**Questions for the Record**
**Senator Mazie K. Hirono**
**September 13, 2017**

**Professor Amy Coney Barrett, Nominee to the Seventh Circuit**

1. At your hearing, I asked you about an article you wrote for the *Marquette Law Review* entitled, "Catholic Judges in Capital Cases" in which you offered guidance for how observant Catholic judges should resolve conflicts between their religious convictions and their duty to apply the law impartially. In your article you described situations, such as the sentencing phase of death penalty cases, in which you concluded that recusal is the proper response for a judge who could not apply the death penalty on the grounds of conscience. I asked you whether you would follow your own recommendations as to recusal in death penalty cases.

   You testified in response that your article only "addressed a very narrow question" of "how a trial court judge… would proceed if the law required that judge to enter the order of execution," and that "we didn't draw any conclusions about how an appellate judge who is a conscientious objector should behave." In answering the question this way, you distinguished the recommendations in your article from situations you would face as an appellate judge.

   Yet, in your article you wrote extensively about the morality of an appellate judge's role in affirming a death sentence, including in two sections titled "Appeal." In fact, your article observes that, "Conscientious Catholic judges might have more trouble with cases like these than they would at trial" because denying an appeal "probably looks to most people like an endorsement of the sentence" and could lead directly to the sentence being carried out. Your article concludes that if an appellate judge, "cannot in conscience affirm a death sentence the proper response is to recuse oneself."

   a. Please tell me why you believe you were being truthful when you testified that, "we didn't draw any conclusions about how an appellate judge who is a consciences objector should behave."

Part I of the article, which discusses the scope of the moral obligations of judges in capital cases, briefly considers whether it is morally permissible for a judge who conscientiously objects to the death penalty to participate in an appellate review of a death sentence. *See* 81 MARQ. L. REV. 303, 326-29 (1998). That analysis concludes as follows: "Considerations like this make it exceedingly difficulty to pass moral judgment on the appellate review of sentencing. The morality of the acts which fall under that description will, it seems to us, vary from one set of circumstances to another." *Id.* at 329. The article thus pointed out that circumstances will vary and made no attempt to analyze the circumstances, if any, in which it is morally impermissible for an appellate judge to participate. As such, it proposed no resolution of the problem in the context of an appeal.

The language that you quote ("Conscientious Catholic judges . . .") appears in Part II of the article, which discusses the question whether conscientious objection to the death penalty legally (as opposed to morally) disqualifies the judge from hearing capital cases. *See id.* at 331 & n. 99. The article repeats Part I's point about appeal with the observation that "it is difficult to say what outcome is morally preferable" in the context of an appeal, *id.* at 341. Unlike the actual entry of a death sentence, where the article contended that the moral objection requires recusal, *see id.* at 335, 339, the article drew no definitive conclusions about presiding over the guilt phase or appellate review, *see id*. at 341, 342. (It is worth noting that this analysis included conscientious objections based on any grounds, not only religiously based moral views.) Although the article observes that those objecting to the death penalty "might" find appellate review of a sentence more uncomfortable than presiding over the guilt phase, an appellate judge would have to make his or her own decision about whether he or she felt comfortable participating in such a case. *See id.* at 342. As I testified at the hearing, I fully participated in advising Justice Scalia in capital cases as a law clerk, including in the common circumstance in which the law required a death sentence to stand.

The final phrase you quote—"If one cannot in conscience affirm a death sentence the proper response is to recuse oneself"—emphasizes the point made repeatedly throughout the article and that I made repeatedly at the hearing: A judge with a moral objection to the law must not twist the law to conform it to his or her view. *See id.* at 343. If the judge chooses to participate in appellate review, the judge must apply the law impartially and fairly. *Id.*

b. Please tell me why you believe you were being truthful when you testified that the "only conclusion the article reached" was that "if I were being considered for a trial court, I would recuse myself and not actually enter the order of execution."

See Answer to Question1a.

c. What was your intent in characterizing your writing at the hearing in the way that you did, suggesting it made no conclusions as to appellate judges?

See Answer to Question1a.

d. Your response prevented me from asking you what you would do as an appellate court judge. If confirmed, would you stand by the conclusion of your article and recuse yourself from death penalty appeals if you believed you could not in good conscience affirm the death penalty?

