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THE NEW CIVIL LIBERTIES ALLIANCE'S ANALYSIS OF POTENTIAL NOMINEES FOR THE U.S. SUPREME COURT BY PRESIDENT TRUMP, BASED ON THEIR VIEWS OF THE ADMINISTRATIVE STATE

Hon. Amy Coney Barrett

Judge, U.S. Court of Appeals for the Seventh Circuit (Indiana), since 2017
Age: 48, born in New Orleans, Louisiana
Education: Rhodes College; Notre Dame Law School
Clerkships: Laurence Silberman (D.C. Circuit); Justice Antonin Scalia

Judge Amy Barrett was nominated by President Donald Trump in 2017. Judge Barrett was confirmed on a 55-43 vote with three Democratic senators, Joe Donnelly (IN), Tim Kaine (VA) and Joe Manchin (WV) joining 52 Republican senators. Two other Democratic senators did not vote. Her views on the Administrative State include the following.

Judicial Opinions. Judge Barrett admirably stood up for the rights of an accused student in *Doe v. Purdue University*. The student was found guilty by a panel of three Purdue administrators, two of whom were alleged not to have read the Title IX report, and none of whom had heard testimony or even seen a written statement, much less a sworn statement from the accuser. Judge Barrett's decision, reversing the district court's dismissal of Doe's claim, noted that it was unclear, to say the least, how the panel could have found an accuser they never heard from in her own words "more credible" than the accused, who was also denied the right to have witnesses and testimony heard on his behalf. Such a denial of the basics of due process deprived Doe of his liberty interest in a Naval ROTC scholarship and career that was a casualty of the college's decision. The ruling also allowed Doe to pursue a Title IX claim against Purdue because he had alleged facts sufficient to support the possibility that the Department of Education's "Dear Colleague" letter, which put federal funding at risk if university administrators did not pursue sexual misconduct claims more rigorously, gave Purdue a financial incentive to discriminate against male students. That potential bias, viewed alongside the lack of evidentiary support in the record for the credibility of the accuser versus the accused, was sufficient to support *his* preliminary Title IX claim of sex discrimination.

In *Cook County v. Wolf*, Barrett's dissent illustrates the dangers posed by deference doctrines and agency guidance that divert courts from actual interpretation of law. The majority opinion declines to defer to the Department of Homeland Security's new "public charge" rule, finding it

likely to fail the arbitrary and capricious standard. Judge Barrett's dissent, while technically a disagreement over how to apply *Chevron* deference, asserts that the "public charge" rule is within the agency's power and is a policy choice that should not be set aside through the vehicle of inter-governmental litigation. She does not express any concern with applying the *Chevron* doctrine.

In *Morales v. Barr*, Judge Barrett authored an opinion that disagreed with a precedential opinion authored by the Attorney General, *Castro-Tum*, that held that as no statute or regulation gives immigration judges general power to administratively close cases, they lack that power. Judge Barrett's opinion disagrees, finding that a regulation that gives immigration judges authority to take "any action" that is appropriate and necessary for the disposition of cases confers that power. In her view, because the regulation gives a single right answer, the Attorney General's opinion is not entitled to *Auer* (as interpreted by *Kisor*) deference. Her decision adds that the Attorney General may amend the rules through proper procedures, but he may not, under the guise of interpreting a regulation, create de facto a new regulation that contradicts one already in place.

Mussat v. IQVIA, Inc. is an important personal jurisdiction case in which Judge Wood (who was interviewed for a Supreme Court vacancy by President Obama), wrote for the panel reversing a district court that had properly struck claims by non-resident proposed class members for lack of sufficient minimum contacts with the jurisdiction. A 2017 Supreme Court decision, *Bristol-Myers Squibb Co. v. Superior Court*, supported the district court's judgment. That 8-1 decision (with Justice Ginsburg in the majority) held that state courts may not exercise jurisdiction over non-residents for claims that did not arise within the state. Analogizing the class action to Multi-District Litigation and "fitting this problem into the broader edifice of class-action law" aggregated claims, the *Mussat* panel—including Judge Barrett—nonetheless held that the *Bristol-Myers* limits on personal jurisdiction over non-residents did not apply to a nationwide class action filed in federal court under a federal statute, even when the federal court is relying on a state long-arm statute as the basis for asserting personal jurisdiction. A cert. petition seeking review of this decision is now pending.

