



## Amy Coney Barrett for Health Care Czar?

Amy Coney Barrett has accomplished many things in her career. Becoming an authority or a policy maker on health care isn't one of them.

At Notre Dame, she was a professor at the law school, not at the Eck Institute for Global Health. She's written for the Cornell Law Review, not The New England Journal of Medicine. She's up to replace the late Ruth Bader Ginsburg at the Supreme Court, not Dr. Anthony Fauci at the National Institute of Allergy and Infectious Diseases.

No one would have guessed it, though, from listening to Democratic senators on the first day of her much-anticipated confirmation hearings. They acted as if Barrett has been nominated to become the nation's health care czar, responsible for everything from the fate of Obamacare to the country's coronavirus response.

This tack underlined political themes that Democrats are hammering home in the final weeks of the election, but they have little or nothing to do with Amy Coney Barrett, a judge seeking to sit on the highest court in the land.

The proximate cause of the Democratic assault on health care is the imminent arrival of an anti-Obamacare lawsuit in the Supreme Court. The Democratic theory is that Barrett is being sent on a not-so-secret mission to destroy the health care law. Sen. Dick Durbin of Illinois says that this is her "assignment." Sen. Sheldon

Whitehouse of Rhode Island says that she is a "judicial torpedo" aimed at the Affordable Care Act.

The lawsuit emanates from a prior Supreme Court ruling on Obamacare. To keep the law from being struck down over its individual mandate, Chief Justice John Roberts reinterpreted the penalty for not complying with the mandate as a tax. Subsequently, Congress zeroed out the tax. Now, Texas and other states are contending that this tax that no one pays cannot truly be considered a tax, and must be struck down – as well as the rest of the law.

It's hard to see how the suit succeeds. One hurdle is standing. The plaintiffs need to demonstrate a harm, which isn't easy when the offending provision is a tax or penalty of zero. Even if the Court throws out the penalty, it would have to conclude that this unenforced provision is so central to the ACA that the rest of the law has to go, too. This would be a stretch.

If the Democratic case against Barrett isn't landing any blows, it is telling, nonetheless. As always, progressives don't view the Supreme Court as a neutral body devoted to interpreting the Constitution and the law as written, but as a supra legislature that should protect and advance their policy goals.

Barrett has a more modest and appropriate view of the Court's role. After getting lectures for hours about the benefits of the ACA, she rightly said in her opening statement: "The policy decisions and value judgments of government must be made by the political branches elected by and accountable to the People. The public should not expect courts to do so, and courts should not try."

In short, if she wanted to create health care policy, she would have gotten into a different line of work.

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