

# **Rebels Without a Clause:**

## **When Senators Run Roughshod Over the “No Religious Test” Clause of the U.S. Constitution**

### **APPENDIX**

The following are verbatim written questions and partial transcripts from confirmation hearings to provide a useful reference tool. The appendix entries are ordered by nominee.

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#### **February 2019 – Administrator of the Office of Information and Regulatory Affairs Neomi Rao**

“Nominations,” Committee on the Judiciary, video at 2:03:11 to 2:04:43, February 5, 2019, accessed February 6, 2019,

<https://www.judiciary.senate.gov/meetings/02/05/2019/nominations>.

Partial Transcript of Questions from Senator Cory Booker (D-N.J.):

Booker: In a 2008 article you criticized the Supreme Court’s landmark decision in *Lawrence v. Texas*, which invalidated the state laws that criminalized same-sex relationships. You said that the Court’s decision “eschews older traditions in favor of an emerging awareness of the meaning and the scope of liberty.” What, in your view, should the Supreme Court have been in the business of upholding older traditions, as you said, of laws that criminalize same-sex relationships?

Rao: Well, Senator, those were some comments made in the course of an article about dignity in constitutional law. And of course, *Lawrence* is a precedent of the Supreme Court, which I would – which I would faithfully follow if I were –

Booker: Are gay relationships in your opinion immoral?

Rao: Um, Senator, um, I’m not sure, you know, the relevance of that to, you know, I mean –

Booker: I think it’s relevant, your opinion – if you think African-American relationships are immoral, do you think gay relationships are immoral.

Rao: No.

Booker: Do you personally believe that gay relationships –

Rao: No. I do not.

Booker: You do not believe that?

Rao: No.

Booker: Do you believe they're a sin?

Rao: Um, Senator, you know, my personal views on any of these subjects are things I would put to one side. And I would faithfully follow –

Booker: So you're not willing to say here that – whether you believe it is sinful for a man – two men to be married. You're not willing to comment on that?

Rao: You know, Senator, no.

Booker: Excuse me?

Rao: I'm sorry?

Booker: I didn't hear your response.

Rao: My response is that these are – these personal views are ones that I would put to one side, whatever my personal views are on the subject, I would faithfully follow the precedents of the Supreme Court –

“Nominations,” Committee on the Judiciary, video at 2:12:51 to 2:13:39, February 5, 2019, accessed February 6, 2019,

<https://www.judiciary.senate.gov/meetings/02/05/2019/nominations>.

Partial Transcript of Questions from Senator Cory Booker

Booker: Mr. Chairman – Mr. Chairman – just a point of clarification because Senator Cruz invoked my commentary. And I – and he knows this, 'cause we're friends. I would defend, die for, to protect the ideals of religious freedom in our country, and I was in no way trying to attack the nominee's religious freedom. I was simply saying that discrimination, under any standpoint, whether it's against religion, someone's race, someone's sexual orientation, should not be tolerated. The Senator and I both know that religion was used as a ruse to discriminate against African Americans. My parents told me stories that dealt with – that it was religiously objectionable that blacks and whites should go to school together and sit down together. And so, while he and I agree on the defense of religious freedom, I also know that he and I agree on the fact that no one should face discrimination in this country when it comes to their race, religion, or even their orientation.

**January 2019 – William Barr**

“Barr Responses to Questions For The Record,” U.S. Senate Committee on the Judiciary, January 27, 2019,

<https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20QFRs.pdf>.

Questions for the Record William P. Barr Nominee to Be United States Attorney General  
Questions from Senator Sheldon Whitehouse (D-R.I.):

48. In a 1992 speech to the “In Defense of Civilization” conference, you called for “God’s law” to be brought to the United States. Reports said that you “blamed secularism for virtually every contemporary societal problem.” You said that secularism caused the country’s “moral decline,” and said that secularism caused “soaring juvenile crime, widespread drug addiction,” and “skyrocketing rates of venereal disease.”

a. 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?

b. Do you still believe that secularism causes juvenile crime and venereal disease? If not, what changed your mind?

49. 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?

### **December 2018 - Judge Brian Buescher**

“Buescher Responses To Questions For The Record,” U.S. Senate Committee on the Judiciary, December 5, 2018,

<https://www.judiciary.senate.gov/imo/media/doc/Buescher%20Responses%20to%20QFRs.pdf>.

Questions for the Record for Brian Buescher From Senator Mazie Hirono (D-Hawaii):

7. You reported that you have been a member of the Knights of Columbus since 1993. The Knights of Columbus has taken a number of extreme positions. For example, it was reportedly one of the top contributors to California’s Proposition 8 campaign to ban same-sex marriage.

a. If confirmed, do you intend to end your membership with this organization to avoid any appearance of bias?

b. If confirmed, will you recuse yourself from all cases in which the Knights of Columbus has taken a position?

8. In May of this year, the Knight of Columbus issued a statement in support of the Trump administration’s efforts to bar clinics that provide abortion services or referrals from receiving federal family-planning funds under Title X funds. In 2016, the Knights of Columbus online magazine published an article claiming that contraceptives have “potentially dangerous side effects related to women’s health” and that “[a] growing body of research indicates that contraception even alters a woman’s ability to choose a more genetically suited spouse” because “contraception suppresses fertility and its corresponding hormones.”

a. You were a member of the Knights of Columbus when they published these statements. Reproductive health providers who receive Title X funds provide a critical

service to women. Do you believe federal funds should not be given to these providers who support abortion services?

b. Do you believe contraceptives may be dangerous to a woman's health and may "even alters a woman's ability to choose a more genetically suited spouse"?

c. If these are not your views, what steps have you taken to make clear that you do not hold these views?

d. Given your membership in this organization, what assurances can litigants have that you will deal with reproductive rights and abortion issues fairly and impartially?