Judge Barrett was on a panel in *Delgado v. ATF* that dealt with a defiant administrative judge (AJ) on the Merit Systems Protection Board. Two years earlier, the Seventh Circuit held that the MSPB had been arbitrary and capricious in dismissing an ATF agent's whistleblower and retaliation claim and remanded the case for rehearing. The AJ still denied relief, in what the court held was an "obvious, unexplained and astonishing example of administrative obduracy." The decision remanded for an award of damages, suggesting that the MSPB assign a new AJ to the case, and invited Delgado to submit a motion to recover his attorney's fees.

In *Orchard Hill Building Company v. U.S. Army Corps of Engineers*, a panel including Barrett found that, in a dispute over whether a landowner's property on the Calumet River was within the jurisdictional waters of the United States, the Corps had "not provided substantial evidence that the wetlands and those similarly situated have a significant nexus to the Little Calumet River; … no amount of agency deference permits us to let slide critical findings bereft of record support."

Judge Barrett also ruled that the Tax Injunction Act did not block an equal protection claim alleging differing measures for Cook County tax assessments in *A.F. Moore & Assoc. v. Pappas*. Unusually, the Cook County defendants admitted that state tax appeal channels did not permit taxpayers to raise constitutional claims. Judge Barrett's opinion held that in that rare instance, recourse to federal court was permitted for taxpayers to challenge a county tax assessor's standards that assessed their property at the mandated ordinance rate "while cutting a break to other owners of similarly situated property."

Judge Barrett was on a panel that considered challenges brought by the Illinois Republican Party on First and Fourteenth Amendment and *ultra vires* grounds against Gov. Pritzker's Covid-19 orders. Those challenges postulated that the governor's carve-out of an exemption from the otherwise mandatory 50-person cap for religious gatherings was a content-based restriction on political speech. Barrett's panel denied injunctive relief in July, and dismissed the claims in September, citing Chief Justice Roberts's opinion in *South Bay Pentecostal Church v. Newsom* and an earlier Seventh Circuit panel decision authored by Judge Frank Easterbrook in which he stated "We line up with Chief Justice Roberts." The merits decision, again authored by Judge Wood, held that it was constitutionally permissible for the governor to carve out more leeway for religious services, while declining to do so for other activities.

In *Protect Our Parks, Inc. v. Chicago Park Dist.*, Judge Barrett authored an opinion rejecting a claim that a transfer of control of public land in Jackson Park to the Obama Foundation violated the public trust doctrine. The decision held that the new use was for a public purpose and rejected applying heightened scrutiny to a transfer plaintiff alleged was tainted by self-dealing, favoritism or conflicts of interest when negotiated by the Obama Foundation with Mayor Rahm Emanuel.

In numerous Social Security cases, Judge Barrett, after careful review of the medical and administrative record, has joined panel decisions reversing Social Security administrative law judges' (ALJs) denials of a claimant's social security benefits. These decisions display judicial attention to providing a fair hearing without undue deference to administrative decisionmakers.

Other Writings. Judge Barrett's writings on Justice Scalia indicate that she shares his commitments to originalism and textualism. One focus of Barrett's academic work has been to question the value of stare decisis. In a 2013 article, Barrett proposed that weakening the force of stare decisis in constitutional cases would promote pluralism on the Supreme Court and foster judicial concord. A 2003 article entitled "Stare Decisis and Due Process" argued that stare decisis violates the due process rights of litigants, denying them the opportunity to litigate the merits of their own claims. Barrett notes that just as the Due Process Clause limits the application of issue preclusion (or collateral estoppel), it should similarly limit the application of stare decisis.

Judge Barrett's *Cornell Law Review* article, entitled "Suspension and Delegation," also demonstrates a commitment to and a thorough historical understanding of the structural constitution and non-delegation. The article studies each historical instance of suspension of the writ of *habeas corpus* and concludes "that while the Suspension Clause does not prohibit Congress from giving the President some responsibility for the suspension decision, it does require Congress to decide the most significant constitutional predicates for itself: that an invasion or rebellion has occurred and that protecting the public safety may require the exercise of emergency power." She notes that while Congress made this determination during the Civil War, "it violated the Suspension Clause in every other case by enacting a suspension statute before an invasion or rebellion occurred, and in some instances, before one was even on the horizon."

