



Democrats Violate Joe Biden's 'Ginsburg Rule' by Raising Pending Obamacare Case

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Democrats on the Senate Judiciary Committee repeatedly violated the “Ginsburg rule” on Monday, which is that potential Supreme Court justices should not be required to comment on cases that might come before them once they are confirmed.

The “rule” was established by then-Sen. Joe Biden (D-DE), who chaired the committee during the conformation hearings of Justice Ruth Bader Ginsburg during 1993. As former Attorney General Edwin Meese wrote at the Heritage Foundation in 2005:

When Sen. Joseph Biden chaired confirmation hearings for Supreme Court nominee Ruth Bader Ginsburg in 1993, he established certain rules for questioning nominees — rules that some of his fellow Democrats seem to have conveniently forgotten.

Ginsburg, while a smart lawyer, had been a radical activist. Her record as an ACLU litigator placed her far outside the mainstream of American law. She had argued for legalizing prostitution, against separate prisons for men and women, and had speculated that there could be a constitutional right to polygamy.

Some Republican senators wanted to know whether she still held such extreme views. On question after question, though, she refused to answer: The Biden rules stipulated that she had no obligation to answer questions about her personal views or on issues that might come before the Court. Despite her silence, the Senate confirmed Ginsburg, 93-3.

On Monday, during opening statements at the confirmation hearing for Judge Amy Coney Barrett to fill Ginsburg's seat, Democrats repeatedly referred to Obamacare — a.k.a. the Affordable Care Act — and suggested that she would vote to overturn the statute.

As Ilya Shapiro of the Cato Institute has explained, the current case facing the Court, *California v. Texas*, deals with the constitutionality of Obamacare — but the whole statute is not likely to be overturned.

Nevertheless, Democrats repeatedly raised the case as a reason not to confirm Barrett, saying it would mean that vulnerable people would lose their health care.

Barrett wrote in a law review article in 2017 that the Court erred in its 2012 decision to confirm Obamacare:

Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute. He construed the penalty imposed on those without health insurance as a tax, which permitted him to sustain the statute as a valid exercise of the taxing power; had he treated the payment as the statute did—as a penalty—he would have had to invalidate the statute as lying beyond Congress’s commerce power.

This view is widely held among conservatives, but it does not mean Obamacare would automatically be invalidated in its entirety by any challenge.

Regardless, Democrats are now throwing aside the “Biden rule” — apparently, in an attempt to help Biden’s presidential campaign — while disregarding the example of Justice Ginsburg, whose memory many have cited in their statements.