Questions for the Record from Senator Kamala Harris (D-Calif.) Submitted December 5, 2018  
For the Nomination of Brian Buescher, to the U.S. District Court for the District of Nebraska:

3. Since 1993, you have been a member of the Knights of Columbus, an all-male society comprised primarily of Catholic men. In 2016, Carl Anderson, leader of the Knights of Columbus, described abortion as "a legal regime that has resulted in more than 40 million deaths." Mr. Anderson went on to say that "abortion is the killing of the innocent on a massive scale."

a. Were you aware that the Knights of Columbus opposed a woman's right to choose when you joined the organization?

b. Do you agree with Mr. Anderson that abortion is "the killing of the innocent on a massive scale"?

c. Do you agree with Mr. Anderson that legal abortion in the United States has "resulted in more than 40 million deaths"?

d. Have you ever, in any way, assisted with or contributed to advocacy against women's reproductive rights? If the answer is "yes," please explain the nature and scope of your assistance.

4. In 2008, the Knight of Columbus spent \$1,000,000 to support Proposition 8, a California ballot initiative that defined marriage as between a man and a woman.

a. Were you aware that the Knights of Columbus opposed marriage equality when you joined the organization?

b. Were you aware that the Knights of Columbus supported Proposition 8 in California?

c. Do you believe the right to marry carries an implicit guarantee that everyone should be able to exercise that right equally?

d. If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?

e. If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?

f. Have you ever, in any way, assisted with or contributed to advocacy against LGBTQ rights? If the answer is “yes,” please explain the nature and scope of your assistance.

### **November 2018 – Paul Matey**

“Matey Responses To Questions For The Record,” U.S. Senate Committee on the Judiciary, November 20, 2018,

<https://www.judiciary.senate.gov/imo/media/doc/Matey%20Responses%20to%20QFRs.pdf>.

Questions for the Record for Paul Matey Senator Mazie Hirono:

4. In your Senate Judiciary Questionnaire, you reported that you have been a member of the Knights of Columbus since 2014. Previously, the Knights of Columbus was reported to be one of the top contributors to California’s Proposition 8 campaign to ban same-sex

a. Do you share that view that marriage should not be allowed for same-sex couples?

b. If confirmed, do you intend to end your membership with this organization to avoid any appearance of bias?

c. If confirmed, will you recuse yourself from all cases in which the Knights of Columbus has taken a position?

5. In May of this year, the Knight of Columbus issued a statement in support of the Trump administration’s efforts to bar clinics that provide abortion services or referrals from receiving federal family-planning funds under Title X funds. In 2016, the Knights of Columbus online magazine published an article claiming that contraceptives have “potentially dangerous side effects related to women’s health” and that “[a] growing body of research indicates that contraception even alters a woman’s ability to choose a more genetically suited spouse” because “contraception suppresses fertility and its corresponding hormones.”

a. You have been a member of the Knights of Columbus when they published these kinds of statements. Reproductive health providers who receive Title X funds provide a critical service to women. Do you believe federal funds should not be given to these providers who support abortion services?

b. Do you believe contraceptives may be dangerous to a woman’s health and may “even alters a woman’s ability to choose a more genetically suited spouse”?

c. If these are not your views, what steps have you taken to make clear that you do not hold these views?

d. Given your membership in this organization, what assurances can litigants have that you will deal with reproductive rights and abortion issues fairly and impartially?

Questions for the Record from Senator Kamala Harris Submitted November 20, 2018 For the Nomination of Paul Matey, to the U.S. Court of Appeals for the Third Circuit:

3. In 2014, you joined an organization called the Knights of Columbus, which is comprised primarily of Catholic men. In 2008, the Knights of Columbus was the top contributor to the “Yes on Proposition 8” campaign, in support of a ballot initiative to ban same-sex marriage in California.

a. Were you aware that the Knights of Columbus opposed marriage equality when you joined the organization?

b. Have you ever, in any way, assisted with or contributed to advocacy against LGBTQ rights?

i. If the answer is “yes,” please explain the nature and scope of your assistance.

c. Do you believe the right to marry carries an implicit guarantee that everyone should be able to exercise that right equally?

d. If a county or state makes it more difficult for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?

4. The Knights of Columbus is also dedicated to what it calls “building a culture of life.” In 2016, Carl Anderson, leader of the Knights of Columbus, said that abortion “is in reality a legal regime that has resulted in more than 40 million deaths.” Mr. Anderson also described abortion as “the killing of the innocent on a massive scale.”

a. Were you aware that the Knights of Columbus opposed a woman’s right to choose when you joined the organization?

b. Do you agree with Mr. Anderson’s description of abortion as “the killing of the innocent on a massive scale”?

c. Do you agree with Mr. Anderson that legal abortion in the United States has “resulted in more than 40 million deaths”?

d. Do you believe that a fetus is entitled to any protection under the U.S. Constitution? If your answer is “yes,” please provide citations.

#### **October 2018 - Nominee Allison Rushing**

“Rushing Responses To Questions For The Record,” U.S. Senate Committee on the Judiciary, October 24, 2018,

<https://www.judiciary.senate.gov/imo/media/doc/Rushing%20Responses%20to%20QFRs.pdf>.

Nomination of Allison Rushing to the U.S. Court of Appeals for the Fourth Circuit Questions for the Record October 24, 2018 Questions from Senator Dianne Feinstein (D-Calif.):

7. You have an extended relationship with the Alliance Defending Freedom (ADF), formerly known as the Alliance Defense Fund. Your affiliation began in the summer of 2005, when you interned for ADF. You have also served as a panelist and speaker at three ADF sponsored events. Among other positions, ADF opposes women's reproductive rights; believes that healthcare workers have a right to decline participation in the performance of practices they find morally objectionable; and opposes marriage equality, civil unions between same-sex couples, and adoption by same-sex couples.

a. When did you become aware that the organization:

i. Opposes women's reproductive rights?

ii. Believes healthcare workers can decline participation in the performance of practices they find morally objectionable?

iii. Opposes marriage equality, civil unions between same-sex couples, and adoption by same-sex couples?

b. In 2017, you received \$1,750 in honoraria from ADF. Have you received honoraria, travel expenses, or any other payments from ADF at any time besides 2017? If so, please provide the year, the amount of the payment, and the reason for the payment.

Written Questions for Allison Rushing Nominee for the U.S. Court of Appeals for the Fourth Circuit Submitted by Senator Patrick Leahy (D-Vt.) October 17, 2018:

1. You served as a legal intern for the Alliance Defending Freedom (ADF). You also served as a panelist and speaker at three ADF events between 2015 and 2017. On the ADF website, the organization states that "[t]he cultural battle over marriage isn't about two individuals looking to legally establish their love. It's much bigger than that, and much more is at stake." (<https://adflegal.org/issues/marriage/redefining-marriage/overview>.) Justice Kennedy, in *Obergefell v. Hodges*, wrote that "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. . . . [Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right." Do you believe that marriage equality represents a threat to the "foundation of society," and risks "needless emotional and material hardships" for "women, children, and the underprivileged"? (<https://adflegal.org/issues/marriage/overview>.)