Conclusion. Judge Barrett has defended Americans' due process rights on college campuses and joined panel decisions and dissented from other panel decisions reviewing administrative power. She has not authored significant judicial opinions or publications directly on administrative law, nor ones challenging the various deference doctrines. That said, in the cases on which she has sat, she has not always accorded deference. Her *Morales* decision declined to grant *Auer* deference to an Attorney General precedential opinion, holding that another regulation unambiguously conferred the regulatory power in dispute. She has not often dissented and seems somewhat inclined to follow fellow judges'

lead in areas outside her expertise. However, one of her seven dissents, *Schmidt v. Foster*, a Sixth Amendment right to counsel case, resulted in rehearing *en banc*, with a majority of ten judges adopting the position she took in her original dissent. This example shows her ability to influence and even lead the direction of her circuit. She has shown dedication to thorough textual analysis in her judicial duty generally and in her review of administrative actions. In the context of *habeas corpus*, Barrett has recognized that the Constitution assigns certain exclusive powers to Congress which it may not divest without violating that document's original design. Further, her criticism of and scholarship on stare decisis suggests that she would overturn a wrongly decided Supreme Court precedent.

Hon. Allison Hartwell Eid

Judge, U.S. Court of Appeals for the Tenth Circuit (Colorado), Colorado Supreme Court 2006-17
Age: 55, born in Seattle, Washington
Education: Stanford University; University of Chicago Law School
Clerkships: Jerry Smith (Fifth Circuit); Justice Clarence Thomas

Judge Allison Eid was nominated by President Donald Trump to the seat vacated by Justice Neil Gorsuch following his appointment to the Supreme Court in 2017. Judge Eid was confirmed by the Senate on a 56-41 vote, with four Democratic senators, Michael Bennet (CO), Joe Donnelly (IN), Heidi Heitkamp (ND), and Joe Manchin (WV) voting in favor and three other Democratic senators not voting. Her views on the Administrative State include the following.

Judicial Opinions. In *Zen Magnets, LLC v. Consumer Product Safety Commission*, 968 F.3d 1156, 1176 (10th Cir. 2020), the CPSC had simultaneously initiated a generally applicable rulemaking process and an adjudication against a specific manufacturer on an identical subject matter. Some Commissioners participated in both, even though at least three Commissioners made public statements showing their prejudgment of the open adjudicatory matter. The manufacturer challenged the adjudication on due process grounds and won a partial ruling in the federal district court. A unanimous panel of the Tenth Circuit upheld the CPSC's action, partially vacating the win in the district court, concluding there were no due process implications for the Commissioners' statements. Judge Eid joined the decision without comment.

Similarly, in *Utah Native Plant Soc'y v. United States Forest Serv.*, 923 F.3d 860, 875 (10th Cir. 2019), Judge Eid wrote separately to express her view that the court had not granted *enough* leeway to a federal agency. In that case an environmental group sued the Forest Service because it had refused to engage in agency action affecting land management, instead relying on a "wait and see" approach to the asserted problem. The district court dismissed for lack of final agency action. The Tenth Circuit panel disagreed and found "final agency action," but upheld the agency conduct as a reasonable regulatory action. Judge Eid concurred in part, agreeing with the ultimate conclusion, but also saying, "I would affirm the district court's decision that final agency action is lacking in its entirety in this case, and thus would not reach the merits." Judge Eid's more expansive view of "finality" would make it much harder to challenge agency action under the Administrative Procedure Act.

Finally, in *Sheff v. United States Dep't of Justice-Civil Div., Radiation Exposure Comp. Program*, 734 F. App'x 540, 543 (10th Cir. 2018), Judge Eid joined an unpublished decision reflexively affirming an agency's action as a "reasonable" one based entirely on *Chevron* deference. Judge Eid indicated no reservations whatsoever in adopting that conclusion.

Judge Eid's record as a Justice on the Colorado Supreme Court is more informative, revealing a willingness to defer to agency interpretation, even when it means departing from a consensus view.

First, in *Hanlen v. Gessler,* Judge Eid wrote a dissenting opinion in defense of executive rulemaking authority. In that case the court considered the Secretary of State's authority to promulgate emergency rules allowing him to strike candidates from a ballot as not being qualified for office. The court majority invalidated the rule as being in direct conflict with statutory directives. Furthermore, the court held that the rule "contravene[d]" a statutory provision requiring "a court, not an election official, to determine the issue of eligibility." Judge Eid disagreed with both conclusions. She would have endeavored to interpret the "regulations and statutory provisions as a consistent, harmonious whole," and would have worked hard to avoid what appeared to be a conflict. With respect to judicial authority, Judge Eid also believed that normal, and deferential, judicial review in agency proceedings would adequately protect the judicial authority to determine candidate qualifications. Judge Eid believed the case came down to "whether there [wa]s a gap in the statutes which [the rule] properly filled," and, after concluding that there was such a gap, she would have allowed the rule to stand.