As explained in the answer to Question 1a, the article did not conclude that any judge is morally precluded from participating in death penalty appeals. What I said at the hearing is fully consistent with the article. I said that I cannot think of any cases or category of cases in which I would feel obliged to recuse on grounds of conscience if I am confirmed as a circuit judge. More specifically, in response to a question from Senator Cruz, I said that it is not my intention as a blanket matter to recuse myself in capital cases if I am confirmed. In all events, I will fully and faithfully apply the law of recusal, including the federal recusal statute and the Code of Conduct for United States Judges.

e. Have your views about the circumstances in which recusal is the proper response for a judge facing these kinds of conflicts between moral convictions and the ability to apply the law changed, in death penalty cases or otherwise? If so, can you specify how your views have changed and what standard you would apply in determining how to resolve the conflicts and whether to recuse?

As I stated at the hearing, I stand by the article's central point that it is never permissible for a judge to follow his or her personal convictions in the decision of a case rather than what the law requires. As I also stated at the hearing, I would not enter an order of execution as a trial judge—a position for which I am not being considered. Those two points are the core of the article. Beyond that, I have not thought in any serious way about the conflicts between conscience and judicial duty in twenty years, since I was a third-year law student working on this article with a senior professor. Like any judge or judicial nominee, I cannot say how I might resolve any issue that might come before me as a judge. If confirmed, I will faithfully apply the law in every case, including the law of recusal.

2. In your *Marquette Law Review* article, you quoted former Chief Justice Rehnquist regarding ideological bias and the need to recuse. You wrote:

"A judge will often entertain an ideological bias that makes him lean one way or the other. In fact we might safely say that every judge has such an inclination. As Chief Justice Rehnquist once observed when rejecting a motion to disqualify himself,

> [s]ince most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.... Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa would be evidence of lack of qualification, not lack of bias.

Implicit in the Chief Justice's observation are two reasons why we should not automatically disqualify judges for holding such views or convictions. One is that everyone has them. If we applied this criterion faithfully we would disqualify the entire judiciary…. The second is that the possessions of convictions is not only inevitable, it is to some extent desirable."

a. If all judges come to the bench, as you observe, with ideological convictions, and in fact such convictions are "desirable," what does it mean when nominees tell the Committee that their personal views don't matter because they will merely apply the law?

Although judges, like all persons, possess ideological convictions, they must put aside those convictions to follow the law. When judicial nominees tell this Committee that their personal views will not matter to the discharge of their judicial duties, they affirm their adherence to this fundamental aspect of the judicial oath.

b. Doesn't your article suggest that the ideological biases and inclinations all judges bring to the bench can and does have a bearing on what they would do as a judge, and how they would apply the law?

No. As the article said in the same section you quote, "We expect judges to recognize [their personal convictions] and follow the law even if it runs against their inclination." 81 MARQ. L. REV. 303, 341 (1998).

c. Would you agree that application of precedent is not always straightforward?

There are sometimes cases in which lawyers and judges disagree about a precedent's scope or application to particular facts, but precedent always controls when it applies.

d. Doesn't your observation undermine reassurances that nominees will simply apply precedent, particularly in areas where many have strong convictions, such as abortion, or in circumstances where the facts of a case don't line up precisely with a precedent and a judge has discretion in what precedent to apply and how it would apply?

No. See Answer to Question 2b.

3. In your *Marquette Law Review* article, after extensive analysis, you provide this guidance for appellate judges in death penalty cases: "If one cannot in conscience affirm a death sentence the proper response is to recuse oneself." To this conclusion, you attached the following footnote: "Michael Paulsen makes an argument much like this in connection with abortion. He concludes that 'where there is no honest, legitimate alternative for deciding the case but to follow positive law supporting the right to commit an abortion,' the judge should recuse."

a. Was your purpose in making this connection between death penalty and abortion to suggest that the same analysis and guidance you set forth for death penalty cases should also apply to abortion cases?

