

NO CATHOLIC JUDGES NEED APPLY

By Kenneth D. Whitehead

On July 31, 2003, the United States Senate voted 53 to 44 against closing off debate on the nomination of William H. Pryor, Jr., the Attorney General of Alabama, to be a federal judge on the 11th U.S. Circuit Court of Appeals based in Atlanta. 60 votes would have been required to close off debate so that an up or down vote could then be recorded on the Pryor nomination itself.

It was the third time in three days that the Senate had voted against closing off debate on one of President George W. Bush's nominations to the federal bench. The day before this cloture vote in the Pryor case, it had been the turn of Texas Supreme Court Justice Priscilla Owen, for whom it was the third time a failed cloture vote had prevented her nomination from coming to a vote; this could not be allowed, it was widely reported, because of her pro-life record as a judge. The day before that, a similar negative cloture vote—this one for the seventh time—barred former Justice Department official, Miguel Estrada, a strict constructionist and thus also feared as a possible pro-life judge, from being able to serve on the federal bench.

Something important was clearly at stake in these votes. There has been a consistent pattern of opposition to many of President Bush's nominees to federal judgeships. Knowledgeable observers of the Washington scene have identified the basic problem as fear on the part of the president's opponents in the Senate that his nominees will change the character of the federal courts, and perhaps even eventually bring about a reversal of the 1973 *Roe v. Wade* Supreme Court decision which legalized abortion in the United States.

Thus a "litmus test" is definitely being applied: no pro-life

judges need apply. This was certainly true in the case of the nomination of Alabama Attorney General William Pryor, who has, among other positions, strongly affirmed his pro-life views. But in his case there was more than just the matter of being pro-life, for William Pryor is a Catholic. At the hearing on his nomination held by the Senate Judiciary Committee in June, he was sharply questioned, notably by New York Democratic Senator Charles E. Schumer, about whether his "deeply held beliefs" would not prevent him from impartially upholding the laws. The word "Catholic" was never mentioned, just his "deeply held beliefs." But the implication in all this questioning was strong and clear that any Catholic who took seriously the teachings of the Catholic Church would necessarily have to be pro-life, against so-called "gay marriage," and so on; and thus in the opinion of these hostile senators would be unable to uphold the law as they expect to see it upheld, i.e., by affirming such court-imposed jurisprudence as legalized abortion.

Democratic Senator Richard J. Durbin of Illinois challenged Pryor by asking him point-blank whether he did not understand that a statement of his raised "concerns of those who don't happen to be Christian, that you are asserting...a religious belief of your own, inconsistent with the separation of church and state." Apparently to affirm any religious belief at all was to fail to separate church from state. Senator Durbin as much as accused Pryor of wishing to "condone by government action certain religious beliefs."

In the Pryor case, then, another "litmus test" for federal judges became evident: no Catholic judges need apply. Genuine Catholic beliefs firmly held evidently now constitute practically an automatic disqualification. Pryor's sin was apparently that he declined to promise, as President Kennedy once famously did in Houston, that he would never allow his Catholic beliefs to affect his decisions in office. As a nominee he had never made any attempt to downplay or conceal

his views in any way, in fact. On the contrary, at the hearing on his nomination he even created a sensation when he forthrightly defended an earlier statement of his that *Roe v. Wade* was “the worst abomination of constitutional law in our history.” Among his reasons for this opinion he cited the fact that the decision had resulted in the deaths of millions of unborn children. Nevertheless, far from wishing to import his personal religious beliefs into the laws of the land, William Pryor had demonstrated by his actual record that he was willing to apply the law as written, regardless of his personal beliefs. Several examples of this were mentioned at his hearing, most notably, when he directed Alabama district attorneys not to enforce Alabama’s partial-birth abortion ban because the law as written lay outside the boundaries of the most recent Supreme Court decision on the matter.

I attended the hearing on the nomination of William Pryor and can testify that he gave equally frank, cogent, and reasoned arguments, based on the law, for all of his positions. He consistently faced down and bested the hostile senators who were trying to paint him as an “extremist,” unfit to be a federal judge. At no time did he soft-pedal his Catholic religious beliefs but rather proudly affirmed them. He showed himself to be highly knowledgeable and competent in the law, as well as a man of character and integrity—the kind of man America needs as a federal judge.

None of this appeased his opponents on the Senate Judiciary Committee, however. Democratic Senator Edward M. Kennedy of Massachusetts declared that “Mr. Pryor is simply too ideological to serve as a federal court judge.” One of the chief things that bothered the hostile senators, in fact, seemed to be the realization that the nominee’s “deeply held beliefs” actually do reflect the teachings of the Catholic Church; and what seemed to be resented was precisely his unwillingness to downplay or mute these views in order to secure confirmation.

But as Pennsylvania Republican Senator Rick Santorum said following the failed cloture vote on his nomination: "What we are seeing, *de facto*, from members of the other side, is a religious test." This has been pretty evident all along, even though, as everyone knows, the Constitution of the United States forbids any religious test for public office in this country. Those opposed to the Pryor nomination attempt to get around this inconvenient fact by refusing to admit that they are, in fact, engaged in applying a religious test. They even resorted to the claim that opposition to the nominee's religious beliefs could not possibly be the motive for their opposition since three of the hostile members of the Senate Judiciary Committee, Senators Durbin and Kennedy, as well as Vermont Democratic Senator Patrick J. Leahy of Vermont, were themselves Catholics: how could such Catholics possibly be styled "anti-Catholic"?

This approach, however, begged the real question. All of the Catholic senators in question—like so many others in Congress, unfortunately—have, in effect, jettisoned any recognizable Catholic teaching in compiling their consistent records of support for such things as legalized abortion, among other issues. They cannot have it both ways: both claiming to be "representative" Catholics, while at the same time being entirely unwilling, in voting on many of the political and moral questions of the day, to be influenced in any way by what everybody in the world knows is Catholic teaching. William Pryor is the one who is consistent here, and one of the things his opponents reproach him for in particular is his unwillingness to compromise his views in order to pander to the modern culture of death which too many of our public servants have been only too willing to come to terms with. For his pains, though, Mr. Pryor instead got himself saddled with a new *de facto* religious test for public office.

There was really something quite cynical and shameless in the way the opponents of President Bush's nominations to the

federal bench were prepared to apply their ill-concealed religious test in the Pryor case. They were the ones who raised the religious issue in the first place. Yet when those in favor of the nominee attempted to counter this, the anti-Pryor senators were the first to cry "foul"! Prior to the impending cloture vote, some private interest groups, notably the Committee for Justice and the Ave Maria List, sponsored some pro-Pryor print and television ads in some of the states where there were thought to be waverers among the senators needed for a favorable cloture vote. These ads depicted judicial chambers with signs reading "Catholics Need Not Apply." The ads thus correctly raised the question of how even a *de facto* religious test can or should be applied under our system.

The opponents of the Pryor nomination were furious. "Religious McCarthyism," cried Senator Leahy. "Shameful...disgusting...unacceptable," declared Senator Durbin. Many of those who follow this kind of thing in Washington, though, thought it was about time some of these senators got a taste of their own medicine; they are quick to dish it out; but it turns out they can't take it themselves.

Nevertheless, for the moment, they continue to prevail: William H. Pryor, Jr., the Attorney General of Alabama, and a Catholic, nominated to be an 11th Circuit federal judge, was unable to secure a vote on his nomination because his opponents still had the votes in the Senate to block it. As Republican Senator Orrin G. Hatch of Utah, the chairman of the Senate Judiciary Committee and a Mormon, remarked following the vote: "It's getting so that a pro-life Catholic can't serve in the federal judiciary."

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