

# STATEMENT TO THE SENATE JUDICIARY COMMITTEE

October 15, 2020

The Honorable Thomas B. Griffith (ret.)  
U. S. Court of Appeals for the D. C. Circuit (2005 – 2020)

## I

Mr. Chairman, Ranking Member Senator Feinstein and Members of the Senate Judiciary Committee:

It is an honor for me to return to this room where I spent much time during my service as the nonpartisan Senate Legal Counsel. I will confess that I am more accustomed to sitting on the back wall on the dais than down here. I have fond memories of working with Senators Dole, Lott and Daschle when they led their caucuses and of participating in the investigative work of committees headed by Senators Hatch and Leahy, Senators D'Amato and Sarbanes, Senators Thompson and Glenn.

I am honored by your invitation to speak in support of the confirmation of my friend Judge Amy Coney Barrett to the Supreme Court of the United States. As you and the nation have seen during these hearings, Judge Barrett is supremely well-qualified and well-suited to join the other esteemed members of the Court.

## II

Allow me a personal story that will set the stage for my comments about why Judge Barrett will be such an outstanding Justice.

It was the day after the Senate confirmed me to fill a vacancy on the D. C. Circuit. I was in my office on the campus of Brigham Young University where I was still the university's general counsel. It was a happy day, and I was the recipient of numerous congratulatory phone calls from friends from around the country. One came from a friend with whom I had worked closely at the law firm of Wiley, Rein & Fielding in Washington, DC.

My friend asked if he could give me some counsel about being a judge. I was in a teachable frame of mind and welcomed his advice. He reminded me that he had been a

law clerk for a distinguished member of the D. C. Circuit who had since passed away and then later for a highly-regarded Justice of the Supreme Court. My friend told me about his first day as a law clerk. His judge invited him into his office and told him how the judge went about his work so that my friend would know what was expected of him. “First,” the judge said, “I learn the facts of the case as best as I can. These are real people who deserve to know that we understand their circumstances.” “Second,” continued the judge, “I think long and hard about the just result, the fair outcome, the equitable disposition. Once I have figured that out,” the judge declared, “I look for law that will support my decision.” In my friend’s considered judgment, that was just how a judge should decide cases.

The purpose of my friend’s call was congratulatory. It was not an invitation to engage in a discussion of the proper role of a federal judge under the Constitution. So I thanked my friend for his advice, but as I hung up the phone, I promised myself that I would do my best to heed the first part of his judge’s approach – learn the facts of the case – but that I would also do my best to ignore the second part of his judge’s approach.

Here’s why. As Professor Herbert Wechsler noted years ago, “the deepest problem of our constitutionalism” is laid bare when courts function as a “naked power organ.” This problem occurs when a judge “lets his judgment turn on the immediate result” – that is, whether the outcome advances a cause she personally favors as a citizen.<sup>1</sup> To do so undermines what Professor Akhil Amar of Yale rightly calls the most fundamental liberty protected by the Constitution: the right of We, the People to determine the laws by which our nation is governed through politically accountable representatives.<sup>2</sup>

The Constitution creates an elaborate mechanism by which that happens: in the case of statutes, bicameral passage in Congress and presentment to the President; in the case of amendments to the Constitution, passage by two thirds of both houses of Congress and ratification by three fourths of the States. Strikingly, judges are absent from these carefully crafted processes. And when judges lose sight of that fact, get out of their lanes, and insert themselves in a lawmaking process that has purposefully left them out, they undermine the most important structural guarantee of liberty: the separation of powers.

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<sup>1</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

<sup>2</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 10 (2005).

This view of the role of a judge is unexceptional. Justice Thurgood Marshall gave this charge to judges:

We must never forget that the only real source of power that we, as judges, can tap is the respect of the people. We will command that respect only as long as we strive for neutrality. If we are perceived as campaigning for particular policies, as joining with other branches of government in resolving questions not committed to us by the Constitution, we may gain some public acclaim in the short run. In the long run, however, we will cease to be perceived as neutral arbiters, and we will lose that public respect so vital to our function.<sup>3</sup>

Justice Kagan made the same point at her confirmation hearing. Describing her method of constitutional interpretation, she explained, “[I]f it is a constitutional question, it’s what the text of the Constitution says, it is what the history says, the structure, the precedent. But what the law says, not what a judge’s personal views [are].”<sup>4</sup> When asked if she agreed that the law only decides ninety-five percent of cases, with the remaining five percent decided by “what is in the judge’s heart or the depth and breadth of a judge’s empathy,” Justice Kagan replied forcefully: “[I]t’s law all the way down.”<sup>5</sup>

This is an important point that seems lost in much of our current public discussions about what role judges are to play under the Constitution. I agree with the Chief Justice. “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”<sup>6</sup> And those political leaders, pundits, and commentators who seek to explain the votes of judges by the President that appointed them do the Republic no service. In fact, those explanations, which assume a partisan divide in the judiciary, do great harm.<sup>7</sup> A recent survey found that

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<sup>3</sup> Justice Thurgood Marshall, Address at the Second Circuit Judicial Conference: The Importance of Judicial Neutrality (May 8, 1981), in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 187, 189 (Mark V. Tushnet ed., 2001).

