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Questioning Judicial Nominees: Legal Limitations and Practice

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SUMMARY

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Questioning Judicial Nominees: Legal Limitations and Practice

The U.S. Constitution vests the Senate with the role of providing "advice" and affording or withholding "consent" when a President nominates a candidate to be an Article III judge—that is, a federal judge entitled to life tenure, such as a Supreme Court Justice. To carry out this "advice and consent" role, the Senate typically holds a hearing at which Members question the nominee. After conducting this hearing, the Senate generally either "consents" to the nomination by voting to confirm the nominee or instead rejects the nominee.

Notably, many prior judicial nominees have refrained from answering certain questions during their confirmation hearings on the ground that responding to those questions would contravene norms of judicial ethics or the Constitution. Various "canons" of judicial conduct—that is, self-enforcing aspirational norms intended to promote the independence and integrity of the judiciary—may potentially discourage nominees from fully answering certain questions that Senators may pose to them in the confirmation context. However, although these canons squarely prohibit some forms of conduct during the judicial confirmation process—such as pledging to reach specified results in future cases if confirmed—it is less clear whether or to what extent the canons constrain judges from providing Senators with more general information regarding their jurisprudential views. As a result, disagreement exists regarding the extent to which applicable ethical rules prohibit nominees from answering certain questions.

Beyond the judicial ethics rules, broader constitutional values, such as due process and the separation of powers, have informed the Senate's questioning of judicial nominees. As a result, historical practice can help illuminate which questions a judicial nominee may or should refuse to answer during his or her confirmation. Recent Supreme Court nominees, for instance, have invoked the so-called "Ginsburg Rule" to decline to discuss any cases that are currently pending before the Court or any issues that are likely to come before the Court. Senators and nominees have disagreed about whether any given response would improperly prejudge an issue that is likely to be contested at the Supreme Court. Although nominees have reached varied conclusions regarding which responses are permissible or impermissible, nominees have commonly answered general questions regarding their judicial philosophy, their prior statements, and judicial procedure. Nominees have been more hesitant, however, to answer specific questions about prior Supreme Court precedent, especially cases presenting issues that are likely to recur in the future. Ultimately, however, there are few available remedies when a nominee refuses to answer a particular question. Although a Senator may vote against a nominee who is not sufficiently forthcoming, as a matter of historical practice the Senate has rarely viewed lack of candor during confirmation hearings as disqualifying, and it does not appear that the Senate has ever rejected a Supreme Court nominee solely on the basis of evasiveness.

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In order to safeguard "the complete independence of the courts of justice,"[1] Article III of the U.S. Constitution provides that "the Judges, both of the supreme and inferior Courts" of the United States, "shall hold their Offices during good Behaviour" and receive a salary that "shall not be diminished during their Continuance in Office."[2] By granting U.S. Supreme Court Justices, judges of the U.S. Courts of Appeals and U.S. District Courts, and other such "Article III" judges a guaranteed salary and "the practical equivalent of life tenure," the Founders sought to insulate the federal courts from political pressures that might influence judges to favor or disfavor certain litigants instead of neutrally applying the law to the facts of a particular case.[3]

Because Article III judges ordinarily hold their positions for life, and because federal judges can decide issues of great legal and political significance,[4] the decision whether or not to elevate any particular judicial candidate to the federal bench can be momentous.[5] The U.S. Constitution empowers the President to nominate candidates for Article III judgeships, but also vests the Senate with the role of providing "advice" and affording or withholding "consent" with respect to the President's nominees.[6] To carry out this "advice and consent" role, the Senate typically holds a hearing at which Members of the Senate Judiciary Committee question the nominee.[7] After conducting this hearing, the Senate generally either "consents" to the nomination by voting in favor of the nominee's confirmation or instead rejects the nominee.[8]

Ideally, "the questioning of nominees at confirmation hearings enables [S]enators to obtain useful and indeed necessary information about nominees."[9] To that end, Senators commonly ask questions that are intended to enable the Senate "to evaluate not only the nominees' qualifications, but also their beliefs and probable voting patterns on the Court."[10] Such questions frequently include inquiries "about specific cases, judicial philosophy, and attitudes on issues that are likely to come before the Court."[11] However, judicial nominees have often refused to answer certain questions at their confirmation hearings—or have volunteered only perfunctory responses—claiming that fully answering certain questions could violate various ethical norms

[1] United States v. Hatter, 532 U.S. 557, 567 (2001) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

[2] U.S. CONST. art. III, § 1.

