

ATTACHMENTS: MEDIA COVERAGE



Under the Radar

Josh Gerstein on the Courts, Transparency, & More

POLITICO

Senators take fire over questions for Catholic judicial nominee

By JOSH GERSTEIN

09/11/2017 08:04 AM EDT

At least two prominent university presidents are accusing senators of religious bias for challenging a Catholic judicial nominee over her faith-driven views during a confirmation hearing last week.

University of Notre Dame President Rev. John Jenkins and Princeton University President Christopher Eisgruber both wrote letters objecting to lawmakers' [pointed questions on the topic to Notre Dame law professor Amy Barrett](#) last week, whom President Donald Trump has nominated to the Chicago-based 7th Circuit U.S. Court of Appeals.

Jenkins wrote directly to the Senate Judiciary Committee's ranking Democrat, Dianne Feinstein of California, taking issue with her statements that Barrett's worldview seems strongly driven by "dogma."

"Your concern, as you expressed it, is that 'dogma lives loudly in [Professor Barrett], and that is a concern when you come to big issues that large numbers of people have fought for years in this country,'" Jenkins [wrote](#). "I am one in whose heart 'dogma lives loudly,' as it has for centuries in the lives of many Americans, some of whom have given their lives in service to this nation.

Indeed, it lived loudly in the hearts of those who founded our nation as one where citizens could practice their faith freely and without apology."

"It is chilling to hear from a United States Senator that this might now disqualify someone from service as a federal judge. I ask you and your colleagues to respect those in whom 'dogma lives loudly'—which is a condition we call faith," the Notre Dame president wrote.

At the hearing, Feinstein said she was deeply worried that Barrett's fidelity to Catholic theology would lead her to ignore Supreme Court precedents on issues like abortion.

"Dogma and law are two different things," Feinstein declared. "And I think whatever a religion is, it has its own dogma. The law is totally different."

Barrett insisted that she'd abide by all precedent and that her writings on the subject actually explain that Catholic judges who find a conflict between their religious views and a specific case need to step aside from that case.

"It's never appropriate for a judge to impose that judge's personal convictions, whether they arise from faith or anywhere else, on the law," Barrett said during the hearing. She also distanced herself from views expressed in an article on the subject two decades ago with a more senior co-author.

Eisgruber's [letter](#), addressed to Feinstein and Senate Judiciary Committee Chairman Chuck Grassley, urged senators to "refrain from interrogating nominees about the religious or spiritual foundations of their jurisprudential views."

"Because religious belief is constitutionally irrelevant to the qualifications for a federal judgeship, the Senate should not interrogate any nominee about those beliefs. I believe, more specifically, that the questions directed to Professor Barrett about her faith were not consistent with the principle set forth in the Constitution's 'no religious test' clause," Eisgruber wrote. He cited no specific questions he found inappropriate.

During the hearing Wednesday, two Republicans—Ben Sasse of Nebraska and Jeff Flake of Arizona—also argued that the questioning of Barrett about her Catholic views crossed the line.

"I think some of the questioning you've been subjected to today seems to miss some of these fundamental constitutional protections that we all have," Sasse said.

A spokeswoman for Feinstein had no comment on the letters, but Feinstein's office also gave reporters background material last week highlighting several statements by Barrett, including a speech to Notre Dame graduates in 2006 where she said: "Your legal career is but a means to an end, and . . . that end is building the kingdom of God."

Other Democrats raised similar concerns about Barrett's writings on the interplay between Catholicism and judging, including Sen. Dick Durbin of Illinois and Mazie Hirono of Hawaii.

While Democrats challenged Barrett most aggressively on the issue, Senate Judiciary Committee Chairman Chuck Grassley and one of the Senate's most conservative Republicans, Ted Cruz of Texas, also asked Barrett about her views on how Catholic judges should handle conflicts between their faith and their judicial duties.

"I've read some of what you've written on Catholic judges in capital cases and, in particular, as I understand it, you argued that Catholic judges are morally precluded from enforcing the death penalty," Cruz said.

"A little bit narrower than that," Barrett said.

"I was going to ask you to just please explain your views on that, because that obviously is of relevance to the job for which you have been nominated," Cruz said.

Josh Gerstein is a senior reporter for POLITICO.



President Eisgruber asks Senate committee to avoid ‘religious test’ in judicial appointments

by the Office of Communications
Sept. 8, 2017 4:34 p.m.