<sup>4</sup> *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 69 (2011) (response of Elena Kagan to Sen. Sessions).

<sup>5</sup> *Id.* at 103 (response of Elena Kagan to Sen. Kyl).

<sup>6</sup> Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks “Obama Judge,”* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

<sup>7</sup> While some scholars have attempted to use empirical studies to prove that partisanship drives judicial decision-making, my friend and former colleague Judge Harry Edwards has shown that even the

over two-thirds of Americans believe that Supreme Court Justices base their decisions primarily on the law, not on politics.<sup>8</sup> Those who persist in describing the role of a judge in partisan terms undermine public confidence in an independent judiciary, a cornerstone of the rule of law.

Having served for fifteen years on the D. C. Circuit alongside judicial appointees of every President from Carter to Trump, I have seen firsthand that judges can and do put aside party and politics in a good-faith effort to correctly interpret the law.

### III

That is precisely the type of jurist Judge Barrett has been and the type of Justice she will be. In fact, it takes no guesswork to determine whether a Justice Barrett will approach her work in this way. She already said she will. In her confirmation hearings prior to her appointment to the Seventh Circuit, she said that a judge should “never” impose her “personal convictions, whether they derive from faith or anywhere else, on the law.”<sup>9</sup> She said so again in a 2017 speech to Hillsdale College: “A judge is obligated to apply the law as it is, and not as she wishes it would be.”<sup>10</sup> She said so again in a 2019 speech at Princeton: “A judge’s view about the constitutionality [of a federal statute] should not turn on whether . . . she thinks the act is good or bad policy.”<sup>11</sup>

And her decisions on the bench bear out that promise. Consider her 2019 vote in *Price v. City of Chicago*,<sup>12</sup> in which pro-life sidewalk counselors challenged an ordinance that barred them from approaching women near abortion clinics for the purpose of leafletting, protesting, or counseling. The ordinance arguably violated the First Amendment, especially under the principles underlying several recent decisions of the

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best of those studies suffer from considerable flaws and do not support anything resembling a strong claim of a partisan judiciary. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1915 (2009).

<sup>8</sup> Charles H. Franklin, *Public Views of the Supreme Court*, Marquette Law School (Oct. 2019), at 12-13.

<sup>9</sup> *Confirmation Hearing on the Nomination of Amy Coney Barrett To Be Circuit Judge for the Seventh Circuit: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 6, 2017) (statement of Amy Coney Barrett), <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations>.

<sup>10</sup> Judge Amy Coney Barrett, Address to Hillsdale College in D.C. (May 21, 2019), <https://www.hillsdale.edu/conversation-with-amy-coney-barrett/>.

<sup>11</sup> Judge Amy Coney Barrett, Walter F. Murphy Lecture in American Constitutionalism: The Constitution as Our Story (Oct. 17, 2019).

<sup>12</sup> 915 F.3d 1107 (7th Cir. 2019).

Supreme Court, and a willful judge might have seized on those decisions to side with the pro-life litigants. But Judge Barrett joined an opinion upholding the ordinance.

The opinion explained that a nearly identical regulation had been upheld by the Supreme Court in *Hill v. Colorado*—a 2000 precedent that remains “binding.” By casting an impartial vote to adhere to the law, Judge Barrett honored her oath. And she displayed the same impartial approach in other rulings, such as *Lee v. Watson*<sup>13</sup> and *Peterson v. Barr*,<sup>14</sup> which allowed the first federal execution in seventeen years to proceed regardless of her personal views on the death penalty. As constitutional law scholar Jonathan Adler pointed out, “Her opinions in death-penalty related cases certainly are not in line with church teaching and further suggest that she understands the oath she gives as a jurist is to apply the law before her whether or not that coincides with her personal . . . beliefs.”<sup>15</sup>

Judge Barrett brings something else to her work as a judge that is especially vital in our polarized Nation. In the words of Judge Laurence Silberman, my friend and distinguished former colleague on the D. C. Circuit for whom Judge Barrett clerked and who has been a mentor to scores of distinguished lawyers during his illustrious career: “Amy combined a powerful analytical ability with an innate kindness and sense of decency.”

The public record makes clear Judge Barrett’s “powerful analytical ability.” I don’t think we can overstate the importance of her kindness and decency.

The Constitution’s Preamble states our national purpose: “to form a more perfect Union”; to unite *everyone* in the nation around a shared commitment to secure the “Blessings of Liberty” and “domestic Tranquility.”<sup>16</sup> The Constitution created a structure of government that the Framers hoped would help us achieve those ends. But they knew that the mortar that would hold the structure together was civic charity,<sup>17</sup> an idea that has been part of our national DNA from the days of John Winthrop and the Massachusetts Bay Colony, and which found its most powerful expression in the words of our greatest president at the moment of our greatest peril. Lincoln called upon our “bonds of

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<sup>13</sup> 964 F.3d 663 (7th Cir. 2020).