[3] *See Hatter*, 532 U.S. at 567–569.

[4] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc. 454 U.S. 464, 473 (1982) ("The exercise of judicial power ... can ... profoundly affect the lives, liberty, and property of those to whom it extends.").

[5] *See* Sen. Charles McC. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 200 (1987) ("Among all the responsibilities of a United States Senator, none is more important than the duty to participate in the process of selecting judges and justices to serve on the federal courts.").

[6] *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .") (emphasis added).

[7] *E.g.*, Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858, 859 (1990) ("Beginning in 1959, with the hearings on Potter Stewart's nomination, senators have considered it proper to use the occasion of the nominee's appearance [at his or her confirmation hearing] to inquire about specific cases, judicial philosophy, and attitudes on issues likely to come before the Court."). *But see* Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 266 (describing instances in which the Senate has opted not to hold a confirmation hearing for a nominee).

[8] Gerhardt & Painter, *supra* note 7, at 270.

[9] William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 1005 (1994).

[10] Nagel, *supra* note 7, at 859.

[11] *Id*.

governing judges and judicial candidates[12] or impair the independence or fairness of the federal judiciary.[13] To name several notable examples, then-Judge Ruth Bader Ginsburg stated during her Supreme Court confirmation hearing she could offer "no hints, no forecasts, [and] no previews" of how she might rule on questions that might come before the Court.[14] Similarly, then-Judge Antonin Scalia refused to state his opinion on any prior Supreme Court decisions, declining even to discuss *Marbury v. Madison*, the foundational case establishing the power of courts to review laws under the Constitution.[15] Some commentators and Members alike have expressed frustration regarding nominees' reticence to reveal their jurisprudential views during their confirmation hearings.[16] While by no means the consensus view,[17] some argue that if prospective judges refuse to divulge how they will rule on controversial legal issues once they reach the bench, then Senators cannot cast a fully informed vote when deciding whether to confirm or reject the nominee.[18]

At the same time, however, even though many wish that federal judicial nominees were more forthcoming during their confirmation hearings, there is nonetheless "relative agreement among nominees, senators, and commentators" alike that "there must be *some* limitations on a potential Justice's answers" during the confirmation process.[19] For instance, most commentators agree that

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[12] Tom Lininger, *On Dworkin and Borkin'*, 105 MICH. L. REV. 1315, 1324 (2007) (arguing that applicable rules of judicial conduct "have generally provided many excuses for judges and nominees to dodge questions about substantive matters").

[13] Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges? Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 475 (2005) ("The nominees themselves frequently cite judicial independence concerns as a basis for declining to answer questions.").

[14] *The Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 323 (1993) [hereinafter *Ginsburg Hearings*] (statement of Ruth Bader Ginsburg, J., U.S. Court of Appeals for the District of Columbia Circuit).

[15] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803); *Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 33 (1986) [hereinafter *Scalia Hearings*] (statement of Antonin G. Scalia, J., U.S. Court of Appeals for the District of Columbia Circuit) ("I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*.").

[16] *See, e.g.*, Justin Wedeking & Dion Farganis, *The Candor Factor: Does Nominee Evasiveness Affect Judiciary Committee Support for Supreme Court Nominees?*, 39 HOFSTRA L. REV. 329, 330 (2010) ("Legal academics, journalists, and other judicial observers routinely criticize Supreme Court confirmation hearings as exercises in obfuscation, where prospective justices give carefully crafted answers that reveal little about their views and opinions." (footnote omitted)); Lininger, *supra* note 12, at 1326 (noting that, during the confirmation hearings of Chief Justice John Roberts and Justice Samuel Alito, several "Senators expressed exasperation that many matters of great importance seemed to be off limits to discussion during the confirmation process"); Amy Goldstein, Paul Kane & Robert Barnes, *Sotomayor Avoids Questions About Her Position on Abortion, Other Issues*, WASH. POST, July 16, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071501114.html (describing Senators as "frustrated" with Justice Sotomayor's "long, elusive replies").

[17] For instance, some Members have instead taken the opposite position—that "answer[ing] questions about previously decided Supreme Court cases" would create an undesirable appearance of bias and prejudgment in future cases. *See* Lori A. Ringhand & Paul M. Collins, Jr., *Neil Gorsuch and the Ginsburg Rules*, 93 CHI.-KENT L. REV. 475, 479–83 (2018) (describing the positions taken by several members of the Senate Judiciary Committee during the confirmation hearing of then-Judge Neil Gorsuch).