Princeton University President Christopher L. Eisgruber sent the following letter Friday, Sept. 8, to the Republican chair and the ranking Democrat on the U.S. Senate Committee on the Judiciary.

September 8, 2017

The Honorable Charles E. Grassley
Chairman
The United States Senate Committee on the Judiciary
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
The United States Senate Committee on the Judiciary
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I write, as a university president and a constitutional scholar with expertise on religious freedom and judicial appointments, to express concern about questions addressed to Professor Amy Barrett during her confirmation hearings and to urge that the Committee on the Judiciary refrain from interrogating nominees about the religious or spiritual foundations of their jurisprudential views.

Article VI of the United States Constitution provides explicitly that “no religious test shall ever be required as a qualification to any office or public trust under the United States.” This bold endorsement of religious freedom was among the original Constitution’s most pathbreaking provisions. The Supreme Court’s unanimous decision in *Torcaso v. Watkins* (1961), holding that the First and Fourteenth Amendments render this principle applicable to state offices and that it protects non-believers along with believers of all kinds, is among the greatest landmarks in America’s jurisprudence of religious freedom. Article VI’s prohibition of religious tests is a critical guarantee of equality and liberty, and it is part of what should make all of us proud to be Americans.

By prohibiting religious tests, the Constitution makes it impermissible to deny any person a national, state, or local office on the basis of their religious convictions or lack thereof. Because religious belief is constitutionally irrelevant to the qualifications for a federal judgeship, the Senate should not interrogate any nominee about those beliefs. I believe, more specifically, that the questions directed to Professor Barrett about her faith were not consistent with the principle set forth in the Constitution’s “no religious test” clause.

I am sympathetic to the challenges that your committee faces as it considers nominees to the federal bench. In my book *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton University Press, 2007), I argued that your committee need not defer to presidential nominations, and that the Constitution permits senators to probe the judicial philosophies of nominees. It is, however, possible to probe those philosophies without reference to the religious affiliation or theological views of a nominee, and Article VI insists that the Senate observe that restriction.

The questions asked of Professor Barrett about her Catholic faith appear to have been provoked in part by her co-authored article, “Catholic Judges in Capital Cases” (1998). I have read that

article, and I believe that the views expressed in it are fully consistent with a judge's obligation to uphold the law and the Constitution. As a university president committed to free speech, academic freedom, and religious pluralism, I must add that, in my view, Professor Barrett's qualifications become stronger by virtue of her willingness to write candidly and intelligently about difficult and sensitive ethical questions: our universities, our judiciary, and our country will be the poorer if the Senate prefers nominees who remain silent on such topics.

I am deeply concerned by the harsh and often unfair criticisms that are now routinely levelled from both sides of the political spectrum against distinguished judicial nominees who would serve this country honorably and well. On the basis of her accomplishments and scholarly writing, I believe that Professor Barrett is in that category. She and other nominees ought in any event to be evaluated on the basis of their professional ability and jurisprudential philosophy, not their religion: every Senator and every American should cherish and safeguard vigorously the freedom guaranteed by the inspiring principle set forth in Article VI of the United States Constitution.

Respectfully submitted,

Christopher L. Eisgruber

cc: Senator Orrin G. Hatch
Senator Patrick Leahy
Senator Lindsey Graham
Senator Dick Durbin
Senator John Cornyn
Senator Sheldon Whitehouse
Senator Michael S. Lee
Senator Amy Klobuchar

ANTI-DEFAMATION LEAGUE (ADL)
DIRECTOR JOHNATHAN GREENBLATT



Feinstein, Durbin dangerously close to pushing religious test on judge

By Jonathan A. Greenblatt, opinion contributor — 09/15/17 04:05 PM EDT [433](#)
The views expressed by contributors are their own and not the view of The Hill



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One of the prides of this country is the way we approach matters of religion related to individuals, government and society. In one of the last cases she addressed as a Supreme Court

Justice, Sandra Day O'Connor commented that we have a system in place regarding religion in this country that we never would want to exchange with any other country on earth.

What she was referring to was the unique balance established by the First Amendment — the separation of church and state, the protection of the free exercise of religion — and by Article Six of the Constitution — the rejection of any religious qualification for public office. All of which presents an opportunity for religion to flourish and for government to maintain independence from religion and religion to maintain its independence from government.

All of this comes to mind as the latest controversy about the role of religion in America bubbled to the surface with [the line of questioning](#) by Senators [Dianne Feinstein](#) (D-Calif.) and [Dick Durbin](#) (D-Ill.) of Federal Appeals Court nominee Amy Coney Barrett. Both raised Barrett's religious beliefs in a way that set off alarm bells.

