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MEMORANDUM

To: Tribal Leaders
National Congress of American Indians – Project on the Judiciary

From: Joel West Williams, Senior Staff Attorney, Native American Rights Fund

RE: The Nomination of Amy Coney Barrett to the Supreme Court of the United States:
An Indian Law Perspective

I. Introduction

On September 26, 2020, President Trump nominated Judge Amy Coney Barrett of the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) to be an Associate Justice on the Supreme Court of the United States (U.S. Supreme Court), to fill the seat opened by the death of Justice Ruth Bader Ginsburg. On October 12, 2020, the Senate Judiciary Committee will convene hearings to consider her nomination. Senate Majority Leader Mitch McConnell has expressed his desire to have a full Senate vote on Judge Barrett's confirmation in late October 2020.

Judge Barrett has described her judicial approach as consistent with that of the late Justice Antonin Scalia, for whom she was a law clerk. She remarked in her speech accepting her U.S. Supreme Court nomination that, "His judicial philosophy is mine, too." In interpreting the Constitution and statutes, Judge Barrett believes that a judge should adhere to the text as it was understood at the time it was written.

This memorandum is intended to provide Tribal leaders with background on Judge Barrett, and in particular her record on Indian law. As more fully discussed below, Judge Barrett's record on

matters addressing Indian law, Tribes, and individual Indians is very thin. She may have had some exposure to Indian law cases as a law clerk at the D.C. Circuit and the U.S. Supreme Court, and her scholarly writing has some very limited mentions of Indian law cases and doctrines. As a judge on the Seventh Circuit, she was on a three-judge panel that unanimously ruled against an Indian inmate’s religious liberty claim against a Wisconsin prison. Such a limited record gives very little insight into how Judge Barrett thinks about Indian law issues, much less how a Justice Barrett might approach Indian law questions coming before the U.S. Supreme Court.

II. A Brief Biography

Judge Barrett was born on January 28, 1972, in New Orleans and grew up in the suburb of Metairie, Louisiana. Her father was an attorney for the Shell Oil Company and her mother was a high school French teacher. Judge Barrett graduated from St. Mary’s Dominican High School in 1990. She is married to Jesse Barrett, who is a partner in a South Bend, Indiana, law firm and a former Assistant United States Attorney for the Northern District of Indiana. They have seven children, one of whom has Down Syndrome, and two of whom the couple adopted from Haiti.

Judge Barrett earned a B.A. in English magna cum laude from Rhodes College in 1994, and her J.D. summa cum laude from Notre Dame Law School in 1997. She graduated first in her class at Notre Dame and was an executive editor of the Notre Dame Law Review. After graduation, she clerked for Judge Laurence H. Silberman of the U.S. Circuit Court of Appeals for the D.C. Circuit. She then clerked for Justice Antonin Scalia of the U.S. Supreme Court. Judge Barrett spent about two years in private practice before embarking on a career as a law school professor, first at Georgetown University Law Center and then at Notre Dame Law School, where she taught for almost 15 years. At Notre Dame, she taught federal courts, constitutional law, and statutory interpretation, and was awarded the “Distinguished Professor of the Year” award three times.

In 2017, President Trump nominated her for a seat on the Seventh Circuit. The Senate confirmed her by a vote of 55-43, and she took the bench on November 2, 2017.

III. Judge Barrett’s Indian Law Record and Experience

Judge Barrett’s Indian law record and experience is summarized below, beginning with her most recent position as a judge on the Seventh Circuit.

A. Seventh Circuit Court of Appeals (2017-present):

During almost three years on the Seventh Circuit, Judge Barrett heard more than 900 cases, and she authored 92 opinions. None of the cases she heard involved an Indian Tribe or an Indian law issue.¹ One case involved an individual Indian bringing a religious liberty claim against the prison

¹ In *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), a Second Amendment challenge to a law prohibiting felons from possessing firearms, Judge Barrett authored a dissent where she points out that at the time the Second Amendment was drafted, “Native Americans . . . were disarmed as a matter of course.” This was included in her discussion of groups understood to be excluded from the Second Amendment’s reach at the time of its

where he was incarcerated:

***Schlemm v. Carr*, 760 Fed. Appx. 431 (7th Cir. 2019).** Judge Barrett was on the panel that heard the appeal of a Native American inmate who sued the Wisconsin Department of Corrections seeking accommodation of some of his religious practices. The lower court entered a preliminary injunction and, after a trial, it ruled in favor of the inmate on several of his claims. However, it did not grant the inmate’s request for fresh game meat to make Indian tacos for a Ghost Feast celebration. On appeal, the Seventh Circuit held that the inmate failed to establish provision of the fresh meat, as opposed to the preserved or dried meat provided by the prison, was the only way to avoid violating his religious beliefs. The court also held that providing access to the dried meat and denying the inmate’s request to individual portions was the least restrictive means of furthering the prison’s security interest. In addition, the court concluded that the prison’s failure to inform volunteers of the lower court’s injunction and not allowing one volunteer to lead a celebration did not violate the injunction. Nor did the prison violate the injunction by interfering with his ability to wear a multicolored headband. This decision was issued as a per curiam order, which means that all three judges on the panel agreed and that authorship was not attributed to any particular judge.

B. Law Professor (2001-2017)

Judge Barrett began teaching law through a teaching fellowship at Georgetown University Law Center in 2001, and in 2002 joined the Notre Dame Law faculty, where she remained for nearly 15 years. Her teaching and scholarship primarily focused on constitutional law and statutory interpretation.

