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Approval of Judge Barrett to the U.S. Supreme Court Hopefully Will Leave Alone Campaign Finance Precedents

JEFF BRINDLE | September 29, 2020, 4:33 pm | in [Edward Edwards](#)

How will the death of Associate Supreme Court Justice Ruth Bader Ginsburg affect the future of campaign finance law?

It will likely leave *Citizens United v. FEC* (2010) intact. Contribution limits for candidates and strong disclosure laws also should remain in place. The newly constituted court, however, may loosen up contribution limits for political parties and give them more freedom in other ways.

Nominated by President Bill Clinton, Justice Ginsburg served on the Court from 1993 to her passing on September 18, 2020.

As only the second woman to be appointed to this august body, Justice Ginsburg distinguished herself as a liberal voice on the Court. She and her ideologically opposite colleague and friend, Trenton native Antonin Scalia, both were icons of the Court. Scalia died in February 2016.

Long before her appointment, Justice Ginsburg had already distinguished herself as a trailblazer for women's rights and equality. A professor at Rutgers and Columbia Law Schools, as well as a volunteer for the American Civil Liberties Union (ACLU), she argued, and won, cases before the Supreme Court.

Associate Justice Ginsburg's record and example will be a very difficult act to follow, regardless of political orientation or perspective on the role of the Court.

Article II, Section 2 of the Constitution states that the president "shall nominate, and by and with the advice and consent of the Senate shall appoint . . . judges of the Supreme Court."

On September 26, 2020, President Donald Trump nominated Federal Appeals Court Judge Amy Coney Barrett to replace the late Justice Ginsburg on the Court.

Judge Barrett has been on the 7th Circuit Court of Appeals bench for three years. Previously a Professor at Notre Dame Law School, she still teaches a class there and is involved in many activities.

Like Justices Neil Gorsuch and Brett Kavanaugh who Trump nominated before her, the President's third nominee is thought to be an originalist.

Originalists believe the Constitution should be interpreted based on the original understanding of people at the time of ratification and that changes be done only through Constitutional amendments.

Once a law clerk for Justice Scalia, another prominent originalist, the appointment of Judge Barrett is expected to give conservatives on the Court a solid majority.

The nomination comes during a presidential election year, which brings with it added scrutiny. In fact, Democratic and Republican "dark money" groups and others are expected to spend as much as \$40 million supporting and opposing her appointment, according to news reports.

In 2016, the last presidential election year, Democratic President Barack Obama nominated Merrick Garland for the Supreme Court. The Presidential nominee was not considered by the Senate, which was controlled by the opposing party to the President.

This year, both the presidency and Senate are in the hands of the same party, the Republicans, so Judge Barrett's nomination will be considered and, likely, approved.

What will Judge Barrett's addition to the Supreme Court mean for campaign finance law?

With the ideological composition of the Court about to become more solidly conservative, it is hard to guess how the Court will view future campaign finance issues that come before it.

I will hazard a few guesses anyway.

For one thing, it is a good bet that the *Citizens United* decision will not be overturned. Though Chief Justice Roberts has replaced former Justice Anthony Kennedy as the swing vote on the Court, he has decidedly supported First Amendment principles as well as the ruling in *Citizens United v. FEC (2010)*.

That landmark case held that corporations and unions were permitted to spend unlimited amounts on elections if they did so independently of parties and candidates.

It also contained one of the strongest endorsements of disclosure as a means of keeping political abuses in check.

The addition of another conservative judge on the Court all but assures that this sweeping precedent will remain the law of the land.

Other issues that may come up for review include the constitutionality of contribution limits, disclosure requirements particularly for independent groups, and limits on political party activities.

Potential cases that could be heard by the Supreme Court include *Libertarian National Committee v. FEC*; *Americans for Prosperity Foundation v. Becerra*; *Lair v. Motl*; *McCutcheon, et. al. v. FEC*, and several other cases involving the Federal Election Commission brought by liberal and conservative legal activist groups.

Despite Justice Clarence Thomas' persistent arguments against disclosure and contribution limits for candidates, the Robert's Court will look to precedent and uphold disclosure as well as reasonable contribution limits as important deterrents against political corruption.

The Court may seek ways to strengthen political parties by raising or eliminating entirely limits on contributions to them and to allow parties more freedom to coordinate with candidates.

Finally, the Court will continue to support transparency by independent groups and continue to allow unlimited contributions to them.

As for Judge Barrett herself, I could find no known campaign finance cases she helped decide.

But as a clerk for the late Justice Scalia in 1998 and 1999, she was mentored by one of the high court's strongest champions ever for political disclosure.

Often cited is his declaration in *Doe v. Reed (2010)*:

"...there are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (McIntyre) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."

There is no guarantee that Judge Barrett will be guided in all instances by the former justice.

On such an important issue as disclosure, we can certainly hope so.

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The opinions presented here are his own and not necessarily those of the Commission.