Rebels Without a Clause:
When Senators Run Roughshod Over the “No Religious Test” Clause
of the U.S. Constitution

Alexandra McPhee, Esq.

Background

Recent senate confirmation hearings have revealed a troubling pattern of questioning posed to presidential nominees by senators. These questions display a hostility toward religion and people of faith, highlighted most significantly in the treatment of those nominated for office by President Donald Trump.

Senators, particularly Democrats, have inappropriately interrogated nominees with comments and lines of questioning spanning theology, congregation membership, and associations with faith-based nonprofits, all seemingly with the intent to discredit the nominees. For example, because in his view “religion [has been] used as a ruse to discriminate,” Senator Cory Booker (D-N.J.) thought it was appropriate to ask a judicial nominee during her confirmation hearing whether she thought same-sex relationships were a “sin.” Senator Bernie Sanders (I-Vt.) found that a nominee was “really not someone who is what this country is supposed to be about” because of the nominee’s expression of his Christian theological beliefs. And Senator Dianne Feinstein (D-Calif.), who referred to religion as a “dogma,” said of a Catholic nominee, that “the conclusion one draws is that the dogma lives loudly within you. And that’s of concern . . . .”

The “No Religious Test” Clause

Commentators correctly point out that such questions violate the spirit—if not the terms—of the “No Religious Test” Clause, a constitutional provision that has received much attention in the past two years because of the questions. Senators frequently pose probing questions to nominees structured in such a way that a nominee’s affirmation of her beliefs or the role of religion in her life would cast her as discriminatory and unqualified for service.

In Article 6, Clause 3, of the U.S. Constitution, the Clause states that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” As Senator Chuck Grassley (R-Iowa) said while serving as chairman for the senate judiciary committee, “one of the most important founding principles” is that one should be deemed qualified based on their demonstrated ability rather than their religious affiliations. Disturbingly, senators have seen fit to buck this principle.

It is important to distinguish what questions should generally be considered appropriate or inappropriate. For instance, “[m]erely asking a nominee whether their beliefs might stop them from fulfilling their Constitutional duties is a relevant question.” But “[r]ejecting someone over their faith alone is unquestionably a religious test.” A senator should not deem a nominee “fit or unfit according to
his or her formal affiliation with one religious group or another.”9 And as Senator Mike Lee (R-Utah) explained, “asking [a] nominee about the particulars of his or her religious beliefs” is inappropriate because it will “inevitably expose those beliefs as somehow a qualifier or a disqualifier for public office.”10

Currently, the interrogations are led primarily by Democratic senators. The nominees are mostly up for judicial office, though not exclusively. The problem is that regardless of the political party of the senator, the nominee’s religious beliefs, or the particular office, these questions deter qualified candidates from pursuing public office at all. They imply that an otherwise upstanding nominee should be disqualified simply because of her religious beliefs or affiliation.

The fact of the matter is, a person’s faith informs every aspect of her life, and the career of a nominee of faith is no exception. Faith and religion are often the foundation for characteristics like integrity and honesty, which are qualities we want in candidates for public office. But the questions posed imply that faith and religion are incompatible with public service. This thinking threatens to create a deficit of true leaders who are often such great role models because of their faith.

Following is a timeline of incidents (starting with the most recent) in which nominees have faced inappropriate questions from senators aimed at discrediting the nominee based on their religious beliefs or affiliation.

**Timeline**

**February 2019** – Administrator of the Office of Information and Regulatory Affairs Neomi Rao11 was asked by Senator Cory Booker, “Do you believe [same-sex relationships are] a sin?” Senator Booker suggested this was an appropriate line of questioning because “religion [has been] used as a ruse to discriminate against African Americans.”

**January 2019** – William Barr12 was questioned by Senator Sheldon Whitehouse (D-R.I.) about a 1992 speech, and Senator Whitehouse quoted reports that said Barr “blamed secularism for virtually every contemporary societal problem.” Relying on this characterization, Senator Whitehouse asked, “About a quarter of American adults today are not religious. Do you still think that those Americans are responsible for virtually every contemporary societal problem? If not, what changed your mind?” Senator Whitehouse concluded, stating, “Given your stated views on the evils of secularism, what commitments will you make to ensure that non-religious career attorneys and staff at the Department are protected against disparate treatment on the basis of their secularism?”

**November/December 2018** – Paul Matey and Judge Brian Buescher13 received questions about their membership with the Knights of Columbus, a “Catholic fraternal benefit society” that provides extensive charitable services.14 Senator Kamala Harris (D-Calif.) questioned both nominees about whether they agreed with the organization’s traditionally held views on the sanctity of marriage and life. Senator Mazie Hirono (D-Hawaii) cast the organization as having “taken a number of extreme positions.” Senator Hirono also asked if, given the nominees’ membership, they would “deal with reproductive rights and abortion issues fairly and impartially.” She questioned whether Judge Buescher and Matey would end their memberships with it “to avoid any appearance of bias.” In addition, Senator Hirono asked Judge Buescher and Matey whether they “believe[d] federal funds should not be given to [those] providers who support abortion services.” Senator Hirono also asked each nominee about the health value of contraceptives and “what steps” each took “to make clear that [they did] not hold [those] views” reflected in statements by the Knights of Columbus.
October 2018 – Allison Rushing received questions from Senators Feinstein, Patrick Leahy (D-Vt.), Whitehouse, Chris Coons (D-Del.), Richard Blumenthal (D-Conn.), Hirono, Booker, and Harris about her participation in programs led by Alliance Defending Freedom (ADF), a nonprofit law firm created to litigate First Amendment violations affecting the Christian community. Senator Hirono questioned Rushing’s ability to render decisions impartially or fairly in cases involving the court-created right to abortion or involving litigants that identify as homosexual or transgender because of Rushing’s internship and speaking engagements with ADF. Senator Blumenthal asked, “Would you perform a same-sex wedding if asked to do so?” In questions related to ADF, Senators Whitehouse, Coons, Blumenthal, Hirono, and Booker relied on the characterization by the Southern Poverty Law Center (SPLC), a progressive activist group that frequently defames ideological opponents. In questions related to a separate speaking engagement, Senator Whitehouse asked, “In your view, are Judeo-Christian morality and homosexuality incompatible?” Senator Harris also asked Rushing whether she believed “that LGBT rights cannot be reconciled with religion.”