Nomination of Allison Rushing, to be United States Circuit Judge for the Fourth Circuit Questions for the Record Submitted October 24, 2018 Senator Sheldon Whitehouse:

1. Are you aware that the Alliance Defending Freedom (ADF), where you worked as a summer intern during law school, has been labeled a hate group by the Southern Poverty Law Center (SPLC) for its anti-LGBTQ views?

a. Are ADF's anti-LGBTQ views in line with your own?

b. ADF's website and its members have made frequent references to the "homosexual legal agenda" being one of the greatest threats to religious freedom in America. Do you believe there is a "homosexual legal agenda"? If so, could you briefly explain the substance of that agenda?

c. Do you believe individuals who identify as LGBTQ are a threat to religious freedom in the United States?

d. Are you aware that a former president of ADF and several of its members have linked homosexuality to pedophilia? Is that a view you share?

e. Are you aware that ADF has supported criminalizing homosexuality domestically and abroad? Is that a policy position you share?

f. While an intern at ADF, you co-wrote a law review article arguing that the courts should prohibit legal challenges to government-sponsored religious displays, such as displays of the Ten Commandments, based on standing. Is it your view that taxpayers lack standing to sue the government for sponsoring religious displays under the Establishment Clause of the First Amendment?

g. In a 2013 panel discussion, you indicated that you opposed the holding in *U.S. v. Windsor* striking down the Defense of Marriage Act (DOMA). You stated that the majority in *Windsor* "write the opinion in a unique way that calls it bigotry to believe that homosexuality does not comport with Judeo-Christian morality."

i. In your view, are Judeo-Christian morality and homosexuality incompatible? If so, why?

Nomination of Allison Rushing, to be United States Circuit Judge for the Fourth Circuit Questions for the Record Submitted October 24, 2018 Questions from Senator Chris Coons (D-Del.):

10. Your Senate Judiciary Committee Questionnaire indicates that you interned for the Alliance Defending Freedom (ADF) and have spoken at ADF on several occasions.

d. In 2016, the Southern Poverty Law Center designated ADF as a hate group. Were you aware of that designation when you spoke at ADF events in 2017?

e. Do you disagree with the Southern Poverty Law Center's designation of ADF as a hate group? If so, please explain why.

f. Given your associations with ADF, if confirmed, do you commit to recusing yourself from cases with which ADF is affiliated?

Nomination of Allison Jones Rushing to be United States Circuit Judge for the Fourth Circuit Questions for the Record October 24, 2018 Questions from Senator Richard Blumenthal (D-Conn.):



You have maintained a connection with the Alliance Defending Freedom (ADF) for thirteen of the fourteen years of your post-college professional career. You first worked for ADF in the summer of 2005, and you subsequently spoke at ADF sponsored events at least three different times. You also published an article with Jordan Lorence, a senior counsel for ADF. As recently as last year, you received a \$1,750 honoraria from ADF. As you know, the Southern Poverty Law Center has designated ADF as an anti-LGBT hate group. (Southern Poverty Law Center, Alliance Defending Freedom, <https://www.splcenter.org/fighting-hate/extremistfiles/group/alliance-defending-freedom>.) According to the Center, ADF “has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society.” (Id.)

1. Do you support the recriminalization of homosexuality in the U.S. and its criminalization abroad?
2. Do you support state-sanctioned sterilization of trans people abroad?
3. Do you believe that homosexuality is linked to pedophilia?
4. Do you believe that there exists a ‘homosexual agenda’ that will destroy Christianity and society?
5. Would you perform a same-sex wedding if asked to do so?

Questions for the Record for Allison J. Rushing From Senator Mazie Hirono:

3. You have a long history with the organization Alliance Defending Freedom.
  - You interned with the organization in 2005 when it was known as the Alliance Defense Fund.
  - You co-authored an article with the organization’s senior counsel in 2005.
  - You authored amicus briefs for clients in support of the Alliance Defending Freedom’s positions in at least three cases.
  - You spoke at Alliance Defending Freedom events in 2012, 2013, 2014, 2015, 2016, and 2017.
  - You received honoraria from the organization in 2017.

The Alliance Defending Freedom has been listed as an anti-LGBT hate group by the Southern Poverty Law Center, which describes the organization as follows:

“Founded by some 30 leaders of the Christian Right, the Alliance Defending Freedom is a legal advocacy and training group that has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society. ADF also works to

develop 'religious liberty' legislation and case law that will allow the denial of goods and services to LGBT people on the basis of religion. Since the election of President Donald Trump, the ADF has become one of the most influential groups informing the administration's attack on LGBT rights working with an ally in Attorney General Jeff Sessions."

- a. How do you justify your continued involvement with an organization that advocates such extreme views?
- b. In view of your close association with the Alliance Defending Freedom, how can LGBTQ individuals or women seeking to assert their constitutional rights to abortion or contraception have confidence that you will treat them fairly if you are confirmed as a judge?
- c. If confirmed, will you recuse yourself from all cases in which the Alliance Defending Freedom has taken a position, including LGBTQ rights, abortion, and access to contraception?

Nomination of Allison Jones Rushing United States Court of Appeals for the Fourth Circuit  
Questions for the Record Submitted October 24, 2018 Questions from Senator Booker:

8. The Alliance Defending Freedom has been designated by the Southern Poverty Law Center as a "hate group" on account of its anti-LGBTQ views and advocacy. The Center's report describes ADF as follows:

Founded by some 30 leaders of the Christian Right, the Alliance Defending Freedom is a legal advocacy and training group that has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a "homosexual agenda" will destroy Christianity and society. ADF also works to develop "religious liberty" legislation and case law that will allow the denial of goods and services to LGBT people on the basis of religion. Since the election of President Donald Trump, the ADF has become one of the most influential groups informing the administration's attack on LGBT rights working with an ally in Attorney General Jeff Sessions. (Alliance Defending Freedom, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremistfiles/group/alliance-defending-freedom> (last visited Oct. 15, 2018).)

