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NCLA’S ANALYSIS OF HON. AMY CONEY BARRETT FOR THE U.S. SUPREME COURT BASED ON HER ADMINISTRATIVE STATE VIEWS

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.