



Post-Hearing Analysis:

Amy Coney Barrett

Introduction

After President Trump nominated Amy Coney Barrett, Alliance for Justice issued our [report](#). Reviewing her record, it was clear that if Barrett is confirmed, the American people will suffer grave harm. Millions will lose their health insurance. The clock will be turned back on critical rights and legal protections. Her record overwhelmingly demonstrates that she would be an extreme member of the Court and would implement the dangerous agenda of President Trump and the Republican Party.

This week, Amy Coney Barrett's testimony before the Senate Judiciary Committee only confirmed and reinforced our prior conclusions. When pressed regarding Trump's litmus tests — and her own record — she was evasive, misleading, and even contemptuous. She was visibly annoyed that senators had the gall to probe her record and views. She chastised senators for asking questions she decided she would not answer. She failed to turn over key documents to the Senate. She famously held up a blank notepad, proudly displaying she had taken no notes; an apt metaphor for how she went out of her way not to address the very real concerns and fears millions of people have with her nomination.

Republican senators spent the hearings trying to downplay the stakes and pretend that they were only interested in judges who will neutrally and without bias apply the law. Ted Cruz once asked a previous Trump nominee — who he later forced to withdraw — what that judge had ever done to advance the conservative cause. Yet, over days of hearing, Republicans tried to pretend they weren't pushing an agenda. They tried diligently to convince the American people that they were ramming through Barrett, through a sham and illegitimate process, merely to be a neutral arbiter and not to advance a partisan ideological agenda. It was a laughable attempt to downplay the last decades of trying to capture the courts expressly for that purpose.

Several Key Observations on this Week

1. *Democrats, with passion, made clear the stakes if Barrett is confirmed*

Democrats used the hearing to highlight the real people who will be impacted if Senate Republicans vote to confirm Barrett, most notably the risk to people's health. Every Democrat had pictures of constituents and put a human face on the millions of people who could lose health insurance if Barrett was confirmed. In just a few of the powerful examples:

- Senator Maize Hirono highlighted two of her constituents, Dean and Jordan, a father and daughter fighting Jordan's rare and life-threatening blood disorder that costs \$500,000 per year in transfusions.
- Senator Cory Booker told the story of a constituent who was sick but couldn't afford to see a doctor. The Affordable Care Act (ACA) finally enabled him to afford medical care and a doctor diagnosed him with Type-2 diabetes. He says that while his condition has improved thanks to the insulin and other medication he can afford under Obamacare, he is worried that if the Supreme Court overturns the ACA and he loses his insurance, he won't be able to find new coverage due to his pre-existing condition.
- Senator Blumenthal discussed Connor Kern, a 10-year-old from Connecticut who suffers from muscular dystrophy. The ACA prevents Connor's health insurance company from implementing arbitrary caps on his coverage and helps his family afford the astronomical costs associated with his incurable disease. Blumenthal said that Connor's family and others like them, oppose Judge Barrett's confirmation to the Supreme Court because she was nominated to overturn the Affordable Care Act which gives sick Americans "a measure of relief, of hope, of peace."

Democrats were forceful in making the case that Republicans have been relentlessly attacking on the ACA for a decade. Yet, despite controlling the White House, Senate, and House, they were unable to repeal the Act. And now, right before the Court is set to hear the latest challenge to the ACA on November 10, Republicans are not taking any chances; they are rushing through Barrett with the express purpose of doing through the Court what they could not do in Congress — stripping away health care from millions.

Democrats repeatedly reminded the public that Trump promised that his justices will vote to invalidate the ACA and take away protections for people with preexisting conditions; in fact, Senator Amy Klobuchar blew up his tweet on poster board. The 2016 Republican Party platform likewise made clear that Republican-appointed judges will overturn the Act; and three Republican appointed lower-court judges have kept a lawsuit challenging the law alive, including one Trump-appointed judge who was the deciding vote on the Fifth Circuit.

Barrett's writings made clear that she meets this dangerous litmus test; she has repeatedly criticized the Court for upholding the Act before. And, in three days of hearing she did nothing to alleviate concerns that she will rip health care from millions; consequences she claimed to be grossly unaware of. She and Republican senators repeatedly tried to argue that she gave "no commitment" to Trump how should we rule in the ACA case — as if Trump and Republicans had any doubts based on her writings where she stood.

Remarkably, Senator Graham moved forward on Barrett's nomination first thing Thursday morning, ignoring Committee rules, even before an outside panel of witnesses, including persons with preexisting conditions, could be heard by the Senate.

2. Barrett's evasion affirmed her risk to the American People

Despite scores of questions from Democratic Senators, Barrett would not answer questions regarding the Affordable Care Act. She would not even confirm that Social Security or Medicare were constitutional.

Barrett also would not answer critical questions regarding reproductive freedom, despite her clear writings and decisions on the issue. She refused to answer whether *Roe v. Wade* was rightly decided. She declined to answer whether *Planned Parenthood v. Casey* is settled law, because, in her words, it continues to be "pressed and litigated." Despite the fact other nominees, including justices appointed by both Democrats and Republicans, would say *Griswold* (the landmark case recognizing the privacy right to use birth control) was rightly decided, she refused to answer. She refused to say whether IVF should be subject to legal challenges or that IVF is not manslaughter.

Senator Durbin and others pressed her on a dissent she had written in which she minimized voting rights compared to Second Amendment rights. She also would not answer questions about our democracy, even ones with clear answers; and in doing so showed her blind loyalty to Trump. She would not say whether voter intimidation is illegal; despite the fact, as Senator Klobuchar pointed out, there is an explicit federal statute making intimidation illegal. She would not say that President Trump could not unilaterally move the election, even though the Constitution makes clear Congress sets Election Day. She would not say that the president should commit to a peaceful transfer of power.