<sup>14</sup> 965 F.3d 549 (7th Cir. 2020).

<sup>15</sup> Elizabeth Dias et al., *Rooted in Faith, Amy Coney Barrett Represents a New Conservatism*, N.Y. TIMES (Oct. 11, 2020), <https://www.nytimes.com/2020/10/11/us/politics/amy-coney-barrett-life-career-family.html>.

<sup>16</sup> U.S. CONST. pmbl.

<sup>17</sup> See MATTHEW S. HOLLAND, BONDS OF AFFECTION—CIVIC CHARITY AND THE MAKING OF AMERICA: WINTHROP, JEFFERSON, AND LINCOLN (2007).

affection” and implored us to remember that we need to see one another with all of our differences as friends—partners in a shared pursuit of the common good – rather than enemies.<sup>18</sup> Our public life must be filled with “malice toward none; with charity for all.”<sup>19</sup>

This is the teaching of some of our greatest American heroes. As Michael Gerson observes, “The heroes of America are heroes of unity. Our political system is designed for vigorous disagreement. It is not designed for irreconcilable contempt. Such contempt loosens the ties of citizenship and undermines the idea of patriotism.”<sup>20</sup>

Judge Barrett’s colleague at Notre Dame, O. Carter Snead, says of her:

There are plenty of smart people in elite academia and on the federal bench, but few with Barrett’s generosity of spirit. She genuinely seeks to understand others’ arguments and does not regard them as mere obstacles to be overcome on the way to reaching a preferred conclusion. Time and again, I have seen her gently reframe a colleague’s arguments to make them stronger, even when she disagreed with them. And she is not afraid to change her own mind in the search for the truth.<sup>21</sup>

Lisa Grow Sun clerked on the Supreme Court the same term as Judge Barrett and is now a professor at the law school at Brigham Young University. Professor Sun knows Judge Barrett’s work as a scholar well and says this about her approach:

Amy always welcomes the opportunity to consider a position from a different angle and to learn more from people whose perspectives differ from her own. She is more than just open-minded. She is eager to consider those new perspectives and reconsider her arguments. She is always very generous to other people’s arguments.<sup>22</sup>

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<sup>18</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 (Roy P. Basler et al. eds., 1953).

<sup>19</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1865), in 8 COLLECTED WORKS OF ABRAHAM LINCOLN 332, 333 (Roy P. Basler et al. eds., 1953).

<sup>20</sup> Michael Gerson, *A Primer on Political Reality*, WASH. POST (Feb. 19, 2010).

<sup>21</sup> O. Carter Snead, *I’ve Known Amy Coney Barrett for 15 Years. Liberals Have Nothing to Fear*, WASH. POST (Sept. 26, 2020), <https://www.washingtonpost.com/opinions/2020/09/26/ive-known-amy-coney-barrett-15-years-liberals-have-nothing-fear/>.

<sup>22</sup> Telephone Interview with Lisa Grow Sun (Oct. 11, 2020).

Throughout her public life as a judge, a scholar, and a lawyer Judge Barrett has embodied civic charity, which is indispensable to our success as a nation and is in such short supply today.

#### IV

Finally, I note that Judge Barrett's nomination to the Supreme Court has made her faith a matter of public debate. While some of that discussion is tinged with bigotry, other commentary reflects a sincere desire to know whether Judge Barrett's faith will dictate her decisions as a Justice. As a person of faith who served on the D. C. Circuit for 15 years, let me assure you that it will not.

Every federal judge must take an oath to support "the Constitution of the United States . . . *So help me God.*" 5 U.S.C. § 3331 (emphasis added). The oath, which was created by the First Congress, is rooted in the belief that its taking is not empty ritual or mere ceremony. Rather, the oath transforms the citizen into an impartial judge whose loyalty while performing her judicial role is to "the Constitution and laws of the United States" and not to any person, party, president, or religion. 28 U.S.C. § 453.

In taking the oath, the judge makes a solemn promise, with God as a witness, that, when acting as a judge, she will be a different person than when she is not acting as a judge; that she will resist the temptation to displace the law created by We, the People with her own wishes about who should prevail in court and why. To a person of faith, an oath is more than a solemn promise of impartiality to one's fellow-citizens -- it is also a solemn promise to God. Robert Bolt's portrayal of Thomas More in *A Man for All Seasons* captures this point simply and powerfully. "What is an oath," More asks, "but words we speak to God?"

In other words, for a person of faith, the judicial oath is a promise to the nation *and to God* that she will not do the one thing secular critics most fear: reach for outcomes based on her religious worldview. That's how I saw it when I was on the D. C. Circuit, and every judge I know who is a person of faith sees it the same. When wearing the robe, there is no conflict between following God and following Caesar. It's Caesar all the way down.