (Senate) votes. And [he would] do [his] best to help [Judge Garland] get them.")

[13] *See, e.g.*, *Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States*, THE WHITE HOUSE (Sept. 26, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-nominee-associate-justice-supreme-court-united-states/; *Remarks by President Trump on Judicial Appointments*, THE WHITE HOUSE (Sept. 9, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-judicial-appointments/; Jordyn Phelps, *Trump Argues His Nominee Needed on Supreme Court in Time to Vote on Election Legal Challenges*, ABC NEWS, Sept. 32, 2020, https://abcnews.go.com/Politics/trump-argues-nominee-needed-supreme-court-time-vote/story?id=73192756.

[14] *See* Miles Harker, *A Summary of Judge Barrett's Opinions*, LEGALLY COMPETENT (Oct. 9, 2020), https://legallycompetent.com/2020/10/09/a-summary-of-judge-barretts-opinions/.

this case. There is a good reason for that delay: it ensures that senators are able to scrutinise the candidate's record; it also means that ordinary lawyers, most of whom are not able to undertake extensive projects at a moment's notice, have sufficient time to offer their own insights. (I probably could have finished the blog during the ordinary period, so I may be a little bitter, but I won't pretend that I'm among the lawyers with real insights to offer.) It would be very optimistic to think that the rushed nature of the hearings was solely responsible for their low quality. It is entirely possible, however, that the rush contributed in some way.

There may well be valid reasons to shorten that period but I haven't heard any of them put forward. On the contrary, all the reasons seemed to cut against doing so, from the risk of spreading Covid-19 to the imminent election. (Legitimacy concerns aside, the usual time period would have placed the confirmation hearings after the election, reducing the distraction posed by campaigning). Perhaps the Senate wanted Justice Barrett to rule on as many cases as possible. I think this weighs the costs and benefits wrongly. Even if Justice Barrett's presence on the Court a month earlier would change any decisions from wrong to right, which strikes me as improbable, that change would benefit the country (and the rule of law) far less than reducing the politicisation of the Court. Moreover, I find it more realistic that the Republican-controlled Senate was trying to ensure that Judge Barrett became Justice Barrett before the election.

I can imagine three other reasons that Republican Senators would attempt to guarantee Justice Barrett's appointment before the election. The first is that it was part of a ploy to steal the election, which smacks of conspiracy theory but is arguably supported by President Trump's comments.[15] Second, more plausibly, the Senators may have hoped that doing so would aid their (or their allies') prospects for re-election. If so, they rushed the appointment process – to its detriment – for entirely political reasons. Third, Republican Senators might have feared that unfavourable election results would make the confirmation appear undemocratic or illegitimate. If so, rushing the confirmation manifestly did not evade the issue. Quite the opposite. Say President Trump is re-elected and the Republicans maintain control of the Senate; there would be no problem with filling the seat, and an appointment that would have been unblemished has been tainted by an apparent attempt to evade the possible consequences of the election. On the other hand, if those conditions aren't met, Judge Barrett's supporters would retain until January the power to confirm her. Would a confirmation after losing an election be any less justifiable than a confirmation that was rushed to precede an election they feared losing? I think not; at least the latter would allow time for proper consideration of the nominee's merits.

That, if you will, is the case for the prosecution. At best, the Republican Party has impeded the judicial selection process for political purposes. At worst, it has actively undermined the independence of the judiciary by selecting judges who would support its policies and opposing the nomination of those who would not. Now, let's consider the defence.

Is it Really the Democrats who Politicised the Courts?

First, Republicans are fond of ascribing the politicisation of the judiciary to the Democrats: Joe Biden first proposed halting nominations during election years when the Senate and Presidency

[15] *See* Phelps, *supra* note 13.

were controlled by different parties; the Democrats first brought politics into the Supreme Court confirmation process by unjustifiably rejecting the nomination of Judge Bork; and, lest we forget, FDR inexcusably tried to pack the Court. I have my doubts about some of those claims and, so far as I know, legal scholars debate when and how several aspects of the judiciary became political.[16] Nevertheless, I am no historian, so I will assume that these claims are correct. Certainly, the Democrats have not been paragons of integrity on this score. They, too, opposed bills to expand the federal judiciary despite the recognised need to do so.[17] They frequently base their judicial selections on desirable policy outcomes. Their response to Trump's judicial nominations, from unjustified opposition to "Republican" judges to their conduct during Supreme Court confirmation hearings, has been indefensible.