Just a few months later, in *Gessler v. Colorado Common Cause*, Judge Eid again dissented in defense of the Secretary's rulemaking. In that case the court considered the constitutionality of campaign contribution rules that had been promulgated in response to a Tenth Circuit decision partially invalidating a statute. Originally, Colorado had imposed a statutory reporting requirement for certain campaign contributions above $200. The Tenth Circuit had invalidated these limits on First Amendment grounds, and the Secretary of State had responded by issuing an administrative rule establishing a $5000 trigger. The majority set aside the rule as exceeding the Secretary's authority because it "directly conflict[ed]" with the language of the relevant statute, and, "[r]egardless of the constitutional ambiguities" created by the Tenth Circuit's intervention, the Secretary lacked "authority to promulgate rules that are contrary to law." Judge Eid concurred in part and dissented in part, writing separately to defend the Secretary's authority to issue prospective rules rather than engage in "case-by-case adjudications." Judge Eid agreed that the rule was partially improper, as it conflicted with statutory authority; nevertheless, she argued that the rule should not be invalidated "in its entirety." Instead Judge Eid insisted that a partial rule was preferable to the uncertainty caused by a lack of regulation in the matter.

Other Writings. Judge Eid's legal writings also provide only limited insight into her views on administrative power. Judge Eid has defended the Supreme Court's "New Federalism" decisions, which limited the exercise of certain federal powers in local affairs, such as through the Commerce Clause. *See* Allison H. Eid, *Federalism and Formalism*, 11 Wm. & Mary Bill Rts. J. 1191, 1230 (2003). But while defending these limits on federal authority, Judge Eid has also argued that regulatory control of local property could be defended as a valid exercise of power under the Property Clause. Allison H. Eid., *Constitutional Conflicts on Public Lands: The Property Clause and New Federalism*, 75 U. Colo. L. Rev. 1241, 1243, 1259 (2004).

Conclusion. Despite being a proponent of limited federal power, Judge Eid has not shown any general reservations concerning the scope of administrative authority. Indeed, Judge Eid has repeatedly defended agency action as both a state and federal judge. Her record on the Tenth Circuit shows general support for existing legal doctrines favoring the Administrative State. Or, at least, her record reveals no specific reservations about them.

Hon. Britt C. Grant

Judge, U.S. Court of Appeals for the Eleventh Circuit (Georgia), since 2018
Associate Justice, Georgia Supreme Court, 2017-18
Age: 42, born Atlanta, Georgia
Education: Wake Forest University; Stanford Law School
Clerkships: Brett Kavanaugh (D.C. Circuit)

President Trump nominated Judge Britt Grant to the Eleventh Circuit on November 17, 2017. The Senate confirmed her 52–46, with three Democratic senators, Heidi Heitkamp (ND), Joe Manchin (WV), and Jon Tester (MT) voting in favor and Arizona senators McCain and Flake not voting. She ended her service on the Georgia Supreme Court and took up duties on the Eleventh Circuit on August 7, 2018. Her views on the Administrative State include the following.

Judicial Opinions. In *Carpenter v. McMann*, 817 S.E.2d 686 (2018), writing for the court, Justice Grant afforded the statutory text its "plain and ordinary meaning" and stated that the court does not have "authority to interpret statutes in a way that departs from their text, context, and structure." The "same interpretive principles hold true," she wrote, "for constitutional interpretation as well."

In *In re Krieg*, 951 F.3d, 1299 (11th Cir. 2020), writing for the panel, she declined to step beyond the plain words of a Georgia statute that the state supreme court had occasion to interpret twice, because the state high court's interpretation adhered to the statute's text. She denied a motion to certify the state-law question to the state's high court, because the Georgia Supreme Court's two previous interpretations of the statute did not depart from its plain meaning.

Judge Grant, writing for the panel in *United States v. Bankston*, 945 F.3d 1316 (11th Cir. 2019), stated that the court is required to give "authoritative" weight to the commentary in the U.S. Sentencing Guidelines Manual. Such so-called *Stinson* judicial deference has been criticized in other circuits because the commentary to the Guidelines never receives approval from Congress. But the panel ultimately relied solely on the text of the relevant provision of the Guidelines to resolve the case—not the commentary, nor the government's proffer of legislative history.