She would not say whether or not she agreed with Justice Scalia that the Voting Rights Act is a "racial entitlement." Senator Harris asked Barrett whether voting discrimination even exists, noting that Chief Justice Roberts has stated that "voting discrimination still exists; no one doubts that." Barrett refused to comment. She also would not comment on *Shelby County* or the Supreme Court opinion in April that shortened the period for casting absentee ballots in Wisconsin. In fact, she tried to downplay the Court's assaults on voting, claiming that the Voting Rights Act still has robust protections, despite the fact as Senator Leahy noted, about 1,600 polling places have closed at 16 million Americans have been kicked off voter rolls since *Shelby County*.

Barrett also failed to alleviate concerns regarding her views on racial justice. In addition to her troubling answers with respect to voting rights, she was pressed on a decision she wrote dismissing a hostile work environment claim by someone who had been called the N-word by his employer. She was asked about her decision to side with a business that segregated workers by race and failed to satisfactorily explain why she didn't rehear the case. She would not express an opinion on a U.S. Sentencing Commission study that found Black defendants were more likely to face harsh mandatory minimum sentences than white defendants in similar cases. She could not name any "studies, articles, books, law review articles, or commentary" she had read "regarding racial disparities in our criminal justice system." Senator Booker also pressed her on a blog post she had written in 2008 regarding efforts to address the racial disparities in crack/cocaine sentencing and how Barrett did not address the racism embedded in the disparity. At the hearing, moreover, she would not say whether racism is "systemic."

Given her criticism of *Obergefell* as a judge, it is notable she refused to say that *Lawrence v. Texas* and *Obergefell v. Hodges* were rightly decided. When asked about marriage equality earlier in the day, Barrett insisted she would never discriminate on the basis of "sexual preference," a language choice that indicated a clear anti-LGBTQ bias — sexual orientation is not a choice. Sen. Mazie Hirono directly confronted her on the language, saying she did not believe it was accident, which prompted Barrett to issue an unconvincing apology for her ignorance.

Barrett refused to say whether separating children from their parents is wrong — what Senator Cory Booker called a "basic question of human rights, human decency and human dignity." When she refused to answer, he responded, "I'm sorry that we can't have a simple affirmation of what I think most Americans would agree on."

Barrett did agree that COVID-19 is infectious and that smoking causes cancer. But when pressed by Senator Harris, she called the notion that climate change is threatening our air and water "a very contentious matter" and refused to affirm that climate change is real.

3. Barrett's answers were misleading and strained credibility

First, on health care, Barrett repeatedly tried to downplay the stakes in the health care case. Barrett — who had judged a moot court on the case — told Senator Feinstein, incorrectly, that the lawsuit being heard on November 10 was not "a challenge to pre-existing conditions coverage or to the lifetime maximum relief to a cap." She said she did not know until Senator Coons showed her the Department of Justice's brief in the case that the entire Affordable Care Act was at issue. She either lied or was grossly uninformed about what the case was about.

Earlier in the hearing, Barrett also said that her writings criticizing John Roberts for his decision in *NFIB v. Sebelius* were not relevant because the case in November deals with different issues. In fact, Justice Scalia (Barrett's mentor)

argued in *NFIB* that the individual mandate was unconstitutional and that therefore the entire Act had to be discarded – the precise issue at stake on November 10.

Barrett also strained credulity in saying that she was unaware of President Trump's comments opposing the Affordable Care Act. She, remarkably, testified that it wasn't until after she was nominated, in conversations with Democratic senators, that she had heard about Donald Trump's litmus test on the ACA.

Barrett also misled the Senators about her own record. As an example of a case in which she applied Supreme Court precedent seen as pro-abortion, she cited a case where she upheld Chicago's buffer zone. However, she neglected to mention that in that opinion she urged the Supreme Court to overturn the precedent she was obligated, as a lower court judge, to apply. If confirmed to the Supreme Court, she could indeed overturn that very precedent.

Barrett also claimed that she had always followed or applied precedent on the Seventh Circuit: "I don't think there's any evidence that I've been unwilling to follow or apply circuit precedent." In fact, as just one example, in *FTC v. Credit Bureau*, Barrett overturned a 30-year-old precedent of the Seventh Circuit in order to prevent the Federal Trade Commission from seeking restitution for victims of consumer fraud.

Also straining credibility, Barrett claimed that she wasn't aware that Alliance Defending Freedom (where she spoke five times) is vehemently anti-LGBTQ. The Southern Poverty Law Center has deemed it a hate group because it "supported the recriminalization of homosexuality in the United States and criminalization abroad," "defended state-sanctioned sterilization of transgender people abroad," and "linked homosexuality to pedophilia and claims that a 'homosexual agenda' will destroy Christianity and society." Not only is it remarkable she didn't know the positions of groups she agreed to speak for, but in 2017, Senator Franken explicitly raised ADF's record to her in her prior confirmation hearing. Yet, three years later, she continued to feign ignorance.

Conclusion

We know where Barrett stands on key issues. Before this hearing President Trump had clear litmus tests, with respect to health care, Roe and other issues. Barrett's record makes clear she not only meets those dangerous litmus tests, but that she will be one of the most extreme judges in recent history. She and the Republicans tried, and failed, to hide and downplay the consequences of her confirmation. But, the hearing only reinforced what we already knew – that Amy Coney Barrett's confirmation, through a sham and illegitimate process, will cause great and irreparable harm to the American people.