May 2018 – Judge Peter Phipps received questions about his membership in the Knights of Columbus from Senator Harris. Senator Harris asked whether Judge Phipps, as a member of the Knights of Columbus, would “defend the right to life of every human being, from the moment of conception to natural death,” whether he had to “swear an oath in order to join [the] organization,” whether “litigants in [his] court [could] expect a fair hearing” “when [the] group’s organizational values conflict with litigants’ constitutional rights,” and “how [he would] approach [the] constitutionally-protected right of abortion in [his] courtroom” “[a]s a member of a group that avowedly opposes abortion.”

April 2018 – Secretary of State Mike Pompeo was asked multiple times by Senator Booker during Secretary Pompeo’s confirmation hearing, “Yes or no, do you believe gay sex is a perversion?” Senator Booker also asked, “Do you have any views that the Muslim faith or people who believe in worshiping ‘other gods,’ is that just something negative in our country?” Senator Coons said during the same hearing, “I think it is important to have a sense on the record of your view of the religion of Islam and of our partnerships in the Muslim world.”

September 2017 – Judge Amy Barrett received questions from Senator Whitehouse about her ability to render decisions impartially or fairly because of a petition, which expressed views traditionally held by Catholics on the sanctity of life, marriage, and sexuality, that she signed in her private capacity. Senators Feinstein, Whitehouse, and then-Senator Al Franken referred to Judge Barrett’s speaking engagements with ADF and relied on information about it from the SPLC. Senators Whitehouse, Feinstein, Dick Durbin (D-Ill.), and Hirono questioned her about an article from law school about Catholic judges and recusal and what a Catholic judge would or would not recuse herself from. At Judge Barrett’s confirmation hearing, Senator Feinstein infamously said, “Whatever a religion is, it has its own dogma. The law is totally different. And I think in your case, . . . the conclusion one draws is that the dogma lives loudly within you. And that’s of concern when you come to big issues that large numbers of people have fought for for years in this country.” Senator Feinstein added, “Over time, we learn to also judge what they think, and whether their thoughts enable them to be free to observe the law.”

July 2017 – Judge Trevor McFadden received questions from Senator Whitehouse about the statements of belief of Judge McFadden’s church, Falls Church Anglican, and about comments made by an associate pastor at the church. Based on those statements, Senator Whitehouse asked Judge McFadden whether he understood Supreme Court precedent in the court-created right to same-sex marriage, whether this contradicted statements made from the associate pastor, whether Judge McFadden thought “natural
law” should “receive greater weight than decisions that may be deemed inconsistent with natural law,” and whether Judge McFadden would “faithfully apply all applicable, binding precedents, regardless of whether they are grounded in ‘natural law.’”

June 2017 – Deputy Director of the Office of Management and Budget Russell Vought received questions from Senators Sanders and Chris Van Hollen (D-Md.) about an article written by Deputy Director Vought in his private capacity. It contained the statement that Islam rejects the deity of Jesus Christ and as such cannot provide salvation. Vought did so to argue that his alma mater, Wheaton College, appropriately ended its relationship with a professor for failing to adhere to the school’s Christian statement of faith. Senator Sanders asked Vought, “Do you believe that that statement is Islamophobic?” and whether members of other religions were excluded from salvation. After Vought attempted to explain that he was stating Christian theological beliefs, Senator Sanders said, “I would simply say, Mr. Chairman, that this nominee is really not someone who is what this country is supposed to be about” and “I will vote no.” “The issue,” Senator Van Hollen said, “is you are now moving from a position where you are a staff member in a Republican Study Committee to somebody who’s supposed to uphold the public trust for the whole country.” Senator Van Hollen continued, “I think it’s irrefutable that these kind of comments suggest . . . you are condemning people of all faiths.” “It’s your comments that suggest a violation of the public trust in what will be a very important position.”

Alexandra McPhee, Esq. is the Director of Religious Freedom Advocacy at Family Research Council.


8 Ibid.


21 “Letter to Synod Fathers from Catholic Women,” Ethics & Public Policy Center, October 1, 2015, accessed February 5, 2019, https://eppc.org/synodletter/. Judge Barrett signed the letter, apparently when she was a law professor and in her private capacity. The website states: “Note: Affiliations are listed for identification purposes only.”

22 “Barrett Responses To Feinstein Questions For The Record,” U.S. Senate Committee on the Judiciary, September 13, 2017, https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Feinstein%20QFRs.pdf; “Barrett Responses To Whitehouse Questions For The Record,” U.S. Senate Committee on the Judiciary, September 13, 2017,


