

AFJ NOMINEE REPORT

JOAN LARSEN



U.S. Court of Appeals for the Sixth Circuit

CONTENTS

INTRODUCTION, 1

BIOGRAPHY, 3

JUDICIAL PHILOSOPHY, 4

EXECUTIVE POWER, 6

OTHER LEGAL VIEWS, 8

LGBTQ Rights, 8

Sentencing Commission, 8

Criminal Justice, 9

Tenth Amendment, 9

CONCLUSION, 10

INTRODUCTION

On May 8, 2017, President Trump nominated Joan Larsen, a justice on the Michigan Supreme Court, to the Court of Appeals for the Sixth Circuit. Larsen is the third of the President's nominees to that court (Amul Thapar and John Bush, both from Kentucky, were the other two).¹

Larsen's record raises several serious questions about her fitness for the federal bench, most notably in the areas of executive power and the interests of corporations. In addition, her inclusion on the original list of potential Supreme Court candidates provided to President Trump by the Federalist Society suggests that she adheres to the ultraconservative orthodoxy of the Society and passed the President's "litmus test" for judicial nominees—which would include opposition to abortion rights.

Significantly, Larsen has written about presidential power in ways that suggest she would not act as an independent check on the Executive Branch, an issue of particular import at a time when the President publicly lambasts judges and demonstrates repeated disdain for the rule of law.

For example, she has praised the use of extreme presidential signing statements and the President's ability to ignore acts of Congress. Referencing George W. Bush's signing statement limiting the application of the McCain Amendment outlawing the use of torture against persons in the custody of the United States, Larsen claimed: "Denying the

president a constitutional voice is the real threat to our system of separated powers... If circumstances arose in which the law would prevent him from protecting the nation, he would choose the nation over the statute."² Noted constitutional scholar Peter Shane has written that Larsen's "enthusiasm for unchecked executive power should be profoundly worrying," and added "we cannot afford judges who would grant President Trump extreme leeway to decide what statutes he may ignore."³

Larsen also authored a memo, while working in the Office of Legal Counsel ("OLC") under President George W. Bush, regarding the *habeas corpus* rights of detained prisoners. The contents of the memorandum have been withheld. Larsen's nomination should not proceed until her work on this critical issue, touching upon issues of executive power, can be properly evaluated.

Indeed, the Chairman of the Senate Judiciary Committee, Senator Chuck Grassley, made this point previously when David Barron was nominated to the First Circuit Court of Appeals. At issue was a memo Barron wrote about the use of drones against American-born terrorists in the Middle East. Grassley opined:

The Senate simply cannot evaluate whether this nominee is fit for lifetime appointment to one of the nation's most important courts without complete access to his

¹ See Amul Thapar, ALLIANCE FOR JUSTICE (Apr. 20, 2017), <http://www.afj.org/wp-content/uploads/2017/04/Thapar-Report.pdf>; see also John K. Bush, ALLIANCE FOR JUSTICE (June 12017), <http://www.afj.org/wp-content/uploads/2017/06/AFJ-Bush-Report.pdf>.

² Damon Root, *Trump SCOTUS Short-Lister Joan Larsen Is a Fan of Executive Power and Presidential Signing Statements*, HIT & RUN BLOG (Jan. 5, 2017, 10:45 AM), <http://reason.com/blog/2017/01/05/trump-scotus-shortlister-joan-larsen-is>.

³ Peter Shane, *The Most Important Question for Trump Nominees*, SLATE (July 5, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/the_most_important_question_for_trump_judicial_nominees_going_forward.html.

writings. It's even more important now that we know that some of those writings concern perhaps the most controversial constitutional issue that the Office of Legal Counsel has addressed in recent years.⁴

Chairman Grassley made clear with respect to the need to gain access to OLC opinions during consideration of David Barron's nomination, "this administration must turn over...every legal opinion from the Office of Legal Counsel written by, or related to" David Barron. "Our obligation, as senators, is to ensure that our constituents have full access to information." He added "[w]ithout full disclosure to the full Senate...this nomination cannot proceed."⁵

Following Grassley's statement, the contents of David Barron's OLC memo were made available to all senators, and ultimately made public. The same principle—the Barron standard—must apply here.