Clearly, both senators were concerned, in light of White House positions, about the future of the rights of women to make decisions about abortion as well the treatment of the LGBT community. Knowing full well that the candidate, like other judicial nominees, would not tip her hand as to how she would vote on specific cases, the senators probed the sensitive area of how her religious views would affect her decision-making on the bench.

It is one thing for an individual to volunteer comments about the influence of religion on their life, presidential candidates do it all the time. It is quite another for someone being grilled at a Senate committee by senators who clearly are unhappy with her nomination to be forced to speak about her religiosity.

This is a moment to reiterate that there can be no religious litmus test for public officials seeking office and that surely includes judicial nominees whose fitness to serve should be based on the individual's merit: intellect, ethics, experience and achievements.

The founders of this country took the no-religious-test-for-office theme so seriously that it was in the original Constitution. Feinstein and Durbin, in their language, seemed perilously close to violating that clause.

Still, there are mitigating circumstances. Barrett, then a professor at Notre Dame Law School, had co-published an article in 1998 entitled: "[Catholic Judges in Capital Cases](#)." In it, she raised difficult questions about when a believing Catholic, living with the obligation to follow church teachings, should or should not recuse herself in cases of capital punishment.

It is a nuanced analysis but it is heavily predicated on the idea that a good Catholic cannot in good conscience violate Church teachings against capital punishment.

During the course of the article, Barrett and her co-author make clear that elements of the nuance in Church teachings about capital punishment do not apply to the issue of abortion where

anything supporting or abetting abortion is a clear and extreme violation of Church ethics and morality.

Had no such article appeared, the comments by the two senators in the hearing clearly would have crossed the line of a religious test for office. But the nominee herself had raised the matter in a profound way through this lengthy article and, to some extent, brought this line of questioning upon herself.

Still, with it all, one is left with an uncomfortable feeling about the whole episode. Particularly at a time when polarization characterizes our politics and religion is used as a tool for pushing political agendas. It would have been far better if Feinstein and Durbin had found better ways to understand where Barrett is coming from.

As Barrett herself notes in her article, appearances of bias are almost as important as bias itself. Feinstein and Durbin left an impression that it is Barrett's Catholic beliefs that are the problem rather than her judicial philosophy. This may or may not cross the line in violating the Article Six stricture, but it definitely enables those who want to see it that way to make a good case.

Religious freedom is a true source of strength for this nation. But that doesn't mean that it is always easy to sort out how it plays out day to day.

Public figures should be particularly sensitive to these realities when they engage in official discourse on matters that touch on religious belief.

Jonathan A. Greenblatt is CEO and National Director of the [Anti-Defamation League](#).

Perspective



Senators should stop asking about judicial nominees' religious beliefs

There are other ways to inquire about their fitness for office — that don't violate the Constitution.



Neomi Rao, President Trump's nominee for a seat on the U.S. Court of Appeals for the District of Columbia Circuit, appears before the Senate Judiciary Committee in February. (J. Scott Applewhite/AP)

By Paul J. McNulty and John A. Sparks
March 4, 2019 at 6:00 a.m. EST

At her Feb. 5 confirmation hearing for the U.S. Court of Appeals for the District of Columbia Circuit — to fill a vacancy resulting from Brett M. Kavanaugh's elevation to the Supreme Court — Neomi Rao faced [tough questioning](#) from Democrats on the Senate Judiciary Committee. Sen. Cory Booker (N.J.) interrogated her about her personal views on same-sex marriage.

“Do you believe [same-sex marriages] are a sin?” he asked. Rao avoided the question by insisting that she would put her personal views to the side when deciding cases. Booker persisted: “So you're not saying here whether you believe it is sinful for two men to be married?”

This is not the first time we have heard this troubling line of questioning.

In a 2003 hearing, [Sen. Charles E. Schumer](#) (D-N.Y.) said of Judge William Pryor, a nominee, that his “beliefs are so well known, so deeply held, that it's very hard to believe ... that they're

not going to deeply influence the way he comes about saying, ‘I will follow the law.’ ” In 2017, Sens. Dianne Feinstein (D-Calif.) and Richard J. Durbin (D-Ill.) engaged in similar colloquies with Amy Coney Barrett, a professor who was nominated for the U.S. Court of Appeals for the 7th Circuit. Barrett is a Catholic who taught at Notre Dame Law School. Her religious convictions are in line with Catholic teaching, and she had made her views known about abortion and capital punishment in writing and speaking before her nomination.