Yet, whatever damage the Democrats have caused, it only justifies Republicans' actions if those actions are directed towards repairing that damage. To paraphrase Chief Justice Roberts, "the way to stop politicisation of the judiciary is to stop politicising the judiciary."[18] That isn't what happened. Republican Senators did not oppose specific Democratic-nominated judges because of any qualms about judicial ideology, they simply opposed the Democrats' ability to appoint judges.

Furthermore, President Trump has been quite open about selecting judges who will promote certain ends. These ends might be dressed up in the language of constitutional rights but, properly understood, they are clearly the same ends that conservatives seek to promote through other means. Now, conservatives often have valid arguments that the law supports a given policy position. I even think some of those arguments are correct. The thing is, the U.S. Constitution wasn't drafted by modern conservatives, any more than it was written by their progressive contemporaries. The legislation that courts interpret was enacted by many sessions of Congress – conservative, progressive, and in between – often in response to a very different world. If one concludes that this mélange of history invariably supports one's policy goals, the only question is whether one is intentionally lying or simply too biased to realise it.

Was the Nomination of Justice Barrett Really Equivalent to the Nomination of Judge Garland?

Second, there is the argument that there was nothing inappropriate about the confirmation of Judge Barrett. It is true that the confirmation, in itself, did not violate any long-running historical norms: there is no tradition of refusing to confirm candidates for the Supreme Court during election years.[19] This misses the point, which is the inconsistency between the nominations of

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[16] For a particularly cynical view, arguing that the Supreme Court was wholly political from its earliest days, see *Packing the Court* by James MacGregor Burns.
[17] Bayles, *supra* note 7; Bayles, *supra* note 8.
[18] *Cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.")
[19] Amy Howe, *Supreme Court Vacancies in Presidential Election Years*, SCOTUSBLOG (Feb. 13, 2016) https://www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/; Josh Blackman, *Nominations to Supreme Court in Election Year with Divided and Unified Governments*, JOSH BLACKMAN'S BLOG (Feb. 13, 2016), joshblackman.com/blog/2016/02/13/nominations-to-supreme-court-in-election-year-with-divided-and-unified-governments/.

Judge Garland and Justice Barrett. Consider it an estoppel- or waiver-type argument: one cannot take advantage of a rule and then disregard it when it becomes inconvenient.[20] Doing so suggests either pretext the first time or a lack of principle the second.

As an aside, there is no tradition that supports the nomination either. No modern nominee had been proposed so close to the election. The historical explanation for this appears to be that the Senate was in recess.[21] I repeat that I am not an historian, so I am not sufficiently qualified to appreciate the significance of this. If the reasons for this recess were simply practical, such as the demands of travel and the difficulty of remote campaigning, changes in technology may have obviated such considerations and justified continuing business until closer to the election. If the recess was driven in part by a commitment to take no action close enough to an election, that argument might still stand.

As a matter of common sense, there must be some cut-off point at which it becomes too late to consider a nomination. Perhaps an examination of nominations to lower courts would help illuminate whether that cut-off point has been decided. At least since President Reagan, district and circuit court judges have been confirmed as late as October of an election year, but the overwhelming majority of those were nominated no later than June (for circuit court judges) or July (for district court judges).[22] Judge Timothy Lewis, however, who was nominated for the Court of Appeals for the Third Circuit in September.[23] A fuller examination of history might elucidate whether Judge Lewis' nomination was an exception to an established rule or an ordinary response to rarely-occurring circumstances.

Returning to the main point, were the circumstances of the two nominations equivalent? Should the same rule have governed both? The most significant difference between the two is that, at the time of Justice Barrett's nomination, the Senate was controlled by the President's party. First, have the Republicans been consistent in this argument? Generally speaking, yes. Most Republican Senators' arguments in 2016 focused on the forthcoming election but many referred to the partisan division, either explicitly or implicitly (by reference to a "lame duck" presidency).

Second, is this distinction actually significant? I do not see how it can be. If the American people is entitled to decide (albeit indirectly) who fills a vacancy on the Supreme Court that arises in an election year, I do not see how it matters whether the Senate majority and the President are of the same party. Additionally, this distinction is not supported by history. It is true that 1888 was the last time the Senate confirmed a judicial nominee from a President of the other party. The reason

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[20] *Cf.* Mathews v. REV Recreation Grp., Inc., 931 F.3d 619, 623 (7th Cir. 2019) ("In other words, the Mathews cannot have it both ways: relying on the contract when it works to their advantage to get repairs done and then alleging that it is unconscionable when it doesn't.")