In fact, the Senate and public deserve to know the complete list of matters Larsen worked on at OLC, what memos she authored, reviewed, or even opined on. Larsen's colleague at OLC, Jay Bybee, was confirmed in a bipartisan vote only because Senators were unaware that he was the author of some of the "torture memos." According to former Senate Judiciary Chairman Patrick Leahy, had Bybee "told the truth, he never would have been confirmed."⁶ The Senate and the American people deserve to know what Larsen worked on while at OLC.

There are also serious questions about whether Larsen will use her role as a judge to

advance the interests of business over the legal rights of everyday Americans. The Chamber of Commerce spent over \$660,000 on broadcast television ads backing Larsen in her bid for re-election to the Michigan Supreme Court, and it contributed over \$16,000 directly to her.⁷ The Michigan Farm Bureau donated over \$14,000. Other key contributors included the Michigan Banker's Association, the Michigan Health & Hospital Association, and the Automobile Club. Current Secretary of Education Betsy DeVos and her family, the multibillionaire founders of Amway, donated at least \$22,500 to Larsen's campaign.⁸

Larsen's record reveals her own outreach to business and corporate interests: she has given speeches to Blue Cross Blue Shield of Michigan,⁹ the Michigan Self-Insurer's Association,¹⁰ and the Michigan Manufacturers' Association.¹¹ It does not appear that Larsen has made similar outreach efforts to consumer groups, advocates for workers' rights, or civil rights organizations.

As a justice Larsen has ruled in ways that make it much more difficult for those injured or whose rights have been violated to seek redress. For example, in *Yono v. Dept. of Transportation*, Larsen wrote an opinion broadly construing government

⁴ Press Release, Senator Chuck Grassley, Transparency Needed from White House on Barron Nomination (May 8, 2014), <https://www.grassley.senate.gov/news/news-releases/transparency-needed-white-house-barron-nomination>.

⁵ *Id.*

⁶ Karl Vick, *Friends Say Judge Bybee Regrets Interrogation Memo He Signed*, WASHINGTON POST (Apr. 25, 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042403888.html>.

⁷ Christine MacDonald, *Supreme Court incumbents face sedate race*, THE DETROIT NEWS (Oct. 31, 2016, 11:04 PM) <http://www.detroitnews.com/story/news/politics/2016/10/31/supreme-court-incumbents-face-sedate-race/93096916/>.

⁸ Seung Min Kim, *DeVos and family members donated to Trump judicial nominee*, POLITICO (May 31, 2017, 6:02 PM), <http://www.politico.com/story/2017/05/31/devos-trump-donations-judicial-238999>; see also, Adam Feldman, *Profiling State Justices on Trump's List of Possible SCOTUS Candidates*, EMPIRICAL SCOTUS (Dec. 23, 2016), <https://empiricalscotus.com/2016/12/23/profiling-state-justices/>.

⁹ Joan Larsen, *Blue Cross Blue Shield of Michigan Speech*, Nov. 10, 2016, available at Sen. Comm. on the Judiciary, 115th Cong., Joan L. Larsen: Questionnaire for Judicial Nominees—Public Appendix 12(a) 358.

¹⁰ Joan Larsen, *Mich. Self-Insurers' Ass'n Speech*, Oct. 13, 2016, available at Sen. Comm. on the Judiciary, 115th Cong., Joan L. Larsen: Questionnaire for Judicial Nominees—Public Appendix 12(a) 373.

