

Barrett Volleys Fire on Health Care Law as Democrats Highlight Pandemic Threat

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WASHINGTON (CN) — Democrats drilling Supreme Court nominee Amy Coney Barrett buckled down Tuesday on their warnings that Republicans are commandeering the high court to overturn the landmark health care legislation that protects those with preexisting conditions, among them the 7 million Americans who contracted Covid-19 this year.

In lockstep, the Senate minority has defined Barrett as a President Donald Trump's pick to overturn the Affordable Care Act by giving the Supreme Court a 6-3 conservative majority in time for a hearing next month where the Justice Department backs conservative states fighting the ACA.

Barrett refused Tuesday to recuse herself from ruling on either the ACA or any election challenges that may arise.

“I have had no conversation with the president or any of his staff on how I might rule in that case,” she said. “It would be a gross violation of judicial independence for me to make any such commitment or for me to be asked about that case and how I would rule.”

Like Republican nominees before her, Barrett time and again invoked Justice Ruth Bader Ginsburg, telling senators that she can provide “no hints, no previews, no forecasts” on a range of hot-button issues including abortion and gay rights as a prospective justice and sitting judge.

But Senator Kamala Harris called out Barrett for relying on the so-called Ginsburg rule, named for the liberal icon whose seat the Trump nominee is slated to fill.

The junior Democratic member on the committee, but a power player as the party's vice presidential nominee, said Ginsburg in her 1993 confirmation hearing was “far more forthcoming,” specifically on the right to an abortion.

Harris quoted the justice saying 27 years ago: “The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.”

Harris said: “I would suggest that we not pretend that we don't know how this nominee views a woman's right to choose and make her own health care decision.”

Barrett insisted that she has no understanding with the Trump administration about how she would rule as a justice, but her assurances did little to sway Democrats.

“She may have made no deal, but the expectations are clear on his part and the appearance is irrefutable,” Connecticut Senator Richard Blumenthal told reporters in a midday recess, referring to the president.

When the health care case goes before the court on Nov. 10, the justices are set to focus on whether the individual mandate is severable from the rest of the Obama-era law. Barrett emphasized under oath Tuesday that this specific topic is not one she ever wrote about in scholarly articles.

The longtime professor did write about another aspect of the law before her 2017 appointment to the Seventh Circuit, saying Chief Justice John Roberts had pushed the ACA “beyond its plausible meaning to save the statute.”

But Barrett declined Democrats’ invitation on Tuesday to share her views on the health care law — “The canons of judicial conduct would prohibit me from expressing a view,” she said, giving a variation of that reply to multiple questions on Tuesday.

Barret also declined to categorize *Roe v. Wade* as “super-precedent,” a term often applied to landmark Supreme Court decisions like *Brown v. Board* and *Marbury v. Madison* that the nominee said are “so well settled that no political actors and no people seriously push for their overruling.”

“I’m answering a lot of questions about *Roe*, which I think indicates that *Roe* doesn’t fall in that category,” Barrett said.

Republican Senator Mike Lee claimed that *Roe v. Wade* had taken the issue of abortion beyond the realm of debate of the judiciary.

“It is simply not the case that the fate of health care in America turns on whether or not someone is confirmed to the Supreme Court of the United States, nor is it a fact to suggest that the availability of an abortion, or lack thereof, is contingent upon anyone’s confirmation to the Supreme Court of the United States,” said Lee, who represents Utah.

Asked by Chairman Lindsey Graham to define her originalist judicial philosophy, Barrett said she believes it is her duty to interpret the text of the Constitution as it is written.

“That meaning doesn’t change over time. And it’s not up to me to update it or infuse my own policy views into it,” Barrett said.

Referring to the late conservative hero for whom she had once clerked, Barrett said Justice Antonin Scalia’s “philosophy is mine, too.”

“But I want to be careful to say that if I’m confirmed, you would not be getting Justice Scalia,” she said. “You would be getting Justice Barrett. And that’s because originalists don’t always agree, and neither do textualists.”

Barrett repeatedly denied coming to the Supreme Court with an agenda. Judges can’t “walk in like a royal queen and impose their will on the world,” she told senators. “You have to wait for cases in controversies.”

The challenge to the ACA will hit the Supreme Court just one week after Election Day, a lineup that Democrats have heavily stressed.

Senator Dianne Feinstein of California also asked the nominee whether she believes the Constitution gives Trump “the authority to unilaterally delay a general election under any circumstances?”

Barrett said that she would need to hear the arguments, review briefs and consult with her fellow justices before deciding such a case.

“If I give off-the-cuff answers, then I would be basically a legal pundit,” she said.

Asked by Democrats to recuse herself from any election challenges that may go before the justices in weeks to come, Barrett recognized the possible appearance of bias and said she would “consider all factors that are relevant to that question” before deciding to step off such a case.

“Basic questions of the law” are ones that Barrett should be able to answer, including whether the president can delay an election, said Gabe Roth, executive director of judicial advocacy group Fix the Court.

“The answer is obviously no,” Roth said in an email. “It’s embarrassing that Barrett didn’t say that.”

Roth said that with some 10 million Americans already casting their ballots in states with early voting, Trump can no longer push off the presidential election.

But William Yeatman, a research fellow at the libertarian Cato Institute, told Courthouse News that Barrett’s deflection was par for the course for judicial nominees.