In *Arias Leiva v. Warden*, 928 F.3d 1281 (11th Cir. 2019), Judge Grant deferred "to the wishes of the elected branches of government" regarding "recognition" of an extradition treaty between Colombia and the United States and whether that "treaty has lapsed." The executive branch had argued that the treaty remains in force. Consequently, the court deferred to that determination. Judge Grant explained that the court was deferring only to the executive branch's "judgment on a *political* issue—that is treaty recognition." She noted that courts retain an "independent duty to interpret treaties … just as they do for any statute, Constitutional provision, or other source of law."

In *Pesci v. Budz,* 935 F.3d 1159 (11th Cir. 2019), Judge Grant, echoing Supreme Court precedent, wrote that the "formidable task of running a prison falls to those other two branches, and separation of powers concerns counsel a policy of judicial restraint and deference to the appropriate prison authorities. Principles of federalism bolster that deference when a state penal system is involved."

In a 2–1 decision, writing for the majority in *Bourdon v. DHS*, 940 F.3d 537 (11th Cir. 2019), Judge Grant acquiesced in the government's position that the relevant federal statute prohibited

judicial review of administrative actions, even where the statute lacks any explicit jurisdiction-stripping language.

Conclusion. Judge Grant served on the Georgia Supreme Court for less than two years before being confirmed and appointed to the Eleventh Circuit. She has served on the Eleventh Circuit for a little over two years. She did not have many cases as a Justice on the Georgia Supreme Court where she could weigh in on administrative law issues. Her record at the Eleventh Circuit is likewise limited in that regard. Some of her judicial opinions could make one hopeful that she would faithfully follow the Constitution's teachings on the proper role of the Administrative State. Several of her opinions, for example, have shown her commitment to using traditional tools of construction to determine the meaning of the text of the constitution, statute, or regulation at issue. She also appears likely to engage in a careful, independent textualist review of the relevant constitution, statute, or regulation. However, there are a few concerns around her views of the proper place for federal-court review, in light of express or implied jurisdiction-stripping statutory language. And her views on deferring to the executive branch on some matters of interpretation are imperfect. Sitting on an intermediate appellate court, those concerns could be explained as her caution in following Supreme Court precedent. But her relatively sparse judicial record on these topics makes more certain analysis impossible.

Hon. Barbara Lagoa

Judge, U.S. Court of Appeals for the Eleventh Circuit (Florida), since December 2019
Justice, Florida Supreme Court, January 2019 – December 2019
Judge, Florida Third District Court of Appeal, June 2006 – January 2019
Age: 52, born Miami, Florida
Education: Florida International University; Columbia Law School
Clerkships: N.A.

President Trump nominated Judge Barbara Lagoa to the Eleventh Circuit on September 12, 2019. The Senate confirmed her 80-15. She resigned from her service on the Florida Supreme Court and took up duties on the Eleventh Circuit on December 6, 2019. Her views on the Administrative State include the following.

Judicial Opinions. As an intermediate appellate judge, Judge Lagoa held, over a dissent, in *K.M. v. Department of Health*, that a child who suffered from "a serious heart condition requiring pediatric cardiac services," which made the child "a beneficiary" of Florida's Child Medical Services ("CMS") lacked standing to challenge the Department of Health's repeal of a rule that set standards for CMS cardiac facilities. Even though the child presented unrebutted expert testimony that the "quality of care could reasonably be affected by repeal of the Rule[,]" Judge Lagoa determined that the testimony was "too speculative … to satisfy the specific injury requirement necessary to establish standing." The dissent pointed out that standing to challenge a proposed rule under Florida's Administrative Procedure Act is broader than traditional standing; he reasoned that the ALJ (and the majority) overstated the child's burden to establish standing and misstated the child's premise for standing.

In *First Quality Home Care, Inc. v. Alliance for Aging, Inc.*, Judge Lagoa departed from the Fourth District Court of Appeal and held, over a dissent, that there was no administrative review (nor

judicial review thereof) of the actions of an "area agency on aging"—a designee of the Department of Elder Affairs ("DOEA") that administers the DOEA's programs on the state's behalf. Judge Lagoa's ruling, that a private organization could not be an "agency," "board," or "any other unit of organization" as those terms appear in the review statutes, closed off any review of decisions of the agency on aging. The dissent agreed with the Fourth District Court, which held that, although an agency on aging was a private non-profit, it "acts as an arm of the state agency."

