

FREEDOM FROM RELIGION *foundation*

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July 27, 2017

SENT VIA FACSIMILE TO: 202-224-6020
The Honorable Chuck Grassley

Re: Questions for Amy Barrett, nominee to Seventh Circuit

Dear Chairman Grassley and Senate Judiciary Committee Members:

On behalf of the Freedom From Religion Foundation, we are writing to thank you for your diligence in scrutinizing the nomination of Notre Dame law professor Amy Coney Barrett for the U.S. Seventh Circuit Court of Appeals. FFRF is a nationwide nonprofit organization representing more than 29,000 members across the country, including members in every state. Our purposes are to protect the constitutional principle of separation between religion and government, and to educate the public about nontheism.

FFRF is headquartered in Madison, Wisconsin, which is under the Seventh Circuit's jurisdiction, and has litigated numerous cases before that appellate court. FFRF is deeply concerned about any judge that puts their religion above the law, as Barrett appears to advocate, and the significant impact that would have on FFRF's work, our membership, and the Constitution.

Barrett's record and stated positions will clearly affect the concerns of the growing number of Americans who identify as secular or nonreligious, today approaching nearly a quarter of the population.

We respectfully request that in order for our membership, the public, and the Committee to gain a better understanding of Barrett's stance on religion and the law, the following questions be posed to her:

Conflict between personal religion and secular oath of office

You have written extensively on the conflict between a judge's personal religion and her secular oath of office. During Justice Brennan's 1957 confirmation hearings, he was asked a question about keeping matters of faith separate from matters of law. Brennan gave an excellent answer — the only answer a federal official should give:

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 criticized this exemplary answer, writing that you “do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty.”¹

We’d like you to answer the same question that Justice Brennan did, if your faith and our law disagree, “would you be able to follow the requirements of your oath or would you be bound by your religious obligations?”

Tenets of the Catholic faith colliding with the law

In 2015, you signed a letter from “Catholic women” to the “Synod Fathers in Christ,” in which you express your “fidelity to and gratitude for the doctrines of the Catholic Church.”² The letter expressed your views on a number of topics that will surely come before the Seventh Circuit: “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.”

Do you believe that your personal religion trumps your secular oath of office or do you, like John F. Kennedy, “believe in an America where the separation of church and state is absolute?” In other words, when confronted with a case concerning gay marriage or abortion, on which the law is well settled, will you abide by the law or will you stand on your religious faith?

Wall of Separation

Several members of the Trump administration have denigrated what Thomas Jefferson dubbed “the wall of separation between church and state.” The Supreme Court adopted this language in 1878 to explain the relationship the First Amendment lays out separating religion and government.

Question: Do you agree with our Founders that a government that has “no particle of spiritual jurisdiction,” as Alexander Hamilton put it in the Federalist #69, offers the best protection for true religious freedom?

Constitutional supplements on religious freedom

In recent years, there has been an attempt to redefine the nature of “religious liberty.” You have expressed some approval of this push:³

1. Do you believe that if properly enforced, the First Amendment’s religion clauses— the Establishment Clause and the Free Exercise Clause—adequately protect Americans’ religious rights?
2. If so, why do we need laws like the Religious Freedom Restoration Act?
3. Do you believe that the right to free exercise of religion includes the right to act in accordance with one’s religious beliefs even when doing so would violate the law or the rights of other citizens?

Government and religion

¹ John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQUETTE L. REV. 303, 347 (1998).

² Available at <https://eppc.org/synodletter/>.

³ See, e.g., Becket Fund, “Unacceptable,” (Feb. 27, 2012), available at <http://www.becketlaw.org/media/unacceptable/>.

Some federal judges have ruled that the phrase “In God We Trust” no longer has any “theological or ritualistic impact” and is “ceremonial deism.” The Supreme Court has upheld legislative prayers. Some lower courts have ruled in favor of “In God We Trust” as a motto or the words “One Nation Under God” in the Pledge of Allegiance, saying “any religious freight the words may have been meant to carry originally has long since been lost.”

1. Are courts an appropriate arbiter for determining if a phrase or action is religious? Is the frequency of use over time really a good measure of religious import or meaning? Would a court claim that John 3:16 or saying the rosary have lost religious significance because they are oft repeated?
2. Overall, 23% of Americans now identify as nonreligious.⁴ That 8-point increase since 2007⁵ and 15-point jump since 1990 makes the “nones” the fastest growing identification in America.⁶ Nationally, about 35% of millennials are nonreligious.⁷ The meaning of a phrase or action can change over time. Should shifting demographics play a role in determining whether a phrase or action is considered religious?

Standing

Standing doctrine has come under heavy criticism because it creates a barrier to access to the courts and can effectively render some federal laws and constitutional provisions unenforceable. Standing doctrine has primarily been used to disqualify plaintiffs in the areas of First Amendment law and environmental law, areas where the public at large has a lot to gain or lose, even if an individual plaintiff may not suffer what some judges consider an injury.

Question: As a judge, how will you ensure that laws meant to protect society at large are enforceable?

Religious exercise by corporations

The Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby* established for the first time that within the meaning of the Religious Freedom Restoration Act, a “person” includes a closely held for-profit corporation.

Question: Do you still believe the framers of our Constitution would support, or even contemplated, extending religious rights to for-profit corporations, closely-held or otherwise?

Thank you for your service on the Senate Committee on the Judiciary and for ensuring that our nation’s highest court is staffed by justices who recognize and are willing to uphold our country’s long-established constitutional principle of separating religion and government.

Very truly,



⁴ *America’s Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

⁵ *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>.

⁶ Barry Kosmin, *National Religious Identification Survey* 1989-1990.

⁷ *America’s Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

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