[18] *See, e.g.*, Lininger, *supra* note 12, at 1327 ("Plainly the present process for confirming Supreme Court nominees is not ideal. This process allows nominees to assume a position of life tenure without meaningful prior screening of their judicial philosophy by the Senate Judiciary Committee."); Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 919 (1983) ("If . . . it would have been proper for Senators to base their votes in whole or in part upon Justice O'Connor's constitutional philosophy, then no Senator could have cast an informed vote without access to information that was not in the record of the hearings.").

[19] Steven Lubet, *Confirmation Ethics: President Reagan's Nominees to the United States Supreme Court*, 13 HARV. J.

a nominee should not make "[e]xplicit or implicit promises" to rule in a certain way in future cases during his or her confirmation hearing, as "such promises if sought and given would . . . compromise judicial independence and due process of law" by depriving litigants of their constitutional entitlement to a fair adjudicator.[20] These commentators further maintain that the integrity of the federal judiciary would suffer if a judge's responses to Senators suggested that his "confirmation ha[d] been purchased through the pledge of future conduct in office."[21]

In response to concerns regarding the proper conduct of judges and judicial candidates,[22] judges and bar associations have promulgated a variety of "canons" of judicial ethics—that is, self-enforcing, aspirational norms intended to promote the independence and integrity of the judiciary.[23] Among other things, these canons provide nominees with general guidance regarding which sorts of statements by judges and judicial candidates are appropriate or inappropriate.[24] As discussed below,[25] most commentators agree that the canons discourage federal judicial nominees from pledging to reach predetermined results in future cases. However, scholars, nominees, and Members of Congress have not reached a consensus regarding the extent to which ethical canons otherwise constrain a nominee from answering other types of questions at his or her Senate confirmation hearing.

Beyond the canons of judicial ethics, historical practice reveals the constitutional norms that have influenced what questions a federal judicial nominee should or must refuse to answer.[26] Here, too, however, different nominees have reached different conclusions regarding which types of responses are improper.[27] As a result, the boundaries between proper responses and improper responses remain unsettled.

This report examines the relevant considerations with respect to the questioning of judicial nominees. The report begins by discussing applicable canons of judicial ethics that may discourage judicial nominees from answering certain questions posed by Members of Congress.[28] The report then proceeds to discuss which types of questions prior federal judicial nominees have

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L. & PUB. POL'Y 229, 234–35 (1990) [hereinafter Lubet, *Confirmation Ethics*] (emphasis added).

[20] Vikram David Amar, *"Casing" Brett Kavanaugh: Why Senate Hearings Can and Should Explore His Views on Past Supreme Court Cases, and at the Very Least His Views on Applying Originalism Where it Would Lead to Progressive Results*, VERDICT (Aug. 13, 2008), https://verdict.justia.com/2018/08/13/casing-brett-kavanaugh. *Accord, e.g.*, Lubet, *Confirmation Ethics*, *supra* note 19, at 235 ("[I]t may seem to future litigants that a justice is bound to a predetermined outcome as a consequence of commitments apparently made during confirmation. This appearance of partiality should be avoided in its own right.").

[21] Lubet, *Confirmation Ethics*, *supra* note 19, at 235.

[22] For the purposes of this report, the term "judicial candidate" refers to "any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment." MODEL CODE TERMINOLOGY.

[23] *See infra* "Codes of Judicial Conduct."

[24] See generally CRS Legal Sidebar LSB10189, *Calling Balls and Strikes: Ethics and Supreme Court Justices*, by Cynthia Brown.

[25] *See infra* "Codes of Judicial Conduct."

[26] *See infra* "Historical Practice."

[27] *E.g.*, Lubet, *Confirmation Ethics*, *supra* note 19, at 234 ("[T]he nominees themselves have responded in widely different fashion to inquiries from the Senate concerning their views of the law—ranging from Robert Bork's willingness to discuss legal issues at length and in detail to Sandra Day O'Connor's virtual refusal to answer in any but the most general terms." (footnote omitted)); *id*. at 262 ("For every question that was declined by one justice-designate, a comparable question was freely answered by another—if not the very same—nominee.").