¹¹ Joan Larsen, *Remarks Justice Joan Larsen Michigan Manufacturers Association*, Dec. 1, 2015, available at Sen. Comm. on the Judiciary, 115th Cong., Joan L. Larsen: Questionnaire for Judicial Nominees—Public Appendix 12(a) 541.

immunity to bar a claim for injuries by a woman who broke her ankle after stepping in a depression in a road surface that she alleged had not been reasonably maintained. 885 N.W.2d 445 (Mich 2016). In dissent, Justice Bridget McCormack wrote Larsen’s opinion is not “consistent with or supported by our prior precedent...” *Id.* at 462 (McCormack J., dissenting). In *Ragnoli v. North Oakland*, Larsen joined an order preventing a plaintiff who fell and injured herself in a dark, icy parking lot from having her case heard by a jury. 892 N.W.2d 377 (Mich. 2017). Finally, in *Barton-Spencer v. Farm Bureau Life Ins. Co. of Mich.*, Larsen joined an opinion holding that a plaintiff had signed away her right to a jury trial concerning attorney fees under an obscure contract provision. 892 N.W.2d 794 (Mich. 2017).

It is also worth noting that Larsen, a member of The Federalist Society, was on the list of potential Supreme Court nominees that the Society presented to President Trump during his campaign. The President said at that time that all of his nominees would “automatically” overturn *Roe v. Wade*.¹² Larsen has often expressed devotion to the legacy of her mentor, the late Justice Antonin Scalia, and to the principle of originalism, a theory of jurisprudence that rejects key holdings over the past century, and has said that originalism’s “enemy is change imposed by judges.”¹³ This stance raises questions about her commitment to properly apply key court decisions that have expanded the rights of people of color, women, and LGBTQ Americans.

Finally, there are concerns about the heavy-handed way in which the Administration has managed Larsen’s nomination, avoiding consultation with her home-state senators. In the past, before making circuit court nominations, Presidents consulted with home-state senators, including those of the other party, and reached agreement on consensus nominees. For example, in 2013 President Obama allowed two Republicans, Senators Orrin Hatch and Mike Lee, to lead the search to fill a vacancy on the Tenth Circuit. He only nominated Carolyn McHugh after both senators provided her name to the White House.¹⁴ Even in situations in which the White House led the search, senators were involved in the process.¹⁵ In stark contrast, the White House did not consult with Senators Stabenow and Peters regarding Justice Larsen’s nomination. As Senator Stabenow made clear, the White House merely “informed” her that it would nominate Larsen¹⁶ — the same as no consultation at all.

BIOGRAPHY

Larsen was born in 1968 and graduated from the University of Northern Iowa in 1990. She received her J.D. from Northwestern University School of Law. Larsen also served as an editor on the *Northwestern University Law Review*.¹⁷ After graduation, Larsen clerked for Judge

¹² Dan Mangan, *Trump: I'll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 16, 2016, 9:31 PM), <http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>; see also Christine Wang, *Trump comes out hard for the Second Amendment, attacks Justice Ginsburg*, CNBC (Oct. 20, 2016, 9:59 PM), <http://www.cnbc.com/2016/10/19/trump-comes-out-hard-for-the-second-amendment-attacks-justice-ginsburg.html>.

¹³ Joan Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71:5 OHIO ST. L. J. 959, 984 (2010), available at <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/03/71.5.larsen.pdf>.

¹⁴ Harsh Voruganti, *The Consultation Double-Standard*, THE VETTING ROOM (June 9, 2017), <https://vettingroom.org/2017/06/09/the-consultation-double-standard/>.

¹⁵ See Sen. Comm. on the Judiciary, 113th Cong., Gregg Costa: Questionnaire for Judicial Nominees 50 (2014), <https://www.judiciary.senate.gov/imo/media/doc/Gregg-Costa-Senate-Questionnaire-Final.pdf>; see also Sen. Comm. on the Judiciary, 113th Cong., Nancy Moritz: Questionnaire for Judicial Nominees 47 (2014), <https://www.judiciary.senate.gov/imo/media/doc/Nancy-Moritz-Senate-Questionnaire-Final.pdf>.