The footnote you reference acknowledges that judges with moral objections to abortion might face similar problems to a judge in the context we actually addressed—capital punishment—but the article did not attempt the in-depth analysis that would be required to decide whether or when recusal would be required in that different context. Here too, however, the article insisted that a judge who cannot faithfully apply the law for any reason, including an objection of conscience, should recuse rather than twist the law to reach a desired outcome.

b. In fact, your article addressed the relative moral conflicts posed by the Catholic Church's teaching on the death penalty and abortion, and described the "abortion case as a bit easier" than the death penalty because "both the state and unborn child's mother are (at least typically) acting with gross unfairness to the unborn child, whereas the moral objection to capital punishment is not that it is unfair to the

offender." Elsewhere in your article, you described the Catholic Church's prohibition of abortion as "absolute," and describe abortion as "always immoral," contrasting the Church's prohibition of abortion with its prohibition of capital punishment, which you describe as not absolute and permissible on rare occasions. So wouldn't the guidance in your article that judges should recuse if they cannot "in good conscience affirm a death sentence," apply at least equally in cases requiring a judge to uphold the right to an abortion, if they could not do so in good conscience?

The article described the Catholic Church's position on abortion, but it did not analyze the moral responsibility of a judge who conscientiously objects to abortion. I do not know how my co-author and I would have analyzed that problem if we had focused on it twenty years ago, and I certainly could not say that my views today would be consistent with whatever conclusion we might have reached then. I was a third-year law student when I co-authored this article, and I would be approaching these issues now with the benefit of twenty years of experience. What I can say is to repeat what I said at the hearing: If I am confirmed and ever conclude that I cannot faithfully apply the law for any reason, I will recuse myself rather than attempt to bring the law in accord with my own view.

4. In your article, you distinguish between the participation of an "observant Catholic judge" in the guilt phase of a capital case from participation in the penalty phase based on the relationship of the judge's role to his or her "cooperation with evil." You describe "his cooperation with the evil of capital punishment" at the guilt phase as "material rather than formal" because his main role at that phase is to "deal justly with the defendant." At the penalty phase, you describe his "cooperation with evil" as formal because at that stage the judge's role is to determine whether or not to apply the death sentence. Based on this framework, you concluded that an observant Catholic judge with a moral conviction against applying the death penalty need not recuse from the guilt phase but should properly recuse from the penalty phase. I understand this framework for what a judge should do to be focused on the relationship of the judge's role at a particular point in the case to the moral conflict. I want to ask you about this framework in the context of abortion.

    a. Would an observant Catholic judge who believes abortion is "always immoral" be in material or formal cooperation with what he or she believes to be evil?

The article did not address that question, and I have never analyzed it.

    b. Would recusal be appropriate in such a circumstance or not?

See Answer to Question 4a.

5. In your *Marquette Law Review* article, you rightly observed that "Federal judges are nominated and confirmed by politicians," and are nominated and confirmed based on their principles and convictions. The example you cited was President Johnson's nomination of Justice Thurgood Marshall "precisely because he was a hero in the fight for racial equality," and you conclude it would have been "odd if those principles kept

him from sitting on school desegregation cases, even if they made his judgments fairly predictable." You have been nominated by a President who has made clear his litmus test for nominees in the context of the Supreme Court, stating that he would select nominees who would overturn *Roe v. Wade* "automatically."

a. In light of your observation the political selection process, do you believe such litmus tests are appropriate?

This is a political issue about which I cannot ethically opine. *See* Canon 5, Code of Conduct for United States Judges; *see also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

b. Your strongly held moral convictions regarding abortion seem clear from your writing and teaching. Do you believe you were selected based on those convictions and that it would be odd for you not to sit on cases involving abortion even if it makes your judgments fairly predictable?

I do not know what those involved in the selection process may or may not have thought about how I would resolve cases involving abortion. If I am confirmed, I will resolve any case, including abortion cases, by engaging in the judicial process, which includes examining the facts, reading the briefs, conducting necessary research, hearing argument, consulting with colleagues, and writing and/or reading opinions.

c. At your hearing, I asked you about a 2013 article you published in the Texas Law Review in which included a list of "superprecedents" that excluded *Roe v. Wade*. You testified that in your article that you were merely "using a list by other very well-respected scholars," and that other lists would include *Roe v. Wade*, but you did not tell us whether you would describe *Roe v. Wade* as a superprecedent.

i. What is your definition of a "superprecedent" and how do they constrain the court as opposed to other Supreme Court precedents?

I have never offered my own definition of "superprecedent." For a court of appeals, all Supreme Court precedent is equally and absolutely binding.

ii. Based on your definition of "superprecedent," would *Roe v. Wade* be on your list? If not, why not?

As stated above, I have never offered my own definition of "superprecedent."