“For decades, it’s how nominees have been coached to respond,” he said in an email. “Before that, such hypotheticals weren’t really part and parcel of the process... Typically, I err on the side of transparency, but the fact is that there are legitimate ethical and due process concerns to having a judge commit to outcomes.”

Graham later told reporters that he was not aware of a constitutional provision that would allow the president to push off the election scheduled for Nov. 3. But Trump has suggested that the unprecedented move is within his power.

Feinstein, the top-ranking Democrat on the committee, pressed Barrett to provide direct responses, given what she called the “grave concerns” about the nominee’s views.

“These are life-or-death questions for people,” Feinstein said.

Same-sex marriage also arose in the early rounds of questioning, with Senator Patrick Leahy of Vermont asking Barrett if she believes the act should be a crime. One of several octogenarians on the committee, he was the first senator to participate remotely Tuesday.

Barrett responded in turn as she had most of the afternoon: Supreme Court precedent — in this case *Obergefell v. Hodges* — clearly holds that same-sex marriage is a constitutional right. But the nominee once again did not avail the committee of her opinion, saying it would jeopardize her judicial independence.

“I’m not going to as Justice Kagan put it, ‘give a thumbs up or thumbs down to any particular precedent,’” Barrett said. “It’s precedent of the Supreme Court that gives same-sex couples the right to marry.”

She also later apologized for having used the phrase “sexual preference” rather than “sexual orientation.” Barrett said she meant no offense to the LGBTQ community, rejects all forms of discrimination and believes *Obergefell* to be “important precedent.”

Republicans took offense at the Democrats’ line of inquiry, saying no one can know how Barrett will rule in the ACA challenge or any other case.

“I find that terribly insulting,” said Texas Senator John Cornyn. “They suggest that you can’t be unbiased in deciding a case you haven’t even participated in yet.”

But Senator Dick Durbin of Illinois tied their concern to the president’s very words.

“This notion that this whole idea of you’re being used for political purposes is a Democratic creation — read the tweets and you have plenty to work with,” Durbin said.

Senator Amy Klobuchar meanwhile underscored the point that 135 million Americans with preexisting conditions who are protected by the Affordable Care Act would lose its life-saving protections if the Trump administration manages to kill the law. She said another 27 million would lose coverage entirely.

Klobuchar also asked Barrett whether it was faithful to democratic principles to fill a Supreme Court vacancy so close to an election.

“I think that is a question for the political branches,” Barrett said.

“OK, that’s your right to answer in that way,” replied Klobuchar. The Minnesota Democrat quoted Trump as having said just last month that “it’s very important that we have nine justices,” because the election will end up in the Supreme Court. Trump also boasted in 2016 that his judicial nominees “will do the right thing, unlike Bush’s appointee John Roberts, on Obamacare,” Klobuchar noted.

Turning to voting rights, Klobuchar asked Barrett whether she agreed with Ginsburg’s dissent in *Shelby County v. Holder*, which eliminated the preclearance requirement in the Voting Rights Act that had required certain districts to seek approval from federal authorities before changing election procedures.

Ginsburg had famously said that throwing out the preclearance requirement when it was working to eliminate discrimination was “like throwing away your umbrella in a rainstorm because you are not getting wet.”

Barrett said the senator’s question sought an opinion she could not express as a judge.

She provided the same response when Klobuchar asked if the nominee thought a reasonable person would feel intimidated by the presence of armed civilian groups at the polls, a reality in the ongoing election spurred by Trump, the senator said.

Trump took to Twitter on Monday during day one of Barrett’s confirmation hearing to boast that his administration will provide Americans with “far better” health care than the so-called Obamacare plan, at a lower cost and with better protection for patients with preexisting conditions. Though the president campaigned in 2016 on replacing his predecessor’s federal health care law, the White House has not put forward such a plan.

On Monday, Democrats said that the timing of Trump's efforts to dismantle the ACA could not be more cruel, with the coronavirus infecting 7 million Americans and killing more than 215,000.

They continue to call for the GOP to hold off appointing a justice to fill Ginsburg's seat, saying Barrett's nomination usurps the right of voters to choose a president to select the lifetime appointee to the high court.

Late Monday, Graham scheduled the committee vote on Barrett for Thursday morning while the confirmation hearing is still underway. Feinstein called the move "unprecedented" in her more than 25 years on the committee.

"It's another example of Republicans ignoring rules and tradition so they can rush this nominee through before the election — and in time to supply a vote to strike down the Affordable Care Act," the top-ranked Democrat on the committee said in a statement Monday.

Bringing Barrett into the debate on U.S. race relations, Durbin asked for the nominee's take on video of George Floyd being killed in a police chokehold over the Memorial Day weekend.

Barrett, who has two adopted children from Haiti as well as five biological children, said the issue was one personal to her family and part of an ongoing discussion of understanding the country's history.

Durbin then questioned how Barrett addresses racism from the bench, given that originalism is her North Star of judicial precedent. The nominee deflected, saying it would exceed her judicial capabilities to define whether the issue is one systemic in nature, or to make "broader diagnoses about the problem of racism."

"I think it is an entirely uncontroversial and obvious statement, given as we just talked about the George Floyd video, that racism persists in our country," Barrett said.

Hours later, Democratic Senator Cory Booker of New Jersey said that over the last two years, 121 Trump judicial nominees have unequivocally said there is implicit racial bias in the criminal justice system. He asked Barrett if she agreed.

"Yes," the nominee said. "I think that in our large criminal justice system it would be inconceivable that there wasn't some implicit bias."