¹⁶ Seung Min Kim, *Cotton prepared to toss Senate's 'blue slip' rule on judicial nominees*, POLITICO (May 9, 2017, 5:10 PM), <http://www.politico.com/story/2017/05/09/cotton-senate-judges-blue-slip-238168>.

¹⁷ Faculty Bio: Larsen, Joan L., <https://www.law.umich.edu/FacultyBio/Pages/Faculty-Bio.aspx?FacID=llarsen> (last visited Jan. 11, 2017).

David Sentelle of the U.S. Circuit Court of Appeals for the District of Columbia and Justice Antonin Scalia. She then briefly worked at Sidley Austin.¹⁸

Larsen spent several years in academia, at George Washington University Law School and University of Virginia, before going to work for the Justice Department's Office of Legal Counsel, from 2002 to 2003. In addition to her opinion on the rights of detainees, according to her Judiciary Committee questionnaire, she authored opinions on the "Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges"¹⁹ and "Whether Section 319(b) of the Patriot Act Includes Authority for the Issuance of Grand Jury Subpoenas to Foreign Banks That Maintain Correspondent Accounts in the United States."²⁰

She then became an adjunct professor of law at the University of Michigan, where she taught until Governor Rick Snyder appointed her, in September 2015, to the Michigan Supreme Court, to complete the remainder of Justice Mary Beth's Kelly term. On February 16, 2016 the New York Times published Justice Larsen's op-ed *What I Learned from Justice Scalia*, praising her former boss after his death. A few months later, on May 18, 2016, Larsen was placed on Trump's initial list of 11 judges he would consider nominating to the Supreme Court.²¹

¹⁸ *Id.*

¹⁹ The Equal Opportunity Commission's Authority to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Admin. Judges, 27 Op. O.L.C. 24 (Jan. 6, 2003), available at <https://www.justice.gov/olc/file/477026/download>.

²⁰ Memorandum for Michael Chertoff Assistant Attorney General, Criminal Division Whether Section 319(b) of the Patriot Act Includes Authority for the Issuance of Grand Jury Subpoenas to Foreign Banks That Maintain Correspondent Accounts in the United States (Aug. 6, 2002), available at Sen. Comm. on the Judiciary, 115th Cong., Joan L. Larsen: Questionnaire for Judicial Nominees—Public Appendix 12(a) 324, and at <https://www.hsdl.org/?abstract&did=741686>.

²¹ Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, THE NEW YORK TIMES (May 18, 2016), <http://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

On November 8, 2016, Larsen was elected to fill the remainder of Kelly's unexpired term.²²

JUDICIAL PHILOSOPHY

As noted, Larsen clerked for Justice Scalia, and has widely praised him, calling him a "great judge for the people of the United States."²³

But her statement raises questions, because there are many communities that have not been well served by Scalia's legacy. Justice Scalia said that the Constitution does not prohibit discrimination on the basis of sex.²⁴ He dissented from the Court's finding that government prosecutors could not eliminate jurors simply on the basis of sex. *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) (Scalia, J. dissenting). He would have overturned *Roe v. Wade*, and once compared a woman's decision to exercise critical reproductive rights to the practice of polygamy and bestiality. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Scalia, J., dissenting). He struck down a portion of the Violence Against Women Act that allowed victims of gender-motivated violence to sue in federal court. *United States v. Morrison*, 529 U.S. 598 (2000). He also restricted the ability of women to sue their employers over gender-based wage

²² 2016 Michigan Official General Election Results, MICHIGAN DEPT OF STATE, http://miboecfr.nictusa.com/election/results/2016GEN_CENR.html (last updated Jan 11, 2017).

²³ Dean Cousino, *Justices urge support for 'rule of law' judges*, MONROE NEWS (Oct. 13, 2016), <http://www.monroenews.com/news/20161013/justices-urge-support-for-rule-of-law-judges>.

²⁴ Amanda Terkel, *Scalia: Women Don't Have Constitutional Protection Against Discrimination*, HUFFINGTON POST (Jan. 3, 2011), http://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution_n_803813.html.

discrimination in *Lilly Ledbetter*. [550 U.S. 618 \(2007\)](#).