Casting aside respect for Barrett’s religious freedom, [Feinstein](#) observed, “When you read your speeches, the conclusion one draws is that dogma lives loudly within you.” Durbin followed up by asking Barrett if she considered herself an “orthodox Catholic.” Feinstein, by referring to “dogma,” undoubtedly meant the authoritative tenets and teachings of the Catholic Church. In these examples, as well as in the exchanges with Rao, senators were seeking to elicit responses or drawing conclusions based on the nominee’s religious views.

Are religious convictions fair game in the confirmation process? Not according to Article VI of the U.S. Constitution. Clause 3 reads as follows: “No religious test shall ever be required as a qualification to any office or public trust under the United States.” According to the limited records of the Constitutional Convention, this provision was approved almost unanimously. As [historian Gerard Bradley](#) has pointed out, the banning of religious tests for federal office is somewhat puzzling because it runs contrary to the actual practice in the states at the time of the adoption of the Constitution; many had religious tests for holding office. The same could be said of the First Amendment language prohibiting Congress from making any law “respecting an establishment of religion.” This protection was ratified at the very time when some states had “established” churches — that is, government-supported churches. However, the intention of the Founders in both Article VI and the First Amendment seems to be clear: The new national government would not favor, either by religious tests for office, or by tax support, particular religious denominations. It’s worth noting that in 1961, the Supreme Court in [Torcaso v. Watkins](#) extended the prohibition on religious tests to state governments. The court concluded that the states, like the federal government, invade “the freedom of belief and religion” protected by the First and 14th amendments when they impose religious tests for state positions.

That’s not to say the question of how religion might influence judges, broadly, is always off limits. In a 1998 law review article, which she co-wrote as a law student with Notre Dame Law School professor John Garvey (currently president of Catholic University), Barrett herself mused about a possible conflict between a Catholic judge’s allegiance to Catholic teaching opposing capital punishment and existing constitutional case law that supported capital punishment. Like the late Justice Antonin Scalia, Barrett concluded in the article that “judges cannot — nor should they try to — align our legal system with the Church’s moral teaching when the two diverge.” The recognition of that potential conflict apparently concerned certain members of the Judiciary Committee, although the article itself seemed to conclude that a judge in that position might have to consider recusing himself or herself.

But the way the Judiciary Committee has pursued the issue is over the line. Senate Democrats are *not* focused on the nominees’ general ethical moorings or their moral compasses, nor are they probing nominees’ allegiance to what is honest, true and right as they conduct themselves in

office. Instead, these questions and statements are meant to unmask particular tenets of potential judges' religious faith that the interrogators fear run counter to their own political stances on issues such as abortion and gay rights.

The Constitution authorizes the president to “nominate, and by and with the advice and consent of the Senate” appoint people for service as federal judges and justices on the Supreme Court, as well as other senior positions within the executive branch. The vast majority of these presidential nominees since the founding have not been subjected to the challenges of today's modern confirmation hearings. Even a hearing for a Supreme Court nominee was a rarity before the 1950s. Sandra Day O'Connor was the first nominee to have a televised confirmation hearing, in 1981. Since then, the TV cameras have afforded ambitious senators plenty of opportunity to grab the spotlight or placate their political base with unfriendly questions.

[Ignore the attacks on Neil Gorsuch. He's an intellectual giant — and a good man.](#)

Still, the Senate's confirmation authority was designed as a proper check on the executive's power of appointment. In [Federalist No. 76](#), Alexander Hamilton argued that the Senate's concurrence in the president's selections “would be an excellent check upon a spirit of favoritism in the president, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity. ... It would be an efficacious source of stability in the administration.” The drama of modern confirmation hearings may not be a necessary component of this responsibility, but it is appropriate for the Senate to consider a nominee's competency and character, or fitness for office, before appointment.

Questions relevant to a broad assessment of moral character are justified: Nominees for federal office ought to be people of good character in addition to being intellectually capable. The trustworthiness of a nominee's assurances that she will fulfill her responsibilities in accordance with the law rests in large measure on the nominee's reputation for integrity. However, it should not matter, for the purposes of the committee's questions, whether the foundation for the nominee's good character are firm religious convictions, or — by operation of God's common grace — a commitment to good behavior apart from religious belief.