[21] Dan McLaughlin, *Why There Has Never Been a Supreme Court Justice Confirmed in the Fall of a Presidential Election Year*, NAT'L REV., Sept. 21, 2020, https://www.nationalreview.com/corner/supreme-court-why-no-justice-has-beenconfirmed-in-the-fall-of-a-presidential-election-year/.

[22] *See* Wheeler, *supra* note 2; *List of Federal Judges Appointed by George H. W. Bush*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_George_H._W._Bush (last visited Nov. 2, 2020).

[23] *Lewis, Timothy K.*, FED. JUDICIARY CTR., https://www.fjc.gov/history/judges/lewis-timothy-k (last visited Nov. 2, 2020).

for this, however, is simply that the opportunity has not arisen since then: 1888 is the last time a President nominated a candidate to the Supreme Court in an election year while the Senate was controlled by the opposing party.[24] The closest recent comparison is the confirmation hearing of Justice Abe Fortas, who was nominated to the position of Chief Justice when the President's party controlled the Senate. Judge Fortas' nomination was successfully filibustered based on a mixture of jurisprudential, ethical, and political concerns.[25] Democrats contributed to this rejection, although at a time of much greater ideological diversity within the parties. Because Fortas was not promoted to Chief Justice, he remained on the Court (until he resigned the following year) and so nominee Homer Thornberry had no seat to fill.[26]

I have heard other objections made. For example, some have supposedly argued that the nomination of Justice Barrett was different because President Trump would he one of the candidates in the upcoming election. I have not actually heard this argument from any Republicans, only from Democrats explaining what they understand Republicans to be arguing. Regardless, is self-serving nonsense, because there is no difference between a President's first and second term. Others have argued that the power of confirmation is at the sole discretion of the Senate. That is true as a constitutional matter but, as a practical matter, power's legitimacy does not – cannot – justify its use. I am not arguing that rejecting Judge Garland's nomination or confirming Judge Barrett, individually or in combination, were unconstitutional; I am arguing that they were wrong. Frankly, anybody who cannot tell the difference between should be in no position to decide the future of the Supreme Court. Finally, in 2016, some Senators argued that Justice Scalia was entitled to a successor who shared his ideology. That argument was (and is) ridiculous but, if it were true, why would Justice Ginsburg not warrant the same respect?

Do Republican Politicians' Actions Undermine Judicial Independence?

Two further objections can be raised. The first is that the Senate has not politicised the Court because it cannot actually control the decisions of its appointees. That is, so long as individual judges are not dependent upon political favours or openly political in their decisions, the judiciary as a whole remains independent.

The assumption that judges are independent of politics is naïve. Do judges intentionally violate their oath to impartially uphold the law? As a rule, they do not (although many Americans probably suspect that particular judges are the exception). Are judges' rulings influenced, even unconsciously, by their biases and ideology? Of course! This view might sound cynical, even ungentlemanly, but it is far from radical: it has been almost 140 years since O. W. Holmes, Jr.

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[24] Blackman, *supra* note 19.

[25] *See, e.g.*, Andrew Hamm, *Legal History Highlight: The Failed Election-Year Nomination of Abe Fortas*, SCOTUSBLOG (Mar. 10, 2016), https://www.scotusblog.com/2016/03/legal-history-highlight-the-failed-election-year-nomination-of-abe-fortas/; Senate Historical Office, *Filibuster Derails Supreme Court Appointment*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm (last visited Nov. 3, 2020).

[26] *See, e.g.,* Martin Weil, *Homer Thornberry Dies at 86*, WASH. POST, Dec. 13, 1995, https://www.washingtonpost.com/archive/local/1995/12/13/homer-thornberry-dies-at-86/50eed866-fa86-4039-b6c0-a4d2425de02c/.

wrote that "intuitions of public policy, avowed or unconscious . . . have had a good deal more to do than the syllogism in determining the rules be which men should be governed."[27] Since then, there has been extensive theoretical and empirical evaluation of the role judges' biases play in decision-making, far more than I could summarise even were I willing to embarrass myself by trying. I suspect that most defence lawyers would rather try a case before – and you or I would rather be tried by – a former federal defender than a former U.S. attorney. Justice Barrett herself has acknowledged as much, in both theory[28] and practice.[29]

If we accept that judges are influenced by their political views, incidentally, then selecting judges for those views might not just take advantage of judges' existing views. If judges understand that they are being appointed or promoted because of certain aspects of their ideology, it might cause them to attach greater significance to that aspect (consciously or otherwise). This might not be the intention and, even if it is, it might backfire. Judges, even those who were not so appointed or promoted, might instead feel compelled to downplay those aspects for the sake of appearances. Nevertheless, it is a risk.

