

THE WASHINGTON FREE BEACON

While Democrats Argue Barrett Will Kill Obamacare, Legal Experts Are Skeptical

ACB won't doom ACA, conservative commentators argue

October 12, 2020

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Democrats zeroed in on the Affordable Care Act in the first day of hearings for Judge Amy Coney Barrett, arguing that her confirmation would mean Obamacare's swift defeat when the Supreme Court hears a case on its constitutionality next month. But conservative legal experts say Barrett is unlikely to invalidate the law.

Dangling the prospect that Barrett would kill Obamacare has become the centerpiece of Democratic attacks on her. Senate Democrats on Monday repeatedly alleged that if confirmed, Barrett would join her conservative colleagues on the Court to strike down one of their signature legislative accomplishments. Liberal activist groups and Democrats, including presidential nominee Joe Biden, have in recent weeks said the same thing.

But multiple right-leaning legal experts with a close eye on the case and the Court's conservative wing told the *Washington Free Beacon* that they see the situation differently. Rather than strike down the Affordable Care Act, they expect that the Court's majority will void the law's individual mandate alone, or reject the case entirely, concluding that the plaintiffs lack the legal right to sue.

They say that the Democrats' argument is misleading at best and "shameful" at worst, with one telling the *Free Beacon*, "It's so ridiculous that I don't even like giving oxygen to it."

At Monday's confirmation hearings virtually every committee Democrat mentioned Barrett's alleged threat to Obamacare. Ranking member Sen. Dianne Feinstein (D., Calif.), for example, claimed that "health care coverage for millions of Americans is at stake with this nominee," while Sen. Richard Blumenthal (D., Conn.) began his remarks with the story of a 10-year-old boy who he claimed could lose life-saving medical care if Barrett is confirmed.

Those attacks are part of the anti-Barrett strategy adopted by Democrats wary of attacking her sterling academic and personal qualifications. In his statement on Barrett's nomination, Biden alluded to Barrett's threat to Obamacare repeatedly, mentioning the actual nominee's name only once. He also repeatedly raised the possibility of repeal during the recent presidential debate.

Liberal activists, such as progressive dark-money group Demand Justice, have also taken up the cry. So too have commentators such as CNN's Joan Biskupic, who extensively insinuated that Barrett would vote down the ACA, failing to disclose that she served alongside Barrett on a

mock trial court in which the latter actually voted to uphold Obamacare. (Biskupic did not respond to a request for comment as to why she did not disclose this information by press time.)

Such mock exercises do not necessarily represent the views of their participants. But in this case, they represent the likely outcome should Barrett be confirmed. Right-leaning legal experts like Case Western Reserve law professor Jonathan H. Adler agree: "The Supreme Court will not strike down the ACA."

The case is *California v. Texas*, a standoff between two groups of states, and the first time Obamacare has come before the Court since 2012. Then, Chief Justice John Roberts joined his liberal colleagues to rule that the "individual mandate," which requires Americans to be insured, was an exercise of Congress's power to levy taxes.

But in 2017, Republicans repealed the associated tax as part of their tax reform bill. That act, the plaintiff states now argue, renders the ACA unconstitutional.

Winning that argument will be an uphill battle, even with a right-leaning Court. That's in part because states may not have legal "standing" to sue, the requirement that legal cases involve some harm that courts can redress. Because "there is no consequence from failing to comply with the mandate," Adler said, "it is not clear how the mandate itself can cause an injury sufficient for standing."

While deceased Justice Ruth Bader Ginsburg "tended to have a fairly permissive view of standing," Adler explained, Barrett seems to have a "narrower view"; Roberts is also "something of a standing hawk," meaning they could sink the case on standing alone. Kevin Walsh, a professor at the University of Richmond law school, agreed with Adler, telling the *Free Beacon*, "It's unclear whether there will be five votes for standing."

"I'm inclined to think not, but state standing has been a little out of hand for some years now," he said.

Even if the Court finds that the states have standing, and even if a majority rules that the individual mandate is now unconstitutional, it is unlikely that there are even "four votes" for striking down the whole ACA, Cato Institute legal director Ilya Shapiro said: "There's no chance that the entire ACA will fall."

South Texas College of Law professor Josh Blackman agreed, telling the *Free Beacon*, "I do think the individual plaintiffs have standing, and that the mandate is unconstitutional, but I do not think that the entire statute will fall." So did Walsh, who said that "it's unclear whether there are any votes for inseverability."

"Inseverability" refers to the question of whether or not the individual mandate can be "severed" from the rest of the law, leaving its other sections in effect. Texas and its co-plaintiffs say it can't, but most Court watchers disagree.

As Blackman and Shapiro explain in an amicus brief they coauthored, it is within the Court's power to overturn the individual mandate, and certain dependent sections, while leaving much of

the rest of Obamacare—"the exchanges, group health plans, Medicaid, Medicare, and other elements of the ACA"—intact.

The Court's conservatives have signaled in recent cases that they are generally sympathetic to such an approach, Walsh said, pointing to opinions by Roberts and Justice Brett Kavanaugh that suggest an "approach to severability analysis that makes it nearly impossible to rebut the presumption of severability." Justices Neil Gorsuch and Clarence Thomas have also strayed away from striking down laws as a whole—according to Adler, the approach they prefer "leads to simply declaring the mandate unenforceable and doing nothing more."

Ending the individual mandate, recent research suggests, would actually have little effect on the overall share of the American population that is insured. That's because its repeal in 2017 did not have a significant impact on the number of people with insurance, indicating that the "tax" it imposed was not substantially altering people's purchasing behavior.

Democrats' agitation against Barrett on the basis of the ACA, then, seems to have little to do with how Court watchers expect the case to shake out. Walsh put it simply: "For anyone who's been following these legal issues carefully for the last several years, the only interesting question is whether to describe [Monday's] fear-mongering as shameful or shameless."