And the record doesn't end there. Scalia dissented from a decision that found that a UPS driver could proceed on her claim under the Pregnancy Discrimination Act when UPS failed to accommodate her pregnancy. [Young v. United Parcel Service, 135 S.Ct. 1338 \(2015\) \(Scalia J., dissenting\)](#). He cast the sole vote in favor of allowing the Virginia Military Institute to continue denying women admission. [United States v. Virginia, 518 U.S. 515 \(1996\) \(Scalia J. dissenting\)](#). He struck down a key section of the Voting Rights Act of 1965. [Shelby County v. Holder, 133 S.Ct. 2612 \(2013\)](#). He suggested African Americans should go to "slower track schools."²⁵ He openly demeaned LGBTQ Americans, blasting lawyers for supporting the so-called "homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." [Lawrence v. Texas, 539 U.S. 558 \(2003\) \(Scalia J., dissenting at 602\)](#).

Given her effusive praise of Justice Scalia, Larsen must address whether she shares his vision of the Constitution and belief in the denial of rights to so many Americans. In fact, now-Justice Kagan faced questioning from Republican senators about her praise for Justice Thurgood Marshall, for whom she clerked. Senator Jon Kyl asked Justice Kagan whether she "agree[d] with Justice Marshall's view of the role of the court in constitutional interpretation."²⁶ And now-Attorney General Sessions explicitly criticized Justice Kagan for

having "associated herself with well-known activist judges," including Justice Marshall. If Justice Kagan could be questioned about her view of Marshall, a lawyer and jurist who was instrumental in ending de jure segregation in America, it is legitimate to ask Justice Larsen about her praise of a Justice who did not believe that the Constitution prohibits sex discrimination or that LGBTQ Americans have equal rights.

Unfortunately, the evidence suggests Larsen does share Justice Scalia's narrow view of critical legal protections. In a 2010 law review article, Larsen said that she believes that "originalism is often caricatured as being at war with change. Originalists are portrayed as pining for a return to a bygone era, which they seek to bring about through ossification of constitutional rules."²⁷ According to Larsen, this isn't true, because "more sophisticated audiences, however, understand that originalism typically is quite comfortable with change; *its only enemy is change imposed by judges*."²⁸ She adds later that "an originalist's Constitution can thus easily keep up with the times. Judges are just not licensed to be the engines of change."²⁹

This view calls into question her commitment to essential constitutional rights, advanced through the courts, including those involving civil rights for African Americans, women's rights, and LGBTQ rights. The rulings in *Brown v. Board of Education*, *Loving v. Virginia*, *Griswold v. Connecticut*, *Roe v. Wade*, *Lawrence v. Texas*, and *Obergefell v. Hodges*, to name just a few, can all be

²⁵ Stephanie Mencimer, *Justice Scalia Suggests Blacks Belong at 'Slower' Colleges*, MOTHER JONES (Dec. 9, 2015), <http://www.motherjones.com/politics/2015/12/justice-scalia-suggests-blacks-belong-slower-colleges-fisher-university-texas/>.

²⁶ *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.* (2010) <https://www.congress.gov/111/chrq/shrq67622/CHRG-111shrq67622.htm>.

²⁷ Larsen, *supra* note 11, at 984.

²⁸ *Id.* (emphasis added).

²⁹ *Id.* at 985.

considered “change” that emanated from the courts.