Even so, let's be naïve. Let's assume that judges, like Vulcans, fully subordinate all other impulses to logic. Does this mean that stacking the court for political reasons respects judicial independence? The answer has to be no. Judicial review is not supposed to be a formality with a foregone conclusion, it is supposed to be a substantial process in which courts disinterestedly assess the legality and constitutionality of various acts by the legislature and the executive. Ideally, this disinterested review would come from politicians choosing disinterested judges, that is, judges who do not strongly favour either party; failing that, it must come from both parties respecting the rules, permitting their adversaries to appoint judges and resulting in a court that has no ideological preferences overall. Filling the courts with judges who will vote in politically desirable ways, precisely because they will vote in politically desirable ways, is an evasion of the process in everything except form. That is true even if the judges in question would otherwise be qualified for their position. We recognise this when politicians try it in, for example, Hungary. Why is it any less true in the United States?

The second objection is that Republican politicians are not actually appointing judges. Instead, the nominations are made by conservative lawyers, who choose candidates purely on the basis of qualifications and judicial ideology. Arguably, we are entitled to take our elected representatives at their word, but President Trump has given us reasons to doubt him on the subject of judges. Of the three persons the President has nominated to the Supreme Court, only one was on the lists of

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[27] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Barnes & Noble 2004) (1881) (emphasis added).
[28] *See* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 333 (1998) ("Of course judges often have to set aside their personal convictions in order to do justice, but this is easier in some cases than in others").
[29] *See* United States v. Atwood, 941 F.3d 883 (7th Cir. 2019) (reversing a criminal sentence because it might have been influenced by the sentencing judge's personal bias); *see also* Miles Harker, *Judge Barrett's Decisions on Criminal Law I*, LEGALLY COMPETENT (Oct. 9, 2020), https://legallycompetent.com/2020/10/09/judge-barretts-decisions-on-criminal-law-i/ (summarising *United States v. Atwood*).

candidates he released while seeking election.[30] You yourselves must assess the degree to which you believe recent candidates have been appointed based on political ideology rather than judicial competence and whether you regard that degree as acceptable. In making that assessment, I call to your attention: that the ABA Standing Committee on the Federal Judiciary has rated ten of President Trump's nominees not qualified[31]; that their confirmation hearings have frequently revolved around extreme political statements; and that at least one candidate has been rejected for being on the wrong side of a political issue.[32]

Conclusion

"To adjudicate" in the United States has become an irregular verb: I apply the law to the facts; you let your political ideology dictate your reasoning; he subverts the Constitution by legislating from the bench. It is increasingly common to hear members of either party talk about a President appointing judges as though it were an act of oppression, rather than an essential part of the President's duties. The nomination of Justice Barrett was an opportunity to counter-act this ever-increasing politicisation of the courts; that opportunity was not taken and, whichever party wins the election, it seems certain the politicisation will continue to increase. "If angels were to govern men, neither external nor internal controls on government would be necessary,"[33] but the existing controls have proved incapable of permitting humans to govern one another. If we wish to have a functional judiciary again, we need to decide the type of courts we want – courts of law or the arbiters of political disputes – and re-structure them accordingly, by legislation if possible and by Constitutional amendment if necessary.

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[30] *See President Donald J. Trump's Supreme Court List*, THE WHITE HOUSE (Nov. 17, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/ (adding then-Judge Kavanaugh and then-Judge Barrett to his list of potential Supreme Court nominees).

[31] AM. BAR ASS'N STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 116TH CONGRESS (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-trump116.pdf; AM. BAR ASS'N STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 115TH CONGRESS (2018) https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/web-rating-chart-trump-115.pdf ; *see also* Derek Hawkins, *Trump Judicial Nominee Fumbles Basic Questions About the Law*, WASH. POST, Dec. 15, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/12/15/trump-judicial-nominee-fumbles-basic-questions-about-the-law/ (describing an extreme example).

[32] *See* Marianne Levine & Eliana Johnson, *Trump Judicial Nominee Withdraws amid GOP Opposition*, POLITICO (June 11, 2019), https://www.politico.com/story/2019/06/11/trump-judicial-nominee-withdraws-1361504 (describing the failure of the nomination); David Bernstein, *Senator Josh Hawley Is Becoming a First-class Demagogue*, REASON: VOLOKH CONSPIRACY (May 27, 2019, 1:16 PM), https://reason.com/volokh/2019/05/27/senator-josh-hawley-is-becoming-a-first-class-demagogue/ (explaining why the opposition was unjustified).

[33] THE FEDERALIST NO. 51 (James Madison).