In the summer of 2005, while you were in law school, you interned at ADF. You co-wrote an article with a senior counsel at ADF. During the last few years, you have served as a panelist at several events sponsored by ADF, and you accepted \$1,750 in honoraria from ADF in 2017

- a. When did you first become aware that the Southern Poverty Law Center had designated ADF as a hate group?
- b. Attorney General Jeff Sessions recently said that he does not believe ADF should be designated as a hate group. (Jeff Sessions, Att'y Gen., Remarks at the Alliance Defending

Freedom's Summit on Religious Liberty (Aug. 8, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-alliance-defending-freedoms-summit>.) Do you disagree with the Southern Poverty Law Center's designation of ADF as a hate group?

c. When you spoke at ADF-sponsored events in recent years, were you concerned in any way about this hate-group designation?

d. Please explain whether or not you disagree with any of the extreme positions taken by ADF on LGBTQ rights, such as the ones identified by the Southern Poverty Law Center's report.

Questions for the Record from Senator Kamala Harris Submitted October 24, 2018 For the Nomination of Allison Rushing, to the U.S. Court of Appeals for the Fourth Circuit:

1. For over a decade, you have maintained a relationship with the Alliance Defending Freedom (ADF). In 2005, you worked there as a legal intern. You published an article with an ADF attorney. While in private practice, you have written several briefs supporting ADF's positions in litigation. ADF forcefully opposes abortion, calling women who choose to terminate their pregnancies "misguided and misinformed." ADF is fighting to overturn *Roe v. Wade* and for courts to recognize that fetuses are persons entitled to constitutional protection. It also advocates for the defunding of Planned Parenthood.

a. Were you aware of ADF's opposition to abortion at any point before or during your relationship with ADF?

b. Have you ever, in any way, assisted with or contributed to ADF's advocacy against abortion or contraception rights? If the answer is "yes," please explain the nature and scope of your assistance.

2. In *Whole Woman's Health* in 2016, the U.S. Supreme Court invalidated two provisions of Texas law that imposed new restrictions on health care facilities that provide abortions. After the law was passed, the number of those facilities in Texas dropped in half, severely limiting access to health care for the women of Texas. ADF submitted amicus briefs to both the Fifth Circuit and the Supreme Court arguing that the Texas law did not violate women's rights to full reproductive healthcare.

a. Was *Whole Woman's Health* correctly decided?

b. Did *Whole Woman's Health* change or clarify the "undue burden" test used to evaluate laws restricting access to abortion? If so, how?

c. When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?

3. ADF also opposes same-sex marriage, civil unions, and adoption by same-sex couples. ADF, for example, has filed amicus briefs urging the U.S. Supreme Court to uphold

antiLGBT laws defining marriage as the union of one man and one woman in both Windsor and Obergefell. In addition, ADF has drafted model legislation – the Student Physical Privacy Act – for many states’ so-called “bathroom bills,” the latest example of the organization’s long record of advocating against LGBT rights.

a. Were you aware of ADF’s opposition to same-sex marriage at any point before or during your relationship with ADF?

b. Have you ever, in any way, assisted with or contributed to ADF’s advocacy against same-sex marriage? If the answer is “yes,” please explain the nature and scope of your assistance.

c. Have you ever, in any way, assisted with or contributed to ADF’s advocacy against other LGBT rights? If the answer is “yes,” please explain the nature and scope of your assistance.

4. In 2013, you gave a speech about religion and morality in the U.S. Supreme Court’s LGBT-related jurisprudence. Among other things, you stated that the Windsor majority, which held the Defense of Marriage Act unconstitutional, “chose to write the opinion in a unique way that calls it bigotry to believe homosexuality does not comport with Judeo Christian morality.” Moreover, you said Justice Scalia’s dissent had pointed out that “citizens who disagree with same-sex marriage on religious or moral grounds have now been marked by the Court’s opinion as motivated by hatred of their fellow man.”

b. Do you believe that LGBT rights cannot be reconciled with religion?

### **May 2018 – Judge Peter J. Phipps**

“Phipps Responses To Questions For The Record,” U.S. Senate Committee on the Judiciary, May 2, 2018,

<https://www.judiciary.senate.gov/imo/media/doc/Phipps%20Responses%20to%20QFRs.pdf>.

2. Since 2011, you have been a member of the Knights of Columbus, a Catholic fraternal organization limited only to men. The Knights of Columbus state that they “[defend] the right to life of every human being, from the moment of conception to natural death.”

a. As a member of this organization, do you carry out this mission?

b. If confirmed to the bench, will you defend the right to life of every human being, from the moment of conception to natural death?

c. Must you swear an oath in order to join this organization? If so, what is that oath?

d. When your group’s organizational values conflict with litigants’ constitutional rights, how can litigants in your court expect a fair hearing?

e. As a member of a group that avowedly opposes abortion, how will you approach that constitutionally-protected right in your courtroom?

f. Is Roe v. Wade settled law?

**April 2018 – Secretary of State Mike Pompeo**

“Nomination of Hon. Mike Pompeo to be Secretary of State: Hearing before the Committee on Foreign Relations United States Senate,” 115th Cong. 55 (2018),  
<https://www.foreign.senate.gov/imo/media/doc/S.%20HRG.%20115%20339%20Pompeo1.pdf>.

Partial Transcript of Questions from Senator Cory Booker (D-N.J.):

Senator BOOKER. I want to pick up on one of the themes we talked at length about, and that involves many of your past statement concerning Muslim-Americans. And perhaps I just want to start with some of your language. In a speech, you talked about folks who “worshipped other gods and called it multiculturalism.” You sort of mourned that we live in a country where that happens. Do you have any views that the Muslim faith or people who believe in worshipping “other gods,” is that just something negative in our country?

Mr. POMPEO. No, Senator, you can look at my record. You do not have to take my word for it here today. My record is exquisite with respect to treating people of each and every faith with the dignity they deserve, to protect their right to practice their religion or no religion for that matter in the way that they want to. I have done that when I ran Thayer Aerospace –

“Nomination of Hon. Mike Pompeo to be Secretary of State: Hearing before the Committee on Foreign Relations United States Senate,” 115th Cong. 55 (2018),  
<https://www.foreign.senate.gov/imo/media/doc/S.%20HRG.%20115%20339%20Pompeo1.pdf>.