Only two of her scholarly articles contain any mention of Indian law topics. In an introduction she wrote for a Notre Dame Law Review symposium,² she used President Jackson’s response to Georgia’s non-compliance with *Worcester v. Georgia*, 31 U.S. 515 (1832), as one example of presidential resistance to U.S. Supreme Court decisions. In the same article, she also discussed public critiques of the U.S. Supreme Court and, in a footnote, suggested that a protest mounted in response to the Court’s decision against Tribes in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), may have been the earliest protest against a U.S. Supreme Court decision at the court’s building.

In an article on statutory interpretation,³ she briefly discussed the Indian canon of statutory construction, which she described as “the maxim that statutes dealing with the Indians must be construed in their favor.”⁴ She traced its origin in Indian treaty interpretation, and noted that after *Worcester*, the Court did not invoke this canon for 34 years, concluding that “[g]iven the paucity of nineteenth century cases applying the canon, twentieth century courts perhaps overstated the

adoption. While her dissenting opinion may have bearing on understanding her approach to interpreting the Second Amendment, it does not shed light on her approach to Indian law or the rights of Indians today.

² Amy Coney Barrett, *Introduction – Stare Decisis and Nonjudicial Actors*, 83 Notre Dame L. Rev. 1147 (2008).

³ Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010).

⁴ *Id.* at 151.

case when they described the canon as ‘well-settled law’ and a ‘rule of construction [that] has been recognized, without exception, for more than a hundred years.’”⁵ However, she stops short of criticizing its use by modern courts, and acknowledges that there are “powerful” arguments for “rationalizing” its use by reference to the Constitution.⁶ Additionally, she found the canon unique insofar as it was originally developed for Indian treaty interpretation, but later was used to interpret federal statutes dealing with Indians and Tribes as well.

C. Private Practice – Miller, Cassidy, Lareoca, and Lewin LLP (merged with Baker Botts LLP in 2001) (1999-2001)

A review of available records did not reveal any involvement with Indian law issues or cases.

D. Clerk to Justice Antonin Scalia (1998-99)

Judge Barrett likely had some exposure to Indian law cases that came before the U.S. Supreme Court during her time as a clerk for Justice Scalia. During the term when she served as a law clerk, the Court decided four Indian law cases: *Arizona Dept. of Revenue v. Blaz*, 526 U.S. 32 (1999) (holding a state may impose a gross receipts tax on a federal contractor performing work on an Indian reservation); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding a Tribe’s treaty hunting rights were not extinguished by Minnesota statehood); *El Paso Natural Gas Company v. Neztosie*, 526 U.S. 473 (1999) (holding Tribal court exhaustion doctrine does not apply where a federal statute mandates removal to federal court); and *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999) (holding reservation of coal beneath Indian lands does not include reservation of coalbed methane). We cannot know the extent of Barrett’s involvement (if any) in these cases, although it would have been consistent with her role as a law clerk to perform research, write memoranda, and discuss the cases with the Justice, if so assigned. Judge Barrett also stated in her 2017 Senate Judiciary Committee Questionnaire that she was part of the “cert pool” (a law clerk who reviews petitions for review and makes recommendations to several justices, not just the one for whom she clerks). As part of the cert pool, she may have reviewed and analyzed petitions involving Tribes, Indian law, or individual Indians that were heard in the term following her clerkship, or ultimately not heard by the Court.

E. Clerk to Laurence H. Silberman (D.C. Circuit) (1997-98)

During her time as a law clerk for Judge Silberman, the judge participated in one case involving an Indian Tribe that did not involve an Indian law issue. He joined a unanimous opinion written by another judge in *Grand Canyon Air Tour Coal v. F.A.A.*, 154 F.3d 455 (D.C. Cir. 1998) (holding, among other things, that the Hualapai Tribe’s challenge to a Federal Aviation Administration aircraft noise rule for the Grand Canyon was not ripe). As discussed with regard to Judge Barrett’s clerkship with Justice Scalia above, we cannot know the extent of her

⁵ This conclusion fails to recognize that the U.S. Supreme Court heard very few Indian law cases in that period and, therefore, had little opportunity to invoke the canon.

⁶ Barrett, *supra* note 2, at n.206.

involvement (if any) with this case, but judicial law clerks frequently perform research, write memoranda, discuss the cases with their judge, and assist in drafting opinions if they are assigned to do so.

IV. Should Indian Country Support or Oppose Judge Barrett's Confirmation?

For Indian Country, Judge Barrett's background, legal experience, and judicial record offer little substance to solicit support for her confirmation. If confirmed, Judge Barrett would replace Justice Ruth Bader Ginsburg. Although Justice Ginsburg was revered as a liberal stalwart on the Court, she had a mixed record on Indian law cases, voting against Tribal interests more than 50% of the time. Generally speaking, Judge Barrett's confirmation likely would solidify a conservative majority on the U.S. Supreme Court. However, her writing as a law professor and her record as a judge on the Seventh Circuit offer little insight into her understanding and views on Indian law topics that may come before the U.S. Supreme Court. In addition, Judge Barrett's statement that she shares Justice Scalia's judicial philosophy raises the question of whether she might align with his approach on Indian law. Justice Scalia voted against Tribal interests more than 86% of the time and wrote several majority opinions harmful to Tribal sovereignty. Yet, occasionally he did cast votes favoring Tribal interests in cases involving, for example, the Indian Child Welfare Act and Indian reservation boundaries.

NARF, in conjunction with the National Congress of American Indians, will monitor the upcoming confirmation hearings closely and evaluate Judge Barrett's responses to questions posed by the Senate Judiciary Committee.