Similarly, in Larsen’s speech accepting the Republican nomination for the Michigan Supreme Court, she said:

Michigan voters will choose this November between 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.³⁰

Larsen must be asked which cases or judges she was referencing when she spoke about “an all-powerful judiciary” that “rewrite[s] the laws.”³¹

Moreover, in 2000, Larsen wrote that the fundamental “divide in contemporary constitutional law [is] between liberals’ impulse to constitutionalize - and therefore ‘judicialize’- every important question and conservatives’ impulse to leave every question to ordinary politics.”³²

While she criticizes “liberals” use of the courts, nowhere in any of her writings or speeches does she criticize *conservatives* for trying to advance their agenda through the courts. This is despite the fact that in recent years the right has sought to use the courts, rather than “ordinary politics,” to challenge the Affordable Care Act, the Voting Rights Act, immigration reforms, environmental regulations, and civil rights guidance, to name a few examples. See [*National Federation of Independent Business v. Sebelius*, 567 U.S. 519 \(2012\)](#) (upholding the constitutionality of the ACA); [*Burwell v. Hobby*](#)

30 Joan Larsen, Convention Acceptance Speech, Address to Chairman and Convention Delegates (2016) (transcript available at Sen. Comm. on the Judiciary, 115th Cong., Joan Louise Larsen: Questionnaire for Judicial Nominees—Public Appendix 12(d), at 416).

31 *Id.*

32 Joan L. Larsen, *Constitutionalism Without Courts?*, 94 NW. U. L. REV. 983, 986-7 (2000).

[*Lobby*, 134 S. Ct. 2751 \(2014\)](#) (determining that closely held corporations could opt out of providing birth control access to their employees); [*Shelby County v. Holder*, 133 S. Ct. 2612 \(2013\)](#) (striking down a key part of the Voting Rights Act); [*United States v. Texas*, 136 S. Ct. 2271 \(2016\)](#) (leaving in place a lower court order staying the President’s executive order that protected the parents of “dreamers” from deportation); [*Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 \(2014\)](#) (upholding the ability of the EPA to regulate greenhouse gas emissions); [*Texas v. United States*, 201 F.Supp.3d 810 \(N.D. Tex., Aug. 21, 2016\)](#) (issuing a preliminary injunction preventing the Obama administration’s protections of transgender students from going into effect).

Based on Larsen’s past statements, she bears the burden of convincing the Senate and the American people that she would protect the constitutional rights of all Americans. Her writings and statements raise serious doubts about whether she would be a fair, unbiased jurist on the federal bench, or an ideological actor who would regularly side with the conservative agenda while regularly dismissing “liberals” seeking to enforce constitutional rights and legal protections.

EXECUTIVE POWER

Larsen worked for the Justice Department’s Office of Legal Counsel (“OLC”) in 2002. During her time with OLC, several legal

opinions were issued authorizing “torture, indefinite detention, warrantless wiretapping, and other abuses of power.”³³ Although Larsen’s direct role in these legal opinions is not clear, through ongoing litigation the ACLU discovered that Larsen co-authored an undisclosed memo in March 2002 regarding the *habeas corpus* rights of detained prisoners.³⁴

This memo has not been made public, and is not listed on her Senate Judiciary Committee questionnaire. When she was appointed to the Michigan Supreme Court, Kary L. Moss, executive director of the ACLU in Michigan, stated:

[G]iven Professor Larsen’s tenure in the OLC, which authorized torture, warrantless wiretapping, indefinite detention and other abuses, this appointment should be accompanied by full disclosure about the role Larsen played in the development of those policies. In addition, we strongly urge Professor Larsen to ask the DOJ to disclose the contents of the memo she penned regarding unlawful and indefinite detention.³⁵

Even without the OLC opinion, it is clear that Larsen favors an expansive view of executive power. For example, in a 2006 op-ed in *The Detroit News*, Larsen praised President George W. Bush’s signing statement limiting the application of the McCain Amendment, which outlawed the use of torture against persons in the custody of the United States. In praising signing statements more broadly, Larsen said that the President is permitted in some

circumstances to ignore acts of Congress: “Denying the president a constitutional voice is the real threat to our system of separated powers. . . . [I]f circumstances arose in which the law would prevent him from protecting the nation, he would choose the nation over the statute.”³⁶

Larsen has also written a number of articles about the separation of powers. For example, in *One Person One Office: Separation of Powers or Separation of Personnel*, she argues that the Incompatibility Clause, which forbids an individual from serving in both the Executive and Legislative branches simultaneously, is critical because it “strengthen[s] the Presidency.”³⁷

