

I take our Constitution seriously when it says there should be no religious test for public office, but many Senators on the Judiciary Committee—three Republicans and two Democrats, including myself—felt the writings of the nominee warranted an inquiry about her views on the impact of her religion on a judge's role. That is far from a religious test in violation of the Constitution.

At her hearing, I asked Professor Barrett several questions about her 1998 *Law Review* article. I asked her whether she still agreed with her article. She said in general that she did. I said that even though I am a Catholic, even though I have gone through 19 years of Catholic education, I have never run into the term “orthodox Catholic,” which she used in that article. I asked her if she could define it. What was she saying? Whom did she describe? She said it was an imperfect term but explained the context for her use of it. I asked her whether she considered herself in that category, using her term which she put forward as carrying certain obligations on judicial recusal. She acknowledged again that the term is a proxy and that it wasn't a term in current use.

Some have argued that I was imposing a religious test—somehow, the three Republican Senators asking the same question have not been challenged—or that I was insinuating that Catholics can't serve on the bench. That is absurd. I myself am Catholic. I deeply respect and value the freedom of religion in our country and the Constitution. And I will let my record speak for itself about the number of Catholic nominees whom I have appointed to the bench or tried to appoint to the bench with the concurrence of the Senate during the course of my career. I voted for many judicial nominees who are of the Catholic religion, including Judge Ralph Erickson, who is outspoken about his Catholic faith and whom I voted to confirm several weeks ago. I am also sure I voted against nominees who were Catholic as well because I didn't think they had the experience, judgment, or temperament to serve in the Federal judiciary.

At nomination hearings, I ask questions to try to understand how the nominee would approach the job of a judge. I asked Professor Barrett questions about issues she raised in her academic writings that could directly impact the discharge of her judicial duties.

I would note that Professor Barrett put forward her views as part of the academic legal debate. Contrast that with Paul Abrams, President Obama's nominee for the Central District of California, who was aggressively questioned by committee Republicans last year about statements he made while speaking at his synagogue. Republicans ultimately blocked Paul Abrams' nomination. No one on this side of the aisle—not this Senator or any Senator—questioned whether they were

applying a religious test in rejecting his nomination.

When judicial nominees have put forward their views on issues like the intersection of law and faith as part of the academic legal debate, I think it is fair for members of the Judiciary Committee to ask them about it. That is no religious test by my measure.

I voted against Professor Barrett's nomination in committee because I don't believe she has sufficient experience to be a circuit court judge and because of her writings about precedent. No one doubts that she is smart, but she has barely spent any time in the courtroom. The only basis we have to judge her on is on her academic writings.

Let's be honest. If a Democratic President had put forward a nominee with as little practical legal experience as Professor Barrett and with a similar history of advocating for not following precedent, I think we know exactly how the Senators on the other side of the aisle would have voted. As it stands, I cannot support Professor Barrett's nomination.

NOMINATION OF JOAN LARSEN

I oppose the nomination of Michigan Supreme Court Justice Joan Larsen to the Sixth Circuit. She is one of the 21 Supreme Court candidates that the Federalist Society and the Heritage Foundation handpicked for President Trump. Clearly, those rightwing organizations are confident that they will like her rulings if she is confirmed.

When she appeared before our committee, I asked some simple questions, and I was troubled by the responses.

In 2006, Justice Larsen wrote an op-ed defending President Bush's use of a signing statement on the McCain torture amendment. The McCain amendment prohibited torture and cruel, inhuman, or degrading treatment. I asked Justice Larsen about that op-ed and asked her if she believes waterboarding is torture and illegal. She would not answer the question. The law is clear on this matter, and I have voted against nominees in the past who would not acknowledge this.

I also asked Justice Larsen about the \$140,000 in ads that a dark money front group called the Judicial Crisis Network had run in support of her nomination. This is the same rightwing, dark money organization that spent millions of dollars in undisclosed donations running ads to oppose Merrick Garland's nomination to the Supreme Court and to support the nomination of Neil Gorsuch.

I am troubled that special interest groups are making undisclosed donations to these nomination front groups. These special interests likely have a stake in the cases that will come before these judges. The donations should be transparent so that judges can make informed decisions about recusal.

I asked Justice Larsen if she could call on this front group to stop running ads in support of her nomination unless donations to the groups are made pub-

lic. She responded that this was a political debate on which she could not opine. I think that is an absurd position, given that the debate here is over her own nomination and getting information for her own recusal decisions.