In *Department of Highway Safety v. Fernandez*, Judge Lagoa overturned a lower-court statutory interpretation in favor of a state agency's reading of the statute. Although the case was one of statutory interpretation, Judge Lagoa offered policy interests to support her reading. Judge Lagoa opined that interpreting the statute at issue to require in-person hearings for the suspension of a driver's license "would impose a heavy burden on the department" and that the driver's "significant" interest in his license "[wa]s not outweighed by the State's interest in policing public roadways and would not benefit from the (negligible) additional procedural safeguard that the hearing officer's personal appearance might offer."

These decisions are in line with Judge Lagoa's recent vote with the majority when the *en banc* Eleventh Circuit decided *Patel v. U.S. Attorney General*. The court in *Patel* considered the effect of a jurisdiction-stripping statute that barred judicial review of the discretionary decisions of the Board of Immigration Appeals. A majority of the court held that the statute precluded review of factual determinations—even if those factual determinations were not a matter of discretion (such as whether non-citizens are eligible for driver's licenses in Georgia). Five judges in dissent would have adopted a "narrower interpretation" that "does not include findings of fact that require no discretionary evaluation from the factfinder," "which has been adopted by almost every circuit court." The dissent also criticized the majority for ignoring the presumption in favor of judicial review as well as a lenity-like rule that requires courts to interpret ambiguities in immigration statutes in favor of the alien.

Conclusion. Judge Lagoa served on the Florida Supreme Court for less than a year before her appointment and confirmation to the Eleventh Circuit late last year. Although she served on Florida's Third District Court of Appeal for 13 years, Judge Lagoa did not issue many opinions during that time on administrative procedure or deference to administrative agencies. While Judge Lagoa does not have an extensive judicial record on administrative law issues, her few opinions on the subject exhibit a tendency to rule in favor of the administration in ways that limit judicial review. These decisions could be concerning considering it is the judiciary's job to "say what the law is" and litigants often require judicial review to vindicate their individual rights after facing a hearing on an agency's home court. Her rulings in the administration's favor could have the effect of closing the courthouse doors to litigants challenging the Administrative State, but her relatively sparse judicial record on this set of topics makes it impossible to analyze her views with greater certainty.

Hon. Joan Larsen

Judge, U.S. Court of Appeals for the Sixth Circuit (Michigan), since 2017
Associate Justice, Michigan Supreme Court, 2015-17
Age: 49, born Waterloo/Cedar Falls, Iowa
Education: University of Northern Iowa; Northwestern Law School
Clerkships: David Sentelle (D.C. Circuit); Justice Antonin Scalia

President Trump nominated Judge Joan Larsen to the Sixth Circuit on May 8, 2017. Although her home-state Democratic senators initially refused to return their blue slips, they did so in August 2017. The Senate confirmed her 60-38, which included Michigan's senators and six other Democrats as 'yes' votes. Her views on the Administrative State include the following.

Judicial Opinions. In her almost three years on the Sixth Circuit bench, Judge Larsen has had limited occasion to weigh in on administrative issues. She has authored three opinions upholding a Social Security administrative law judge's determination that a claimant did not qualify for benefits. *See Fox v. Comm'r of Soc. Sec.*, No. 20-5332 2020 WL5587709 (6th Cir. Sept. 18, 2020); *Moruzzi v. Comm'r of Soc. Sec.*, 759 Fed. App'x 396 (6th Cir. 2018); *Mokbel-Aljahmi v. Comm'r of Soc. Sec.*, 732 Fed. App'x 395 (6th Cir. 2018). Consistent with circuit precedent, she noted the court was "limited to determining whether the Commissioner's decision is supported by substantial evidence and was made pursuant to proper legal standards." She found substantial evidence in each case. In *Moruzzi*, again consistent with precedent, she did defer to the ALJ's decision to discount some of the plaintiff's subjective complaints, in part because the ALJ had the opportunity to observe plaintiff.