In the same article, Larsen is very critical of congressional oversight of the executive branch. As she writes:

Although the committee system is nowhere contemplated or described in the text of the Constitution, Congress has, for most of our history, maintained an extensive and costly extra-constitutional network of committees that watch over the work of the various Cabinet departments and agencies. Commentators have long recognized the power and significance of these unplanned appendages of the Legislative Department...The constitutional bar of the Incompatibility Clause is, in our judgment, the main reason these stunted growths have not overrun the

³³ Dan Nguyen & Christopher Weaver, *The Missing Memos*, PRO PUBLICA, (Apr. 16, 2009 6:00 PM), <https://www.propublica.org/special/missing-memos?s=1>.

³⁴ Kary L. Moss, *Statement on Appointment of Bush Administration Attorney to Michigan Supreme Court*, ACLU, (Oct. 1, 2015), <http://www.aclumich.org/article/statement-appointment-bush-administration-attorney-michigan-supreme-court>.

³⁵ *Id.*

³⁶ Joan Larsen, *Bar Group is Wrong: Presidents Can Interpret Laws They Sign*, THE DETROIT NEWS (Sept. 13, 2006), https://www.law.umich.edu/newsandinfo/pdf/Documents/06_09_september_bargroup.pdf.

³⁷ Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1048, 1086 (1994).

departments and agencies they oversee.³⁸

She describes that the “unplanned congressional committee system” emerged because “the ambition and love of power of our Senators and Representatives caused them to lust after the patronage and media glory that a committee post could bring.”³⁹ She criticizes “the shadow parliamentary system that has grown up in Congress”—i.e., the committees, which “are, of course, grotesque and well known.”⁴⁰

OTHER LEGAL VIEWS

I. LGBTQ RIGHTS

Larsen objected to the Supreme Court’s decision in *Lawrence v. Texas*, which struck down discriminatory sodomy laws. She said “it would be an understatement in the extreme to call the Supreme Court’s decision in *Lawrence v. Texas* revolutionary.”⁴¹ While she focused her article on whether international law could be applied to a U.S. case, she called the decision “remarkable” and asserted that it “should alarm us” that the majority allegedly cited international norms without what she considered a sufficient explanation.

Moreover, she criticized the Justice Department for not defending the constitutionality of the Defense of Marriage Act, or DOMA.⁴²

³⁸ *Id.* at 1090.

³⁹ *Id.* at 1090.

⁴⁰ *Id.* at 1115.

⁴¹ Joan Larsen, *Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1289 n. 26 (2004).

⁴² Joan Larsen, *When Can the President Refuse to Enforce the Law*, Speech to Northern Kentucky University Federalist Society for Law & Public Policy Studies (Nov. 9, 2012).

As a state Supreme Court Justice, moreover, Larsen failed to give *Obergefell v. Hodges* full effect. In *Mabry v. Mabry*, 499 Mich. 997 (Aug. 2, 2016), Justice Larsen joined the four other Republican-appointed justices in refusing to review an appellate court decision concerning whether a gay parent, who did not have custody of his or her child and had separated from their long-term partner, could obtain parental rights. In a dissent, Justice Bridget McCormack argued that the court should have granted certiorari to hear the case. McCormack emphasized that *Obergefell* showed that same-sex couples had been unconstitutionally denied the right to marry in Michigan and that by refusing to consider the case the majority was exacerbating this state-inflicted injury. Justice McCormack noted that a number of other state supreme courts took up similar cases and ruled in favor of parental rights. See, e.g., *Conover v. Conover*, 448 Md. 548 (2016); *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015). “At the very least,” wrote Judge McCormack, “this question deserves this Court’s considered analysis.”

