

Six Key Issues Aired on Day Two of Barrett's Confirmation Hearings

After a first day of speechifying on Monday, the Senate Judiciary Committee got down to questions for federal appeals court Judge Amy Coney Barrett on the second day of her confirmation hearing to serve on the U.S. Supreme Court.

President Donald Trump [nominated Barrett](#), currently a judge on the 7th U.S. Circuit Court of Appeals, on Sept. 26 to fill the vacancy left by the death of Justice Ruth Bader Ginsburg eight days earlier.

Here are six key issues raised on Day Two.

1) Recusal for Obamacare, the Election?

Democrats contended that Barrett would do away with the Affordable Care Act, better known as Obamacare.

Barrett said she was “not hostile” to [Obamacare](#), but that as a law professor, she critiqued the reasoning behind the 2012 Supreme Court ruling that upheld the constitutionality of the law in writing a book review.

“I think that your concern is that because I critiqued the statutory reasoning that I’m hostile to the ACA, and because I’m hostile to the ACA that I would decide a case in a particular way,” Barrett said in answering a question from Sen. Dick Durbin, D-Ill. “And I assure you I am not. I am not hostile to the ACA. I’m not hostile to any statute that you pass.”

Early in the hearing, the committee's chairman, Sen. Lindsey Graham, R-S.C., asked, "What's the precedent of the Affordable Care Act, if any?"

Barrett said there isn't a current precedent on the issue that's coming before the court in the case of *Texas v. California*, set to be heard in early November.

"It turns on a doctrine called 'severability,' which was not an issue in either of the two [prior] big Affordable Care Act cases," Barrett said of the current case.

She also explained, "It's not a challenge to preexisting conditions coverage or to the lifetime maximum relief from a cap."

After Congress eliminated the individual mandate in Obamacare, Texas and other states sued, arguing the rest of the law should not stand. The reasoning was that the Supreme Court upheld the constitutionality of the law based on the mandate being a tax.

"The issue now is, now that Congress has zeroed [the mandate] out, can it be called a tax or is it now a penalty?" Barrett continued, in explaining the case. "The second issue is, can it just be cut out of the statute so that the rest of the statute includes protections for preexisting conditions."

Graham asked, "Do you feel like you should recuse yourself because you are being nominated by President Trump?"

Barrett didn't have a clear answer, but said recusal itself is a legal issue based on statute and precedent. She also cited Ginsburg.

"Justice Ginsburg, in explaining how recusal works, said it's always up to the individual justice, but it always involves consultation with the colleagues, with the other eight justices," Barrett said. "That's not a question I can answer

in the abstract.”

Later in the hearing, she addressed health care again when Sen. Patrick Leahy, D-Vt., asked if Barrett would recuse herself from a case about a postelection dispute.

“Sen. Leahy, I want to begin by making two very important points, and they have to do with the ACA and any election disputes that may or may not arise,” she said.

“I have had no conversation with the president or any of his staff on how I would rule in that case. It would be a gross violation of judicial independence for me to make such a commitment or for me to be asked about that case and how I would rule. I also think it would be a complete violation of the judiciary for anyone to put a justice on the court as a means for obtaining a particular result.”

Pressed later about postelection litigation, Barrett told Sen. Chris Coons, D-Del., “I hope all members of the committee have more confidence in my integrity than to think I’d allow myself to be used as a pawn to decide this election for the American people.”

2) *Roe* v. *Wade* Not a ‘Superprecedent’

Sen. Dianne Feinstein, D-Calif., the ranking member of the committee, pressed Barrett from the beginning on *Roe v. Wade*, the 1973 ruling that legalized abortion nationwide.

“It’s distressing not to get a straight answer,” Feinstein said. “So, let me try again. Do you agree with [the now-deceased] Justice [Antonin] Scalia’s view that *Roe* was wrongly decided?”

As she did on questions on other issues that could come before

the court, Barrett did not take a position.

"Senator, I completely understand why you are asking the question, but again, I can't pre-commit to, or say, 'Yes, I'm going to go in with some agenda,' because I'm not," Barrett said. "I don't have any agenda. I have no agenda to overrule [*Planned Parenthood v.*] *Casey*. I have an agenda to stick to the rule of law and decide cases as they come."

That was a reference to a 1992 ruling that upheld the precedent of *Roe*.

In an exchange with Sen. Amy Klobuchar, D-Minn., Barrett explained an example of a "superprecedent" is the 1954 *Brown v. Board of Education* ruling that outlawed school segregation, as among a small number of cases that legal scholars nearly unanimously say couldn't be overturned.

"People consider it to be on that very small list of things that are so widely established and agreed upon by everyone, calls for its overruling simply don't exist," Barrett said.

Klobuchar asked, "Is *Roe* a superprecedent?" Barrett answered there were cases that are "so well-settled that no political actors and no people seriously push for their overruling."

"I am answering a lot of questions about *Roe*, which I think indicates that *Roe* doesn't fall into that category," Barrett said. "Scholars across the spectrum say that doesn't mean that *Roe* should be overruled. But, descriptively, it does mean that it's not a case that everyone has accepted it."