I also asked Justice Larsen if she agreed, as a factual matter, with President Trump's patently absurd claim that 3 to 5 million people voted illegally in the 2016 election. I think that is an easy question. Justice Larsen ducked it, saying that this was a political debate. I am troubled by these answers. I believe Justice Larsen has not shown the necessary independence from the President or rightwing groups like the Judicial Crisis Network, and she does not earn my vote.

NOMINATION OF ALLISON EID

I oppose the nomination of Colorado Supreme Court Justice Allison Eid to the Tenth Circuit. She is another on the short list of 21 Supreme Court nominees that the Federalist Society and the Heritage Foundation assembled for President Trump. She has now been nominated to the seat of the Tenth Circuit once held by Supreme Court Justice Neil Gorsuch.

I am troubled by the dissents Justice Eid wrote in a number of cases. I asked her about one of those cases during her hearing. A 2015 case, *Westin Operator, LLC v. Groh*, involved a hotel that evicted a group of college-age, intoxicated friends into freezing weather one night. The young adults ended up getting into a car and driving away. The car crashed, and a person was killed. The family of Caitlin Groh, who suffered traumatic brain damage in the accident, sued the hotel for negligently evicting the guests into a foreseeably dangerous environment.

Justice Eid's dissent argued that the court should have dismissed the Groh's family claim on a motion for summary judgment. She said that she saw no material dispute of fact in the case because she claimed the hotel video showed there were taxis in the area that the evicted guests could have taken. But the majority of the court saw the same evidence, the same video, and came to the opposite conclusion.

The majority wrote:

Video footage from hotel security cameras shows two taxis in the vicinity during the general timeframe of the eviction. No taxi is visible on screen during the time in which the group exited the hotel and walked to the parking lot en masse, but there is a police car parked at the entrance. It is unclear from the record whether the taxis visible at other times in the video were occupied or available for service, whether any member of the group saw the taxis, and whether the security guards evicting the group were aware if a taxi was immediately available. . . . One of the people evicted testified at his own deposition that he tried to look for a cab outside the hotel but didn't see one.

In other words, looking at the same evidence, the majority of the court could not reach the same conclusion. It is difficult to understand how Justice Eid saw this evidence as undisputed and why she wanted this case dismissed

on summary judgment—until you read the part of Justice Eid's dissent where she talks about "the burden that the majority is placing on Colorado businesses." That appears to explain her ruling, not the facts in the case.

In written questions I asked Justice Eid if she had also considered the burden the court's decision would place on these young adults and their families. She did not respond.

This is one of her troubling dissents, but there were others. In the 2014 case of *City of Brighton v. Rodriguez*, her dissent would have denied workers' compensation for a city employee who fell down the stairs to her office and needed brain surgery. In the 2017 case of *People v. Boyd*, her dissent criticized the State's decision not to prosecute a person on appeal based on a marijuana possession statute that is no longer operative. The cases go on and give ample reason why I do not believe this troubling record justifies Justice Eid replacing Justice Gorsuch on this important court.

NOMINATION OF STEPHANOS BIBAS

The last nominee I will address is, I believe, one of the most unusual I have ever seen before the Senate Judiciary Committee—Stephanos Bibas, who has been nominated for a lifetime appointment to the Third Circuit Court. In 2009, Professor Bibas wrote a lengthy draft paper entitled "Corporal Punishment, Not Imprisonment." In it, he said that for a wide range of crimes "the default punishment should be non-disfiguring corporal punishment, such as electric shocks." He went on to call for "putting offenders in the stocks or pillory where they would sit or stand for hours bent in uncomfortable positions." Professor Bibas then went on to say that "bystanders and victims could jeer and pelt them with rotten eggs and tomatoes (but not rocks)."

For more severe crimes, Professor Bibas called for "multiple calibrated electroshocks or taser shots" with medical personnel on hand to ensure "that the offender's health could bear it."

He also wrote "instinctively, many readers feel that corporal punishment must be unconstitutionally and immorally cruel, but neither objection withstands scrutiny." He then wrote that corporal punishment "in moderation, without torture or permanent damage, is not cruel."

Professor Bibas said at his hearing that he didn't ultimately publish the 60-page, footnoted paper because he realized that his writings were wrong and offensive. He now says that he rejects his paper. But his 2009 paper was not just scribbles on a notepad. This was a polished, heavily footnoted, 60-page draft law review article.