[28] *See infra* "Codes of Judicial Conduct."

answered or declined to answer, focusing on nominees for the U.S. Supreme Court.[29] The report concludes with some takeaways for Members.[30]

Codes of Judicial Conduct

The federal judiciary, state courts, state legislatures, and various bar associations have all developed codes of ethical standards intended to guide the conduct of judges and judicial candidates.[31] As explained below, many of these codes contain provisions that could discourage nominees for federal judgeships from answering certain types of questions during their confirmation hearings.[32] Each of the ethical rules discussed below purport to *constrain* what a federal judicial nominee may permissibly say during the confirmation process; none of the ethical rules, however, affirmatively *obligate* nominees to respond to particular questions.[33] Moreover, the applicable ethical rules purport only to prohibit the *nominee* from *answering* certain questions; they do not explicitly purport to prohibit *Members* from *asking* those questions.[34]

As the following sections explain, however, canons of judicial ethics are generally self-enforcing, with the result that there is virtually no case law and only minimal commentary analyzing how these codes of judicial conduct apply in the specific context of confirmation hearings for appointed federal judges.[35] Although it is possible to draw analogies from other contexts—especially statements and promises that candidates for elected judgeships at the state level make during their campaigns—neither the canons nor the advisory opinions interpreting them definitively address how the various ethical rules apply in the specific context of a confirmation

[29] *See infra* "Historical Practice."

[30] *See infra* "Conclusion."

[31] *See infra* "The Code of Conduct for United States Judges"; "The ABA Model Code of Judicial Conduct."

[32] Note that ethical rules that purport to constrain judges and judicial candidates from stating their views on legal or political issues may raise First Amendment concerns. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 768–88 (2002) (invalidating state judicial canon that prohibited candidates for judicial election "from announcing their views on disputed legal and political issues" on First Amendment grounds). The First Amendment implications of the canons discussed herein are outside the scope of this report.

[33] *See, e.g.*, Lininger, *supra* note 12, at 1324 ("[T]he ethical rules for judges do not presently include any obligation that judges or judicial candidates must forthrightly disclose their judicial philosophies in confirmation hearings . . . . A candidate for judicial office could comply fully with existing rules by declining to make any statement concerning his or her own views. Even an evasive answer to a question about the candidate's views could be compliant with the present ethical rules for judges, provided that the answer does not make any affirmative misrepresentations."); Lubet, *Confirmation Ethics*, *supra* note 19, at 251 (arguing that "silence" is "permitted by the Code"); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1044–45 (D.N.D. 2005) ("There is certainly nothing in this opinion that *requires* any judicial candidate to respond to [questions about his or her jurisprudential philosophy].") (emphasis added); Kan. Judicial Review v. Stout, 196 P.3d 1162, 1176 (Kan. 2008) (per curiam) (explaining that "judges and candidates for judicial office" are "not in any way required to" respond to questionnaires "call[ing] for the candidate's personal views on disputed legal or political issues").

[34] *See, e.g.*, CODE OF CONDUCT CANON 3(A)(6) ("*A judge* should not make public comment on the merits of a matter pending or impending in any court") (emphasis added); MODEL CODE RULE 4.1(A) ("*A judge or a judicial candidate* shall not . . .") (emphasis added).

[35] *See* Steven Lubet, *Advice and Consent: Questions and Answers*, 84 NW. U. L. REV. 879, 880 (1990) [hereinafter Lubet, *Advice and Consent*] ("Notably absent from the entire debate [over the proper scope of questioning a judicial nominee] has been any consideration of the Model Code of Judicial Conduct . . . [I]t is essentially treated as if nonexistent in the other literature on Supreme Court selection."); Lininger, *supra* note 12, at 1323 (criticizing an account of the Supreme Court confirmation process for failing to "pay[] enough attention to the role of ethical rules for judges").

hearing before the U.S. Senate. Further complicating matters is the fact that not all of the canons discussed below apply equally to all nominees.