Partial Transcript of Questions from Senator Cory Booker:

Senator BOOKER. I have a minute left because I do want to give you a chance to speak about your comments on gay and lesbians. You said in a speech that “mourning an America that endorses perversion and calls it an alternative lifestyle” is your words. Is being gay a perversion?

Mr. POMPEO. Senator, when I was a politician, I had a very clear view on whether it was appropriate two same-sex persons to marry. I stand by that today, sir.

Senator BOOKER. So, you do not believe it is appropriate for two gay people to marry.

Mr. POMPEO. Senator, I continue to hold that view. It is the same view for the record that –

Senator BOOKER. And so, people in the State Department, I met some in Africa that are married under your leadership. You do not believe that that should be allowed.

Mr. POMPEO. Senator, we have – I believe it is the case, we have married gay couples at the CIA you should know. I treated them with the exact same set of rights –

Senator BOOKER. Do you believe – do you believe that gay sex is a perversion, yes or no?

Mr. POMPEO. Senator, if I can –

Senator BOOKER. Yes or no, sir. Do you believe that gay sex is a perversion because it is what you said here in one of your speeches.

Mr. POMPEO. Senator –

Senator BOOKER. Yes or no, do you believe gay sex is a perversion?

Mr. POMPEO [continuing]. Senator, I am going to give you the same answer I just gave you previously. My respect for every individual regardless of their sexual orientation is the same, and it will be so if I am confirmed.

Senator BOOKER. So, I will conclude – I will conclude by saying, sir, you are going to be Secretary of State of the United States at a time that we have an increase in hate speech and hate actions against Jewish-Americans, Muslims-Americans, Indian-Americans. Hate acts are on the increase in our Nation. You are going to be representing this country and their values abroad in nations where gays individuals are untold persecution, untold violence.

Your views do matter. You are going to be dealing with Muslim states and on Muslim issues. And I do not necessarily concur that you are upholding the values of our Nation when you cannot even – when you believe that there are people in our country that are perverse and where you think you create different categories of Americans and their obligations when it comes to condemning violence. So, I will have another round, but thank you

“Nomination of Hon. Mike Pompeo to be Secretary of State: Hearing before the Committee on Foreign Relations United States Senate,” 115th Cong. 55 (2018), <https://www.foreign.senate.gov/imo/media/doc/S.%20HRG.%20115%20339%20Pompeo1.pdf>.

Partial Transcript of Questions from Senator Christopher Coons (D-Del.):

Senator COONS. Last question if I might, Mr. Chairman. There was some exchange you had previously about statements you made as an elected official right after the Boston Marathon bombing in 2013, and whether that sends a message to America’s Muslims, their community within our country, and the leaders around the world you will need to work with as a chief diplomat. Just tell me something about who the leaders are in the Muslim world you will be willing to work closely with, and what priority you would place on changing that perception of your views given by a few statements that, as we discussed yesterday, you think were taken out of context. 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.

Mr. POMPEO. Let me—let me try and do that, but let me try and give evidence. I have worked with—I have worked with our—with our intelligence partners throughout, a broad range of Muslim majority countries. I have worked with them closely. We have done very difficult things together. It might be difficult for you to chase some of them down, but I think if you could speak to them, you would find that the view that you suggested that some have seen from that remark, it would be very different to them. I think they have come to understand that I deeply honor their religion. I honor their commitment to that.

Where it causes some of the challenges that you asked in your previous question, we have tried to push back even at the—even at the lowly intelligence level. We have taken on some of these human rights issues in a crisp and square way. I assure you that I will continue to do that if I am confirmed into this new position as well.

### **September 2017 – Judge Amy C. Barrett**

“Nominations,” U.S. Senate Committee on the Judiciary, video at 2:43:57 to 2:47:11, September 6, 2017, accessed February 7, 2019,

<https://www.judiciary.senate.gov/meetings/08/08/2017/nominations>.

Partial Transcript of Questions from Senator Dianne Feinstein:

Feinstein: Why is it that so many of us on this side have this very uncomfortable feeling that, you know, dogma and law are two different things. And I think whatever a religion is, it has its own dogma. The law is totally different. And I think in your case, Professor, when you read your speeches, 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. And I listen carefully to what Senator Whitehouse said, because he’s spent a lot of time on this whole issue of dark money moving out and controlling, and the president’s litmus test, and I assume if both of you were on the lists that you would be a “no” vote on *Roe*. And that puts a number of us, just very honestly, in layman’s language, in a very difficult position. So I want you to understand that. If you have a comment, that—we appreciate hearing it.

Larsen: My comment would be that as a Justice of the Michigan Supreme Court and also, if I am fortunate to be confirmed to the Sixth Circuit, I would—I don’t—there’s no opportunity for me to be a “no” vote on *Roe*. And I would not be. I would be bound by the precedents of the Supreme Court of the United States.

Feinstein: Do you know for almost a quarter of a century every single person before us has said they would be bound by precedent. I remember when Senator Specter was chairman how, “oh, that’s superprecedent,” someone that went on the Supreme Court said. And then got there and voted the other way. And, so, you know, you’re under oath, and I assume people mean what they say. But over time, we learn to also judge what they think, and whether their thoughts enable them to be free to observe the law. Would you like to make a comment, Professor?

Barrett: Um, I agree with Justice Larsen. I'm being considered for a position on a court of appeals, and there would be no opportunity to be a "no" vote on *Roe*. And as I said to the committee, I would faithfully apply all Supreme Court precedent.

Feinstein: Okay. Thank you. Thank you very much.

"Nominations," U.S. Senate Committee on the Judiciary, video at 2:25:55 to 2:31:02, September 6, 2017, accessed February 7, 2019, <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations>.