Similarly, Judge Larsen has authored several opinions upholding decisions by immigration judges (IJs) and the Board of Immigration Appeals (BIA), finding that the IJ or BIA's decision was supported by substantial evidence. *See Rubio-Mauricio v. Barr*, 782 F. App'x 444 (6th Cir. 2019); *Cazares-Hernandez v. Barr*, 757 F. App'x 511, 513 (6th Cir. 2019); *Gomez v. Sessions*, 731 F. App'x 501, 504 (6th Cir. 2018). Judge Larsen authored an opinion finding that the court lacked jurisdiction under the immigration statutes to overturn the BIA's hardship determination because Congress set a jurisdictional bar. *See Valdez-Arriaga v. Barr*, 778 F. App'x 380, 383-84 (6th Cir. 2019). She also authored an opinion denying a petition for review because the petitioner's claims were not properly presented to the BIA and the court was barred by statute from hearing the appeal. *See Palencia v. Barr*, 790 F. App'x 767, 768-69 (6th Cir. 2019). In contrast, in one opinion Judge Larsen held that the BIA abused its discretion because it failed to consider petitioner's "motion to remand based on his counsel's ineffective assistance and by not 'consider[ing] all the aspects of the petitioner's claim.'" *Id.* at 79 (citation omitted).

Judge Larsen also authored an opinion finding that the court could not review an order issued by the Acting Administrator of the Drug Enforcement Administration (DEA) that purportedly quashed an administrative subpoena issued by a DEA ALJ to the agency because the "order was not a 'final decision' within the meaning of 21 U.S.C. § 877." *See Miami-Luken, Inc. v. DEA*, 900 F.3d 738, 739 (6th Cir. 2018). In the opinion she stated that the court's determination was "bolstered by the Supreme Court's analysis of the Administrative Procedure Act (APA)" because quashing the subpoena was an "interlocutory" action and "the order neither imposed any duties on Miami-Luken nor 'determined' its 'rights and obligations' with respect to its registration." *Id.* at 742 n.4.

Justice Larsen recused herself from two appeals at the Michigan Supreme Court involving presidential candidate Jill Stein's efforts to force a recount in Michigan, stating that her "appearance on the president-elect's list [of potential nominees to the U.S. Supreme Court] and his presence as a party in these cases creates a conflict requiring my disqualification." That decision may bode ill in terms of whether a future Justice Larsen would be willing to weigh in on Trump Administration policies or controversies at the U.S. Supreme Court. Having recused herself once over a relatively minor issue, she might be hard pressed not to do so again when the stakes could be higher. On the other hand, once appointed as a justice for life, she might feel there is no longer a conflict.

On the Michigan Supreme Court Justice Larsen wrote few opinions on administrative issues. No doubt this is in part because Michigan is among those states that do not defer to administrative agencies in interpreting state law. She joined an opinion in *Clam Lake Township v. Dep't of Licensing*, overturning a state boundary commission's decision, saying its views deserve only "respectful consideration." At least a Justice Larsen would know what a post-*Chevron* world could look like.

Justice Larsen's campaign website professed that "judges should interpret the laws according to what they say, not according to what the judges wish they would say. Judges are supposed to interpret the laws; they are not supposed to make them." In speeches Larsen has said "originalism typically is quite comfortable with change; its only enemy is change imposed by judges" and that "[j]udges are just not licensed to be the engines of change." She has also contrasted "a Court that searches for the original meaning of the words of the written law and a Court that believes that an all-powerful judiciary is free to rewrite the laws enacted by the People's legislative representatives."

As a teacher of Legislation and Regulation courses at University of Michigan Law School, Judge Larsen presumably has well-developed views on the Administrative State, but she does not have an established judicial record on those topics. Nor does her scholarship reveal much aside from a general disposition to respect legislative outcomes. She has written about a "divide in contemporary constitutional law between liberals' impulse to constitutionalize—and therefore 'judicialize'—every important question and conservatives' impulse to leave every question to ordinary politics."

In an op-ed defending President Bush's use of signing statements, Judge Larsen disputed an ABA resolution criticizing the practice. Her main defense of issuing signing statements was that they "give[] notice of the president's view" and that "giving notice is usually thought to be a good thing" from a rule of law perspective. Critics have asked whether she would be pro-presidential power and not provide an independent check on the Executive Branch.

One opinion she wrote at the Office of Legal Counsel may shed some light on Judge Larsen's thinking about administrative issues. The controversy concerned whether the Equal Employment Opportunity Commission could impose attorney's fees against the Department of the Navy as a sanction for failure to comply with an EEOC administrative judge's orders. In a very tightly reasoned and well written opinion, Larsen explained that EEOC has no inherent authority to impose such fees and that no written statutory waiver of sovereign immunity supports permitting such fees to be imposed.