Perhaps for these reasons, neither judicial nominees nor Members of Congress nor commentators have reached a consensus regarding the precise range of responses that are permissible under the relevant canons of judicial conduct. Some nominees have suggested that ethical considerations prohibit judicial candidates from making virtually any statement about any legal issue that could conceivably come before the federal judiciary.[36] Some scholars, by contrast, take the opposite position—that the applicable canons "impose[] surprisingly few restraints on the scope of a nominee's responses."[37] According to this view, "a nominee's answers before the Senate Judiciary Committee[] will violate" the applicable codes of judicial conduct "only where they evince a settled intention to decide certain cases in a certain manner," such as "promising to reach a predetermined outcome" in a future case "irrespective of the arguments of the parties or the discrete facts of the presented case."[38] Still other commentators take the intermediate position that the applicable ethical rules grant judicial nominees the flexibility to "make a personal judgment about how to fulfill the ethical requirements of the role of a judge in responding to questions posed by Senators during the confirmation process"—and, thus, a personal judgment about which types of responses would or would not run afoul of ethical norms.[39]

The Code of Conduct for United States Judges

The first relevant set of ethical standards is the Code of Conduct for United States Judges (Code of Conduct) promulgated by the Judicial Conference of the United States (Judicial Conference).[40] The Code of Conduct "prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary."[41] It contains a series of ethical "canons" intended to "provide guidance to [federal] judges and nominees for judicial office" regarding proper judicial behavior.[42] By its terms, the Code of Conduct "applies to" most Article III judges, including "United States circuit judges" and "district judges."[43] The Code of Conduct is therefore

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[36] *See* Lubet, *Confirmation Ethics*, *supra* note 19, at 241 ("As candidates for appointment, Justices O'Connor and Scalia took the position that virtually all legal issues may eventually be heard by the Supreme Court and that no nominee should express any view on most questions of law." (footnotes omitted)).

[37] *Id*. at 237.

[38] Lubet, *Advice and Consent*, *supra* note 35, at 882. *Accord* Steven Lubet, *Questioning Ethics*, 115 YALE L.J. POCKET PART 61, 61 (2006) [hereinafter Lubet, *Questioning Ethics*] (arguing that the Code of Conduct for United States Judges supports the proposition "that judicial nominees may (and should) properly be asked to explain how they would have decided well-known Supreme Court cases").

[39] Todd L. Wheeler, *I Can't: Ethical Responses and the Roberts Confirmation Hearings*, 19 GEO. J. LEGAL ETHICS 1067, 1076–77 (2006).

[40] *See* United States v. Microsoft Corp., 253 F.3d 34, 111 (D.C. Cir. 2001) ("The Code of Conduct for United States Judges was adopted by the Judicial Conference of the United States in 1973."). The Judicial Conference of the United States is composed of "[t]he Chief Justice of the United States, . . . the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit." 28 U.S.C. § 331.

[41] *Microsoft*, 253 F.3d at 111.

[42] CODE OF CONDUCT CANON 1 cmt.

[43] CODE OF CONDUCT INTRODUCTION.

The Code of Conduct does not, however, apply to Justices of the Supreme Court. *See id.* (omitting Justices of the Supreme Court from the list of entities covered by the Code of Conduct); Carolyn A. Dubay, *Public Confidence in the Courts in the Internet Age: The Ethical Landscape for Judges in the Post-Watergate Era*, 40 CAMPBELL L. REV. 531, 550 (2018) ("[T]o this day Justices of the United States Supreme Court are not bound by the Code and are subject only to federal law and internal policies with respect to substantive ethics rules."). However, the Justices nonetheless "consult the Code of Conduct" for guidance as to proper judicial behavior. Anthony J. Scirica, *Judicial Governance*

especially relevant for nominees to the U.S. Supreme Court, many (though not all) of whom tend to be sitting federal judges.[44]

Significantly, the Code of Conduct is not a binding set of laws per se, but is rather a set of "aspirational rules" by which federal judges should strive to abide.[45] "The Code of Conduct contains no enforcement mechanism,"[46] and "the Code is not designed or intended as a basis for civil liability or criminal prosecution."[47] "The only remedies for violation of the Code are the institution of a disciplinary complaint" against the offending judge "or a motion to disqualify" the judge from a pending case,[48] and neither of those remedies is granted with great frequency.[49] Furthermore, not every violation of the Code of Conduct warrants discipline or disqualification.[50] Thus, while the Code of Conduct may limit the types of responses a sitting federal judge may provide during his or her confirmation hearing, a nominee who transgresses those limits might not ultimately face any practical consequences as a result of that transgression.