Partial Transcript of Questions from former Senator Al Franken:

Franken: [Alliance Defending Freedom (ADF)], for those who are not familiar with it, is a far-right group that files cases and lobbies for policies that ADF characterizes as defending religious liberty. But when you actually take a look at ADF's work, it's clear that the group's real purpose is to advance an extreme version—or vision of society. The Southern Poverty Law Center, which tracks hate groups, describes ADF as a group that has "supported the recriminalization of homosexuality in the United States and criminalization abroad." Criminalization of homosexuality. Has defended state-sanctioned sterilization of transgender people abroad, has linked homosexuality to pedophilia and claims that a homosexual agenda will destroy Christianity and society. In addition to the lawsuits it files, ADF also runs a training program for law students and young attorneys who share its views. Professor Barrett, if my understanding is correct, the payments you received from ADF were connected to presentations you delivered at ADF's training seminars. Is that right?

Barrett: Yes, I gave a one-hour presentation on constitutional law.

Franken: Mhm. And you delivered these presentations to law students participating in the Blackstone legal fellowship program. Blackstone is an ADF program. Were you aware of that when you accepted their invitation to speak?

Barrett: I—I actually wasn't aware until I received the honorarium and saw the ADF on the check or maybe when I saw an email and saw the signature line. But, yes, ADF is the organization that sponsors the Blackstone—

Franken: But you weren't aware of it—

Barrett: When I—Senator Franken, I can't remember exactly when exactly I became aware of it. I was aware of the Blackstone program for some time.

Franken: But you were not aware when you—when the gig—

Barrett: By the time I, by the time I spoke I was aware. I can't remember exactly when I was aware. But, for present purposes—

Franken: Is it your habit of accepting money from organizations without first learning what they do?



Barrett: Senator, I'm invited to give a lot of talks. As a law professor, and it is not—I don't know what all of ADF's policy positions are, and it has never been my practice to investigate all of the policy positions of a group that invites me to speak.

Franken: So, so, if you got, um, you know—Let's say in the seventies I did lectures, and, say, Pol Pot had asked me to speak. But I didn't, like, check it out. Do you think that would have been good judgment?

Barrett: No, Senator, and if I were invited to speak by Pol Pot, or the KKK, or a group like that, I would certainly decline the invitation. But I think it's a long way from—

Franken: Let me just tell you this, that Blackstone's affiliation with ADF is clearly stated on its website. The first question on Blackstone's frequently asked questions page is "Who created the Blackstone legal fellowship?" The answer reads, "Blackstone legal fellowship is a program of Alliance Defending Freedom." I mean, this is a group that fights against equal treatment of LGBT people. This is a group which calls for the sterilization of transgender people abroad.

Barrett: I was not aware of that.

Franken: Well that begs my question again. So, you will speak to anyone that pays you? You don't check out who they are? I mean, if they're the lobby for dogs, puppies, and American pie, but happen to be, I don't know, anti-Semitic, you wouldn't do any research?

Barrett: Senator, again, if I were invited to speak by a hate group, if I were invited to speak by the KKK, or that kind of group—

Franken: Well, it sounds like ADF is something of a hate group, doesn't it?

Barrett: Senator, that was not my—that was not what my interactions with Blackstone were like. The people who I interacted with, we had a wonderful group of students from Notre Dame go, I never witnessed any discriminatory conduct in any way. I never had a whiff of that. My presentation was about constitutional interpretation. It had nothing to do with those topics, and it just was not my experience. I didn't have—

"Barrett Responses To Whitehouse Questions For The Record," U.S. Senate Committee on the Judiciary,  
<https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>.

Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit  
Questions for the Record Submitted September 13, 2017 Questions from Senator Whitehouse:

3. In October 2015, you signed onto a letter expressing "fidelity to and gratitude for the doctrines of the Catholic Church" that stated in part: "We give witness that the Church's teachings—on the dignity of the human person and the value of human life from conception to natural death; on the meaning of human sexuality, the significance of sexual difference and the complementarity of men and women; on openness to life and

the gift of motherhood; and on marriage and family founded on the indissoluble commitment of a man and a woman—provide a sure guide to the Christian life, promote women’s flourishing, and serve to protect the poor and most vulnerable among us.”

a. Given your public avowal of “marriage and family founded on the indissoluble commitment of a man and a woman” and views you have articulated in your writings and in other public statements, how can you assure members of the LGBTQ community and other vulnerable groups that you are committed to rendering decisions impartially and without bias or prejudice?

b. As you know, the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) that, as a matter of civil law, same-sex couples are entitled to the same protections, rights and benefits of marriage as different-sex couples. Do you agree that the Church’s view regarding marriage as a union between a man and a woman is irrelevant to the legal question of the right of same-sex couples to marry?

c. In *Pavan v. Smith*, 582 U. S. (2017), the Supreme Court summarily reversed a decision from the Arkansas Supreme Court refusing to list both members of a same-sex married couple on their child’s birth certificate. Justice Gorsuch dissented from that decision, arguing that *Obergefell* did not decide the question presented in that case. What is your view?

d. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court rejected religious and moral beliefs about sodomy as a justification for a law that criminalized intimate same-sex relationships. Do you agree that religious or moral beliefs cannot be the sole basis for the enactment and enforcement of criminal laws?

e. In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court rejected arguments about innate differences between men and women as a justification for excluding women from enrolling in VMI. Likewise, in *Windsor* and *Obergefell*, the Supreme Court refused to credit similar arguments when offered as a justification for denying same-sex couples the protections and responsibilities of civil marriage. Is your view about “the significance of sexual difference and the complementarity of men and women” something to which you would attach legal significance? And if so, how do you reconcile that with the cases I just mentioned?

4. In your 1998 article *Catholic Judges and Capital Punishment*, you describe litigants’ concerns about “appearance of partiality” and a law requiring a judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned as being “public relations concerns” that are “trump[ed]” by “constitutional guarantees.”

a. Do you believe that the public’s confidence in a fair and impartial judiciary is essential to our legal system?

5. As discussed at your confirmation hearing, you delivered a paid speech for the Blackstone Legal Fellowship program funded by Alliance Defending Freedom (ADF). ADF has been classified as a hate group by the Southern Poverty Law Center for its

advocacy against gay rights here and abroad. According to SPLC, ADF has “supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society. ADF also works to develop ‘religious liberty’ legislation and case law that will allow the denial of goods and services to LGBTQ people on the basis of religion.

a. You explained that you were unaware of the program’s discriminatory conduct at the time you made your speech. If you had known of the program’s support for anti-gay policies, would you have still provided the speech? Why or why not?

b. Now that you have had a chance to more thoroughly familiarize yourself with ADF, do you agree with the Southern Poverty Law Center (SPLC) that ADF is a hate group? Do you agree with their efforts to criminalize homosexuality?