II. SENTENCING COMMISSION

Larsen has argued that the U.S. Sentencing Commission is unconstitutional. In a law review article, she and her co-author lambasted the Supreme Court for its decision in *Mistretta v. United States*, writing:

More dramatically, in *Mistretta v. United States*, the issue arose as to whether three inferior federal judges could sit on the U.S. Sentencing Commission if the Commission was, as the Department of Justice argued,

an agency of the executive department. The majority of the Court, idiotically concluding that the Commission was an Article III entity, allowed dual service in this instance. Justice Scalia wrote an impassioned dissent that correctly and elegantly explained the Court's separation-of-powers errors in upholding the constitutionality of the U.S. Sentencing Commission.⁴³

III. CRIMINAL JUSTICE

Larsen, in an article written as a student, criticized the fact that criminal defendants were being denied the right to present exculpatory evidence because of interpretations of the Federal Rules of Evidence "formulation of the common-law propensity rule."⁴⁴

Moreover, in her article, *Ancient Juries and Modern Judges*, Larsen discussed the importance of the jury in providing protections to criminal defendants. She wrote, "social movements, or even the Court itself, through the odds it is making in the direction of original understanding, will convince the public of forgotten virtues of jury justice, like contextualism, fine-grainedness, and perhaps even mercy."

After Justice Scalia died, Larsen wrote that "her proudest moment as his clerk was convincing him [Justice Scalia], with two sleepless nights of research into dusty old precedents, that a criminal defendant should win a case that none of the justices originally thought he should win."⁴⁵

As a justice on the Michigan Supreme Court,

⁴³ Calabresi & Larsen, *supra* note 37 at 1138.

⁴⁴ Joan Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U.L. REV. 651, 651-53 (1993).

⁴⁵ Joan Larsen, *What I Learned From Justice Scalia*, THE NEW YORK TIMES (Feb 16, 2016), https://www.nytimes.com/2016/02/16/opinion/what-i-learned-from-justice-scalia.html?_r=0.

Larsen joined a dissent in *People v. Radandt*, 882 N.W.2d 533 (2016). There, the police knocked on a suspect's front door, did not get a response, and then walked around back where they observed a fan blowing air from the second story, and they smelled marijuana. They returned with a warrant, found marijuana, and arrested and charged the defendant.

The Michigan Supreme Court permitted the inclusion of the evidence. Larsen joined a dissent by Justice Bridget McCormack, in which McCormack wrote that the police acted unconstitutionally by going into the backyard without a warrant. She wrote that "exercising the right to retreat into one's home and to decline to speak with the person knocking on the door does not give greater license to the person knocking to proceed to other areas of one's property." *Id.* at 537.

Finally, she states in a 2010 law review article that the death penalty is clearly constitutional under an originalist framework.⁴⁶

IV. TENTH AMENDMENT

Larsen criticized the anti-commandeering doctrine articulated in *New York v. United States* and *Printz v. United States*. In a law review article, she and her co-author Steven Calabresi wrote:

[S]tate judges have been asked to adjudicate cases involving federal questions, and states executives to a much lesser degree have been asked to execute and implement

⁴⁶ Larsen, *Ancient Juries*, *supra* note 13.

federal law. Saikrishna Prakash, in his thoughtful article entitled *Field Office Federalism*, persuasively explains how *state* officials can constitutionally be asked or even forced to carry out these *federal* tasks.⁴⁷

The doctrine was recently used by courts to rule that the Trump Administration's efforts to commandeer local law enforcement to enforce immigration law were unconstitutional.

CONCLUSION

Though she has only sat on the Michigan Supreme Court for a year and, for the most part, has avoided pronouncements on many controversial constitutional issues, Joan Larsen is no stealth nominee. Her law review articles, clerkships, work for the Bush Justice Department, and work on the Michigan Supreme Court cumulatively suggest that Justice Larsen would be a very conservative federal judge. She seems to be a proponent of originalist constitutional theory, and there are serious concerns about her view of executive power, which could be used to justify a President running rampant under the guise of national security and executive privilege. Justice Larsen's nomination raises real concerns and should be carefully reviewed by senators of both parties.

⁴⁷ Calabresi & Larsen, *supra* note 37, at 1150.