It is uncontroversial that the Code of Conduct at least permits a judicial nominee to appear at his or her confirmation hearing for questioning.[51] However, the extent to which the Code of Conduct

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and Judicial Independence, 90 N.Y.U. L. REV. 779, 797 (2015). *Accord, e.g.*, Lynne H. Rambo, *High Court Pretense, Lower Court Candor: Judicial Impartiality After* Caperton v. Massey Coal Co., 13 CARDOZO PUB. L. POL'Y & ETHICS J. 441, 457 (2015) ("[A]ccording to Chief Justice Roberts, the members of the Supreme [Court] treat the Code as a 'current and uniform source of guidance,' but are not bound by it." (quoting 2011 Year-End Report on the Federal Judiciary 5 (Dec. 31, 2011) (Roberts, C.J.), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.)).

[44] *See* Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1393 (2009) ("[T]he circuit courts have become the most common source for Supreme Court nominees.").

[45] White v. Nat'l Football League, 585 F.3d 1129, 1140 (8th Cir. 2009). *See also In re* Charges of Judicial Misconduct, 769 F.3d 762, 766 (D.C. Cir. 2014) (noting that the "main precepts" of the Code of Conduct "are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules" (quoting JUDICIAL CONFERENCE OF THE UNITED STATES, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, RULE 3 cmt. (2008))).

[46] Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 332 F. Supp. 2d 667, 671 (S.D.N.Y. 2004) (quoting United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir. 2001)). *Accord, e.g.*, *White*, 585 F.3d at 1140 ("The Code of Conduct . . . relies upon self-enforcement.").

[47] CODE OF CONDUCT CANON 1 cmt.

[48] *Metro. Opera Ass'n*, 332 F. Supp. 2d at 671. *Accord Microsoft*, 253 F.3d at 114 ("There are, however, remedies extrinsic to the Code. One is an internal disciplinary proceeding . . . . Another is disqualification of the offending judge . . . ."). *See also* 28 U.S.C. § 351(a) ("Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . may file with the clerk of the court of appeals for the circuit a written complaint . . ."); *id.* § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

[49] *See* Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 844 (1995) ("Judicial discipline . . . is . . . rare in the federal courts."); Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts's Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. L. REV. 1, 28 n.117 (2009) ("Judicial recusal cases based on perceived lack of impartiality . . . are relatively rare at the federal appellate level.").

[50] *See, e.g.*, CODE OF CONDUCT CANON 1 cmt.("Not every violation of the Code should lead to disciplinary action."); United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1175 (9th Cir. 2017) ("[N]ot every violation of the Code of Conduct creates an appearance of bias requiring recusal . . . .").

[51] CODE OF CONDUCT CANON 4(A)(2) ("A judge may . . . appear at a public hearing before a[] legislative body . . . on matters concerning the law, the legal system, or the administration of justice."); *id.* at 4(A)(1) ("A judge may speak . . . concerning the law, the legal system, and the administration of justice."); Lubet, *Advice and Consent*, *supra* note 35, at 881 ("Read in combination, [these two canons] provide a fair endorsement of recent nominees' practice of making themselves available to the Senate Judiciary Committee. The confirmation testimony is an appearance before a legislative body in order to speak about the law.").

restricts what the nominee can say during that hearing is less certain. Canon 3(A)(6) of the Code of Conduct provides that, with certain exceptions unrelated to judicial confirmation hearings,[52] a "judge should not make public comment on the merits of a matter pending or impending in any court."[53] This rule is intended to ensure that federal judges "perform the duties of the office fairly [and] impartially."[54] While it is fairly clear that a sitting federal judge who has been nominated for elevation to a higher federal court should generally refrain from directly commenting about the merits of a pending case[55]—especially a case arising from the nominee's own court[56]—it is less clear whether (or to what extent) Canon 3(A)(6) discourages judicial nominees from answering more general questions about their jurisprudential views, controversial legal issues, and the soundness of judicial precedents that litigants may challenge in the future. For one, neither Canon 3(A)(6) nor the cases and commentary interpreting it specify how broadly the term "impending in any court" sweeps.[57] As at least one court has recognized, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court" at some point or another.[58] Perhaps for that reason, some nominees have taken the position that "no nominee should express any view on most questions of law" because "virtually all legal issues may eventually be heard by" a federal court.[59]

However, at least one scholar has taken the opposite position—that a matter is "impending" within the meaning of Canon 3(A)(6) only if there is "a discrete controversy[] with identifiable facts" and "specific litigants" that "is poised for litigation, though not actually filed."[60] According to this definition, "a general issue" about law or jurisprudence—"even a highly contentious one that might someday reach the Supreme Court—would therefore lack the defining characteristics of an action or proceeding until it was actually embodied in a definable controversy between known parties."[61] This scholar therefore maintains that the Code of Conduct permits judicial nominees to "explain how they would have decided well-known Supreme Court cases" like *Roe v. Wade*, even though an abortion case may well come before that nominee in the future.[62] This scholar further contends that "pure questions of law, even those likely to be considered by the court, are never 'impending'" for the purposes of Canon 3(A)(6).[63]

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[52] CODE OF CONDUCT CANON 3(A)(6) ("The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.").