7. You have written that abortion is “always immoral.” Do you still ascribe to that view?

Nomination of Amy Coney Barrett to the Seventh Circuit Court of Appeals Questions for the Record Submitted September 13, 2017 Questions from Senator Feinstein:

7. During your nominations hearing, you were asked a number of questions about the 1998 article you co-authored, *Catholic Judges in Capital Cases*. You testified that the “article addressed a very narrow question. It actually addressed the obligation – or how a conscientious objector to the death penalty who was a trial judge – would proceed if the law required that judge to enter the order of execution. It did not address even the obligations – we did not draw any conclusions – about how an appellate judge who is a conscientious objector should behave.” Your article, however, does address how conscientious objector appellate judges should approach capital cases. For instance, you wrote that “[a]ppellate review of a death sentence is not . . . a case of formal cooperation. This does not mean that it is all right. Whatever might be the legal significance of an affirmance, it probably looks to most people like an endorsement of the sentence. This can cause scandal, leading others into sin . . . . Considerations like this make it exceedingly difficult 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.” (*Catholic Judges in Capital Cases*, 91 MARQUETTE L. REV. 303, 328-29). You also addressed whether appellate judges should recuse themselves in capital cases that come before them on appeal: “Recusal problems on appeal are like those at the guilt phase, though they are not identical. From a moral point of view deciding an appeal is an act of material cooperation, not formal, and one where it is difficult to say what outcome is morally preferable. The issue is especially difficult in cases where the judge is asked to review the death sentence itself. Unless he intervenes the defendant will die. And his act of affirming, whatever its legal significance might be, looks a lot like approval of the sentence. Conscientious Catholic judges might have more trouble with cases like these than they would at trial. . . . If one cannot in conscience affirm a death sentence the proper response is to recuse oneself.” (*Catholic Judges in Capital Cases*, 91 MARQUETTE L. REV. 303, 341-42).

a. If confirmed as a judge on the Seventh Circuit, you may sit on a panel of appellate judges asked to review a capital sentence. Do you believe that you “in conscience [could] affirm a death sentence”? Do you believe that you “in conscience” could deny a stay of execution?

8. During your hearing before this Committee, Chairman Grassley asked how, if you were confirmed, you would decide whether you needed to recuse yourself from a case. You testified: “I can’t think of any cases or category of cases in which I would feel obliged to recuse on the grounds of conscience.” A little while later, Senator Hirono asked “If you were not up for a circuit court but a district court [position], would you recuse yourself as a Catholic judge from death penalty cases?” You replied: “If I were being considered for a trial court, I would recuse myself and not actually enter the order of execution.”

a. From your perspective and the perspective of the article you co-authored, what is the difference between a trial court judge entering an order of execution and an appellate judge affirming a death sentence or denying a stay of execution?

b. Your article *Catholic Judges in Capital Cases* also states “The prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not.” Besides recusing yourself from entering orders of execution as a trial court judge, are there other circumstances where you believe you would have a moral obligation to recuse from certain judicial proceedings, if you had been appointed to a different judgeship? For example, do you also believe you would need to recuse yourself from participating in judicial bypass proceedings for minors seeking abortions, had you been nominated to serve on a court that heard such claims?

c. If not, why not? From your perspective – and I am asking only about what your personal approach would be – what is the difference between a case involving the death penalty and a case involving abortion, and what is the difference between a trial court judge and an appellate judge reviewing cases that present these issues?

9. In *Catholic Judges in Capital Cases*, you wrote: “Judges cannot – nor should they try to – align our legal system with the Church’s moral teaching whenever the two diverge. They should, however, conform their own behavior to the Church’s standard. Perhaps their good example will have some effect.” (*Catholic Judges in Capital Cases*, 91 MARQUETTE L. REV. 303, 350). What did you mean when you wrote that a judge should “conform their own behavior to the Church’s standard”?

10. In *Catholic Judges in Capital Cases*, you wrote: “Justice Brennan took a similar position during his confirmation hearings in 1957, when he was asked whether he could abide by his oath in cases where ‘matters of faith and morals’ got mixed with ‘matters of law and justice.’ He said: ‘Senator, [I took my] oath just as unreservedly as I know you did...And...there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision

that it is that oath and that alone which governs.’ We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty.” What did you mean when you said that you “do not defend” Justice Brennan’s position as the “proper response for a Catholic judge to take with respect to abortion or the death penalty”?

11. At your hearing, Senator Franken questioned you about speeches you gave to the Blackstone Legal Fellowship Program. As Senator Franken noted, that program is sponsored by the Alliance Defending Freedom, which the Southern Poverty Law Center has called “a legal advocacy and training group that specializes in supporting the recriminalization of homosexuality abroad, ending same-sex marriage, and generally making life as difficult as possible for LGBT communities in the U.S. and internationally.”

a. At the time you spoke at the Blackstone Legal Fellowship Program, did you know about the Alliance Defending Freedom’s support to end same-sex marriage and recriminalize homosexuality abroad?

b. If you are confirmed, what will you do to ensure that LGBT litigants appearing before you can have confidence that you will treat them impartially?

Senator Dick Durbin (D-Ill.) Written Questions for Amy Coney Barrett, Joan Larsen, and Eric Dreiband September 13, 2017:

8. In “Catholic Judges in Capital Cases,” you recounted on p. 347 what Justice Brennan said “during his confirmation hearing in 1957, when he was asked whether he could abide by his oath in cases where ‘matters of faith and morals’ got mixed with ‘matters of law and justice.’” You quoted Justice Brennan saying: “Senator, [I took my] oath just as unreservedly as I know you did...And...there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.” You then wrote “We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty.” It is unclear from the context whether you did not defend Justice Brennan’s position because you did not believe his position was the proper response, or rather that you did not defend Justice Brennan’s position because you were simply citing his position to make a “sociological observation” in the last paragraph of p. 347 and thus you did not need to opine whether Justice Brennan’s position was proper for purposes of making that sociological observation. Please explain your citation of Justice Brennan’s position on p. 347 of this article.

Questions for the Record Senator Mazie 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 [sic] objector should behave.”