Klobuchar said, "If you say that [about *Brown*], why won't you say that about *Roe v. Wade*, a case that the court's controlling opinion in that *Planned Parenthood v. Casey* case has described as a superprecedent? That's what I'm trying to figure out."

At that point, after more than five hours of fielding

questions, Barrett showed her first sign of annoyance at redundant questioning.

“Well, senator, I can just give you the same answer that I just did. I’m using a term in that article that is from scholarly literature,” Barrett explained. “It’s actually one designed by scholars that are certainly not conservative scholars, who take a more progressive approach to the Constitution. Again, as Richard Fallon from Harvard said, *Roe* is not a superprecedent because calls for its overruling have never ceased. But that doesn’t mean that *Roe* should be overruled.”

3) ‘Impact’ of George Floyd’s Death

Durbin asked about George Floyd, a black man who died in Minneapolis police custody.

“Have you seen the George Floyd video?” Durbin asked.

Barrett answered, “I have.”

Durbin asked, “What impact did it have on you?”

Barrett talked about the circumstances in her own family.

“Senator, as you might imagine, given that I have two black children, that was very, very personal for my family,” Barrett said. “[My husband] Jesse was with the boys on a camping trip out in South Dakota, so I was there, and my 17-year-old daughter, Vivian, who was adopted from Haiti, when all of this was erupting.”

Barrett continued:

It was very difficult for her. We wept together in my room. Then it was also difficult for my daughter Julia, who is 10. I had to try to explain some of this to them. I mean, my children, to this point in their lives, have had the benefit

of growing up in a cocoon, where they have not yet experienced hatred or violence.

And for Vivian, to understand there would be a risk to her brother or the son she might have one day of that kind of brutality has been an ongoing conversation. It has been a difficult one for us, like it is for Americans all over the country.

4) Second Amendment Questions

Graham asked Barrett, "Do you own a gun?"

Barrett responded, "We do own a gun."

Graham asked, "Do you think you could fairly decide a case even though you own a gun?"

Barrett replied, "Yes."

Later in the hearing, Durbin questioned her view of the [Second Amendment](#).

"I'm going to take you back in history for a moment and note that when the Second Amendment was written—and you did the analysis of it—we were talking about the likelihood that the person could purchase a muzzle-loading musket," the Illinois lawmaker said.

"We are now talking about virtual military weapons that can kill hundreds of innocent people. It is a much different circumstance," he continued. "Maybe an originalist pins all their thinking to that musket. I've got to bring it to the 21st century, and the 21st century has people being killed on the streets of Chicago because of the proliferation of deadly firearms."

Durbin criticized Barrett's dissenting opinion in a 7th Circuit case, *Kanter v. Barr*, regarding a state ban on

firearms for nonviolent felons.

The defendant in that case, Rickey Kanter, pleaded guilty to mail fraud. That felony conviction prevented him from buying a gun, which Kanter challenged as a violation of his Second Amendment rights. The 7th Circuit upheld the ban.

Barrett's dissenting opinion in the case concluded that "legislatures have the power to prohibit dangerous people from possessing guns," but that power "extends only to people who are dangerous."

Durbin, however, noted that Barrett didn't oppose restricting voting rights for ex-felons, and suggested she valued Second Amendment rights ahead of voting rights.

5) No Likely Changes to Same-Sex Marriage

For the Supreme Court to reconsider the 2015 legalization of same-sex marriage would require a lengthy process, Barrett said in response to a question from Graham.

"For the Supreme Court to take it up, you would have to have lower courts going along and saying we are going to flout *Obergefell*," she said, referring to the [*Obergefell v. Hodges*](#) ruling that required every state to recognize same-sex marriage.

"The most likely result would be that lower courts who are bound by *Obergefell* would shut such a lawsuit down, and it wouldn't make its way to the Supreme Court," Barrett said.

6) Attacks on Faith, Family

Since her nomination, Barrett's [critics](#) have attacked her deeply held Catholic faith and ridiculed her for adopting two black children.

The judge said she has attempted a “media blackout for the sake of my mental health,” but couldn’t avoid it entirely.

“I’m aware of a lot of the caricatures floating around, so I think what I would like to say in response to that question is that, look, I’ve made distinct choices. I’ve decided to pursue a career and have a large family. I have a multiracial family. Our faith is important to us. All of those things are true, but they are my choices,” Barrett said. “I have a life brimming with people who have made different choices. I’ve never tried in my personal life to impose my choices on them. The same is true professionally. I apply the law.”

She went on to discuss why she exposed herself to the historically brutal Supreme Court confirmation process.

“We knew our lives would be combed over for any negative detail. We knew that our faith would be caricatured. We knew our family would be attacked,” Barrett said. “So, we had to decide whether those difficulties would be worth it. What sane person would go through that if there is not a benefit on the other side?”

She continued:

The benefit, I think, is that I’m committed to the rule of law and the role of the Supreme Court in dispensing equal justice for all.

I’m not the only person who could do this job. But I was asked, and it would be difficult for anyone [to decline]. So why should I say ‘no’ if the difficulty is the only reason to say ‘no’? It would be difficult for someone else.

So, why should I say someone else should do the difficulty if the difficulty is the only reason to say ‘no’? I should serve my country, and my family is all in on that, because they share my belief in the rule of law.

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