[53] *Id*.

[54] *See* CODE OF CONDUCT CANON 3 (entitled "A Judge Should Perform the Duties of the Office Fairly, Impartially, and Diligently").

[55] A matter is "pending or impending" for the purposes of Canon 3(A)(6) "until the appellate process is complete." *Id.* at 3(A)(6) cmt.

[56] *See id.* ("If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality . . . .").

[57] *See In re* Charges of Judicial Misconduct, 769 F.3d 762, 788–89 (D.C. Cir. 2014) (noting that the Code of Conduct does not define "impending" matters).

[58] Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993). *Accord* Lubet, *Confirmation Ethics*, *supra* note 19, at 240 ("'[M]ight come before the Supreme Court' is an elastic standard that arguably encompasses all human activity.").

[59] *See* Lubet, *Confirmation Ethics*, *supra* note 19, at 241–42 (describing the confirmation hearings of Justice O'Connor and Justice Scalia).

[60] Lubet, *Questioning Ethics*, *supra* note 38, at 62–63.

[61] *Id*. at 62.

[62] *Id*. at 61–62.

[63] Lubet, *Confirmation Ethics*, *supra* note 19, at 243.

Apart from whether a nominee's comments would concern an "impending" case, it is also unclear what kinds of responses would amount to a public comment "on the merits." "Canon 3[(A)(6)] does not define 'on the merits,'"[64] and few if any legal opinions provide meaningful guidance regarding what types of comments during a Senate confirmation hearing would impermissibly pertain to the "merits" of a pending or impending case for the purposes of the Code of Conduct.[65] Thus, while it is clear that the Code of Conduct may constrain judicial nominees from answering certain questions during the confirmation process, nominees and commentators have not reached a consensus regarding the scope of those constraints.

The ABA Model Code of Judicial Conduct

Another pertinent set of ethical standards is the ABA Model Code of Judicial Conduct (Model Code) promulgated by the American Bar Association (ABA).[66] The Model Code "is intended . . . to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies."[67] Thus, like the Code of Conduct described above, the Model Code "establishes standards for the ethical conduct of judges and judicial candidates,"[68] including nominees for appointed judgeships.[69]

Nevertheless, the extent to which the ethical principles embodied in Model Code constrain federal judicial nominees remains somewhat unclear because, as the name suggests, the Model Code is merely a "*model* template[] of legal and judicial ethics."[70] In other words, the Model Code is not itself "binding on judges unless it has been adopted in" the state in which the judge is stationed or in which the judicial candidate is seeking office.[71] "The ABA does not enforce the [Model] Code or discipline judges for violating it. Instead, the ABA offers its Code as a model for jurisdictions to adopt, and those that do are responsible for creating a mechanism to enforce it."[72] Although many states have adopted binding standards of judicial conduct that are similar or identical to those set forth in the Model Code,[73] variances between states do exist, with the consequence that

[64] *In re* Charges of Judicial Misconduct, 769 F.3d 762, 793 (D.C. Cir. 2014).

[65] *See id*. (describing existing precedent interpreting the term "on the merits" as "only minimally illuminating"). *Cf. In re* Bos.'s Children First, 244 F.3d 164, 168 (1st Cir. 2001) ("[I]t is not at all clear that Judge Gertner was commenting on the merits of petitioner's motion [when making comments to the media about the case].").

[66] The American Bar Association is a professional organization of lawyers tasked with "improving the administration of justice, accrediting law schools, establishing model ethical codes, and more." *About the American Bar Association*, https://www.americanbar.org/about_the_aba.html (last visited Aug. 24, 2018).

[67] MODEL CODE PREAMBLE [3].

[68] *Id*.

[69] Several of the rules discussed below apply not only to sitting judges, but also to "judicial candidates"—a term the Model Code defines to include "any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment." MODEL CODE TERMINOLOGY. *See also* MODEL CODE RULE 4.1 cmt. [2] ("When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.").