Conclusion. Judge Larsen does not have an extensive judicial record when it comes to administrative issues. She has said many things that could make one hopeful that she would faithfully follow the Constitution's teachings on the proper role of the Administrative State. However, her relatively sparse academic and judicial record on these topics makes it impossible to analyze her views with greater certainty.

Hon. Allison Jones Rushing

Judge, U.S. Court of Appeals for the Fourth Circuit (North Carolina), since March 2019
Age: 38, born in Henderson, North Carolina
Education: Wake Forest University; Duke University School of Law
Clerkships: Neil Gorsuch (Tenth Circuit); David Sentelle (D.C. Circuit); Justice Clarence Thomas

President Trump first nominated Rushing to the Fourth Circuit on August 27, 2018. Her nomination lapsed and was returned on January 3, 2019. Trump re-nominated Rushing on January 23, 2019, and she was confirmed on a 53-44 party-line vote by the Senate on March 5, 2019. Judge Rushing has not authored significant opinions or publications directly on administrative law. She has joined at least one dissent advocating for deference to an agency. In that case, heard by the Fourth Circuit *en banc*, Judge Rushing signed onto a dissent stating the majority wrongly denied *Chevron* deference to the Department of Health and Human Services. The agency had promulgated a Final Rule prohibiting healthcare providers in Title X programs from referring patients for an abortion, which the majority found arbitrary and capricious. The dissent, with which Rushing agreed, argued that the rule was properly within the statutory authority and was a product of reasoned decision-making. Judge Rushing does not have a well-established judicial record concerning administrative power or any of the various deference doctrines, likely because of her short tenure thus far on the bench. Her relatively sparse judicial record on these topics makes it impossible to analyze her views with greater certainty.

Kate Comerford Todd

Deputy Assistant to the President and Deputy White House Counsel, since 2019
Age: 45
Education: Cornell University; Harvard Law School
Clerkships: Michael Luttig (Fourth Circuit); Justice Clarence Thomas

Kate Todd is the only person on President Trump's shortlist with no experience on the bench and, thus, no judicial opinions for NCLA to evaluate. In her role as Deputy White House Counsel, she has been judiciary adjacent, but her work has always been representing others' views. While she has contributed to *amicus* briefs for the National Chamber Litigation Center, she has been careful to separate her views from those of her client. At a fascinating 2017 Federalist Society panel on opportunities for public-interest litigators, she explicitly stated that the views expressed were not the Chamber's. Presumably they were her own. She acknowledged that the "business community" does not always have a "conservative" view. She noted that Richard Cordray "made it sexy to speak on *Humphrey's Executor* again." She also acknowledged the dichotomy of the business community's view on nationwide stays from when they were fighting Obama to when they were intervening to help the current deregulatory environment. Todd argued that, in light of the new appointees and case law, 'we don't have to use the APA to "nip around the edges" of administrative power but can make real structural change, particularly on deference. She acknowledged that "Big Law" is usually, though not always, against the deregulatory and deference arguments. She opined that we should not have a country that runs to the court for every problem, and she urged careers in conservative non-profit law because there is nothing more challenging than—or as "fun" as—designing the case and the Complaint. The talk is available here: https://fedsoc.org/conferences/2017-national-lawyers-convention?#agenda-item-litigation-conservative-public-interest-litigation-in-the-modern-era

Conclusion. Ms. Todd has publicly expressed some views in favor of cabining the Administrative State to constitutional bounds. Those who know her personally in D.C. circles believe she does not have any preconceptions favorable to administrative overreach or hostile to separation of powers and civil liberties, but that reassurance provides little to go on for those lacking personal knowledge. She has a strong intellect; however, she has no judicial record, and she has never been an elected official expressing or defending her own views. It is unknown how she would deal with other judges and their opinions or the pressure of being in the public eye. Such a background is more typical of successful nominees to federal courts of appeals but would be atypical for a Supreme Court nominee. It is hard to predict how Ms. Todd would handle these issues if appointed to the highest court in the nation. Her lack of a judicial record on these topics makes it impossible to analyze her views with greater certainty.

Finally, as a practical matter, her work for the White House and the U.S. Chamber of Commerce would spark demands for documents that might well delay a confirmation vote. There are other potential nominees with more experience and more of a proven track record—especially a judicial track record—on administrative issues whose nominations would not raise the same practical issues (regarding the Senate's advise and consent role).