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.”

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?

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?

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?

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?

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?

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?

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

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."

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?

### July 2017 - Judge Trevor McFadden

"McFadden Responses To Questions For The Record," U.S. Senate Committee on the Judiciary, July 5, 2017,

<https://www.judiciary.senate.gov/imo/media/doc/McFadden%20Responses%20to%20QFRs.pdf>.

Nomination of Trevor Neil McFadden Nominee to the United States District Court for the District of Columbia Questions for the Record Submitted July 5, 2017 Questions from Senator Whitehouse:

1. You are an elected member (until 2020) of the Falls Church Anglican, which broke away from the Episcopal Church largely due to the denomination's consecration of an openly gay bishop. The Falls Church Anglican considers "marriage to be a life-long union of husband and wife" intended for "the procreation and nurture of godly children" and entailing "God-given" "roles of father and mother." In 2015, the associate pastor of the Falls Church Anglican agreed that "if the U.S. Supreme Court decision includes a redefinition of marriage, this will constitute an intrusion of the state on God's institution of marriage 'from the beginning'."

a. Do you understand the majority of the Supreme Court in *Obergefell v. Hodges* to have held that the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that same-sex couples may not be deprived of that right?

b. Do you believe that the Supreme Court's decision in *Obergefell v. Hodges* that the Fourteenth Amendment requires every state to perform and recognize marriages between individuals of the same sex "constitute[d] an intrusion of the state on God's institution of marriage 'from the beginning'"?

c. *Obergefell* is not a decision grounded in "natural law." Should legal precedents that are, in your view, consistent with "natural law" receive greater weight than decisions that may be deemed inconsistent with natural law?

d. Do you agree with the analysis of the majority of the Supreme Court in *Lawrence v. Texas* that, under the U.S. Constitution, religious or moral beliefs cannot be the sole basis for the enactment and enforcement of criminal laws?



e. In your view, what limits (if any) are there on the government's ability to intrude upon personal decisions regarding the creation of personal relationships, family formation and procreation?

f. Do you understand the holding of the majority of the Supreme Court in *Roe v. Wade*, that the constitutional right to privacy encompasses a woman's decision whether or not to continue a pregnancy, is maintained by the Court's current doctrine following *Whole Woman's Health v. Hellerstedt*?

g. How do ideas about "God-given" "roles of father and mother" accord with the legal precedent established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination prohibited by Title VII?

### **June 2017 - Deputy Director of the Office of Management and Budget Russell Vought**

"Nomination Hearing for Deputy Director of White House Budget Office," U.S. Senate Committee on the Budget, video at 44:34 to 46:58, June 7, 2017, accessed February 7, 2019, [https://www.budget.senate.gov/nomination-hearing-for-deputy-director\\_of-white-house-budget-office](https://www.budget.senate.gov/nomination-hearing-for-deputy-director_of-white-house-budget-office).

Partial Transcript of Questions from Senator Bernard Sanders (I-Vt.):

Sanders: You wrote, "Muslims do not simply have deficient theology. They do not know God because they rejected Jesus Christ, His son, and they stand condemned." Do you believe—do you believe that that statement is Islamophobic?

Vought: Absolutely not, Senator. I'm a Christian, and I believe in a Christian set of principles based on my faith. That post, as I stated in the questionnaire to this committee, was to defend my alma mater, Wheaton College, a Christian school, that has a statement of faith that includes the centrality of Jesus Christ for salvation and—

Sanders: Again, I apologize, I do—forgive me, we just don't have a lot of time. Do you believe that people in the Muslim religion stand condemned?

Vought: Again Senator, I'm a Christian, and I wrote that piece—

Sanders: What does that say—

Vought: According to the statement of faith at Wheaton—

Sanders: I understand that. I don't know how many Muslims there are in America, I really don't know, probably a couple million. Are you suggesting that all of those people stand condemned? What about Jews? Do they stand condemned too?

Vought: Senator, I'm a Christian, I—

Sanders: I understand you are a Christian. But this country is made up of people who are not just—I understand that Christianity is the majority religion. But there are other

people who have different religions in this country and around the world. In your judgment, do you think that people who are not Christians are going to be condemned?

Vought: Thank you for probing on that question. As a Christian, I believe that all individuals are made in the image of God and are worthy of dignity and respect regardless of their religious beliefs. I believe that as a Christian, that's how I should treat all individuals –

Sanders: And do you think your statement that you put into that publication – “They do not know God because they rejected Jesus Christ, His son, and they stand condemned” – do you think that's respectful of other religions?

Vought: Senator, I wrote a post based on being a Christian and attending a Christian school that has a statement of faith that speaks clearly with regard to the centrality of Jesus Christ in salvation.

Sanders: I would simply say, Mr. Chairman, that this nominee is really not someone who is what this country is supposed to be about. I will vote no.

“Nomination Hearing for Deputy Director of White House Budget Office,” U.S. Senate Committee on the Budget, video at 51:27 to 52:49, June 7, 2017, accessed February 7, 2019, [https://www.budget.senate.gov/nomination-hearing-for-deputy-director\\_of-white-house-budget-office](https://www.budget.senate.gov/nomination-hearing-for-deputy-director_of-white-house-budget-office).

Partial Transcript of Questions from Senator Chris Van Hollen (D-Md.):

Van Hollen: I do have to say, Senator Gardner, I don't think anybody was questioning anybody's faith here. I think the issue that Senator Sanders was raising was whether the nominee was questioning the faith of others, and he quoted the nominee saying, and I'm quoting again, “Muslims do not simply have a deficient theology. They do not know God because they have rejected Jesus Christ, his Son, and they stand condemned.” So, nobody's questioning your faith. The issue is you are now moving from a position where you were a staff member in a Republican Study Committee to somebody who's supposed to uphold the public trust for the whole country. And I think it's irrefutable that these kind of comments suggest to a whole lot of Americans that number one, not just that their religious philosophy is deficient, and in condemning them, because they have rejected Jesus Christ His son, you are condemning people of all faiths other than Christians. I'm a Christian, but part of being a Christian in my view is recognizing that there are lots of ways that people can pursue their god. So no one's questioning your faith, Mr. Chairman. It is your comments that suggest a violation of the public trust in what will be a very important position.