Professor Bibas admitted that he presented this draft paper at conferences—on June 8, 2009, at a conference at the University of Pennsylvania Law School; on July 20, 2009, at George Washington University Law School; on

September 12, 2009, at that Vanderbilt Criminal Justice Roundtable.

According to the website of the Federalist Society, Professor Bibas also gave presentations on this same article to three student chapters of the Federalist Society—on September 3, 2009, at George Mason; on October 21, 2009, at the University of Florida; on October 22, 2009, at Florida State. Incredibly, this presentation by Professor Bibas was advertised with the title "Corporal Punishment, Not Imprisonment: The Shocking Case for Hurting Criminals." This is an insensitive title for a presentation that called for administering electric shocks to human beings.

In his draft article, Professor Bibas thanked nine other people for their thoughts and comments on this paper. This was not something the professor wrote as a child or even as a student. When he wrote this paper in 2009, Professor Bibas was a professor at the University of Pennsylvania Law School, and he had already worked as an assistant U.S. attorney. He wrote this paper after Congress had considered the McCain torture amendment.

At the hearing I asked Professor Bibas: Do you remember the debate we went through as Americans about the acceptable method of interrogation for suspected terrorists overseas? Do you remember the debate we had on the floor when Senator McCain, the victim of torture himself as a prisoner of war in the Vietnam war, came forward and authored an amendment, which got a vote of 90 to 9, condemning torture, cruel, inhuman, and degrading treatment of prisoners suspected of being terrorists? I asked him if he remembered that debate, which occurred 3 years before he wrote this outrageous article.

He said at the hearing: Well, I want to make it clear that I don't support waterboarding.

I said: So you support electric shock on American prisoners, but you do not support waterboarding?

He said on the record, under oath: "I [knew] it was a crazy idea."

This is a man seeking a lifetime appointment to the second highest court in the land. This paper deeply troubles me. Not only did Professor Bibas go a long way down a dangerous path with his proposals, but this law school professor got the law wrong. The Supreme Court had made clear in 2002 in the case of *Hope v. Pelzer* that the corporal punishment practiced in the State of Alabama of restraining prisoners by tying them to a hitching post in uncomfortable positions constituted cruel and unusual punishment in violation of the Eighth Amendment.

Professor Bibas wrote his paper, workshopped it, took it to six different universities, and then ran away from it only after he heard how offensive his proposals were.

That is not my only concern about his nomination. We spent a lot of time at the hearing talking about his ag-

gressive prosecution of Linda Williams. What was she charged with? The alleged theft of \$7 from a cash register. The magistrate judge acquitted this defendant even before the closing argument from defense counsel. The case was weak, yet it was aggressively pursued by then-attorney Bibas. Professor Bibas apologized at his hearing for this prosecution, but we have seen over and over again that many people try to walk away from who they are and what they have done when it comes to a confirmation hearing.

I believe these cases that I mentioned, particularly this outrageous article, show a real insight into the judgment and temperament of this judicial nominee.

I have been a member of the Senate Judiciary Committee for a number of years, and I have seen many nominees. I will tell you without fear of contradiction that I have never seen a nominee who has written an article that is so unsettling and so worrying. I wonder about the temperament of this nominee. Given the power that we are about to give him to judge the fate of others for decades to come, can we really trust his temperament? Can we really trust his judgment?

Sadly, if the shoe were on the other foot, if this were a nominee who had been proffered by a Democratic President before that same committee, I know exactly what his fate would have been. He would never have been taken seriously or considered for such a high position.

Mr. President, the article by Amy Coney Barrett, "Catholic Judges in Capital Cases," published in the *Marquette Law Review* can be found online at <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1443&context=mulr>, and the article by Stephanos Bibas entitled "Corporal Punishment, Not Imprisonment," can be found online at <https://www.judiciary.senate.gov/download/stephanos-bibas-corporal-punishment>, so that those who read my statement will understand exactly what it was based on.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. SCHUMER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECOGNITION OF THE MINORITY LEADER

The Democratic leader is recognized.

RUSSIA INVESTIGATION

Mr. SCHUMER. Mr. President, yesterday morning we learned that two members of the Trump campaign—Mr. Manafort, his one-time campaign chairman, and Mr. Gates, a close associate of Manafort's—were indicted on a dozen charges as part of Special Counsel Mueller's investigation, including