So where do the inquiries that Democrats have been aiming at Republican judicial nominees fall? Are they proper questions about character and fitness, or do they exceed the boundaries set by Article VI? The questions exceed the limits of Article VI because of what they do and what they don't do: They don't tell the Judiciary Committee members anything about a nominee's integrity, character or suitability for office. They do, however, aim at making a public issue of the nominee's religious beliefs and how these convictions do not square with the questioner's own political posture on current divisive issues such as capital punishment, abortion and gay rights. Often questioners persist even after the nominees maintain that they will be guided only by the existing law and the Constitution that they take a solemn oath to uphold.

An insightful [Harvard Law Review note](#) on Article VI in 2007 concludes: “The drafters and proponents of the No Religious Test Clause would be astonished to learn that members of the

Senate Judiciary Committee have questioned judicial nominees under oath about their religious beliefs and the extent of those beliefs. ... Requiring a nominee under oath to profess a religious belief runs afoul of the clause [in Article VI].”

Nominees, presented with these types of questions, should firmly object to them, citing the wisdom of our Founders in adopting Article VI, Clause 3, of the Constitution. At stake is nothing less than the freedom of conscience enshrined in our national charter.

Paul J. McNulty is the ninth president of Grove City College and former deputy attorney general of the United States.

John A. Sparks is the retired dean of arts and letters at Grove City College and a fellow at the college’s Center for Vision & Values. He is a graduate of the University of Michigan Law School and a member of the State Bar of Pennsylvania.



[Monday, June 08, 2020](#)

'I thought we got away from religious tests': Clarence Thomas addresses Senate Democrats' litmus tests for Catholic judicial candidates

by [Becket Adams](#)

| April 14, 2019 09:33 AM



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Supreme Court Justice Clarence Thomas is unimpressed with Senate Democrats' attempts to apply religious tests to Roman Catholic judicial nominees.

That Thomas is saying anything at all on the subject is notable given his reputation for being tight-lipped.

"I thought we got away from religious tests," Thomas remarked this year during Pepperdine University School of Law's annual banquet. He was referring to Article VI of the Constitution, which states that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

Thomas' comments, which were flagged first by [the Daily Caller](#), came in response to being asked specifically about a moment in 2017 when Sen. Dianne Feinstein, D-Calif., told [Judge](#)

[Amy Coney Barrett](#) that the “[dogma lives loudly within you](#),” suggesting she was just *too* Catholic to be a federal judge.

"When you read your speeches, the conclusion one draws is that the dogma lives loudly within you," the California senator said. "And that's of concern when you come to big issues that large numbers of people have fought for, for years in this country."

Thomas said these supposed fears are bunk.

“I don’t think I know a single judge who has allowed religion to interfere with their jobs,” Thomas, himself a Roman Catholic, said at the Pepperdine banquet. “I think if you start the day on your knees, you approach your job differently from when you start thinking that someone anointed you to impose your will on others.”

Feinstein is not alone in winking at the know-nothing idea that Catholics are too compromised to serve on the courts. In December 2018, for example, Sens. Mazie Hirono, D-Hawaii, and Kamala Harris, D-Calif., suggested attorney Brian Buescher is unfit to serve as a federal judge on account of his membership in an “extreme” Catholic organization: the Knights of Columbus.

“The Knights of Columbus has taken a number of extreme positions,” Hirono claimed of the 137-year-old charitable group.

Harris, for her part, asked of the Catholic attorney: “Were you aware that the Knights of Columbus opposed a woman’s right to choose when you joined the organization?” and, “Have you ever, in any way, assisted with or contributed to advocacy against women’s reproductive rights?” and, “Were you aware that the Knights of Columbus opposed marriage equality when you joined the organization?”

Just so we are all on the same page: [The Knights do not profess anything that is not already Church doctrine](#). They’re in probably every parish in the U.S. They're not some crazy sect. The Knights are pro-life and pro-traditional marriage. This is not al Qaeda we are talking about.

Further, [as my Washington Examiner colleague Quin Hillyer notes](#), Feinstein, Sen. Dick Durbin, D-Ill., and Senate Minority Leader Chuck Schumer, D-N.Y., have been using anti-Catholic insinuations and innuendo since at least the early 2000s, back when Judge William Pryor was first being considered for the 11th U.S. Circuit Court of Appeals.

Senate Democrats are no strangers to suggesting Catholics are unfit to serve on the courts. It was only a matter of time before some of the higher profile Catholic judges voiced their dissent.