[70] Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 826 (2009) (emphasis added).

[71] Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 64 n.7 (2005). *Accord, e.g.*, Stempel, *supra* note 70, at 826 ("[T]he ABA Canons and Model Code are not binding unless adopted by the relevant state supreme court or legislature.").

[72] Arthur H. Garwin *et al.*, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 2 (3d ed. 2016) [hereinafter ANNOTATED MODEL CODE]. Depending on the severity of the violation, disciplinary sanctions for judges who engage in misconduct may include, *inter alia*, removal, suspension, public reprimand, or private admonition. *See* ABA MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT § II.6.2.

[73] Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46

the principles discussed in this section of the report will not necessarily apply equally to every judicial nominee.[74] Nevertheless, the Model Code still provides guidance regarding the sorts of judicial conduct that are proper and improper,[75] and judges commonly consult the Model Code to resolve ethical quandaries.[76] Therefore, the following subsections of this report analyze provisions of the Model Code that could discourage federal judicial nominees from answering certain questions at their confirmation hearings.

Pledges, Promises, and Commitments

First, the Model Code prohibits judges and judicial candidates from making "pledges, promises, or commitments" regarding "cases, controversies, or issues that are likely to come before the court . . . that are inconsistent with the impartial[] performance of the adjudicative duties of judicial office."[77] As the commentary to the Model Code explains, this prohibition is intended to promote the independence, integrity, and impartiality of the judiciary by insulating the judiciary from political influence:[78]

> [A] judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.[79]

Significantly, the commentary to the Model Code squarely states that the prohibition against "pledges, promises, or commitments" applies when a judicial candidate is "communicating directly with an appointing or confirming authority"[80]—a term defined to include "the United States Senate when sitting to confirm or reject presidential nominations of federal judges."[81]

HOFSTRA L. REV. 139, 139 n.2 (2017) ("As of August 22, 2016, thirty-five states have adopted amendments to their codes of judicial ethics based on the 2007 ABA Code of Judicial Conduct."). *See also In re* Sheffield, 465 So. 2d 350, 355 (Ala. 1985) (explaining that, once affirmatively adopted by a state, canons of judicial ethics are no longer "merely guidelines for proper judicial conduct," but rather "have the force and effect of law").

[74] Michael P. Seng, *What Do We Mean by an Independent Judiciary?*, 38 OHIO N.U. L. REV. 133, 142 (2011) ("[T]he ABA Model Code . . . is not binding and may vary slightly from state to state.").

[75] *See* Lubet, *Confirmation Ethics*, *supra* note 19, at 233 ("Notwithstanding its technical inapplicability to the Supreme Court, the [Model Code] stands as the broadest and most universally applicable statement available regarding judges' ethical aspirations for their own profession. It would hardly seem credible for nominees to excuse what would otherwise be clear ethical lapses on the ground that the rules did not reach them personally.").

[76] *See* Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims Into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 906 ("While the Model Code of Judicial Conduct is not binding on federal courts, its principles have generally been viewed as instructive."). *Cf. In re* Charges of Judicial Misconduct, 769 F.3d 762, 789 (D.C. Cir. 2014) (consulting the Model Code for guidance in interpreting the Code of Conduct).

[77] MODEL CODE RULE 2.10(B); MODEL CODE RULE 4.1(A)(13). *See also* MODEL CODE RULE 4.3 cmt. [1] ("[W]hen communicating directly with an appointing or confirming authority, a candidate for appointive judicial office must not make any pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.").

[78] *See also* MODEL CODE CANON 2 ("A judge shall perform the duties of judicial office impartially . . ."); MODEL CODE CANON 4 ("A Judge Or Candidate For Judicial Office Shall Not Engage In Political Or Campaign Activity That Is Inconsistent With The Independence, Integrity, Or Impartiality Of The Judiciary.").

[79] MODEL CODE RULE 4.1 cmt. [1].

[80] MODEL CODE RULE 4.3 cmt. [1].

[81] ANNOTATED MODEL CODE, *supra* note 72, at 578.

That said, the Code of Conduct that governs federal judges does not contain a provision that is precisely analogous to the Model Code's "pledges, promises, or commitments" rule governing state judges and judicial candidates. *See* Lubet,

As courts interpreting analogous state ethical rules have explained, "[w]hether a statement is a pledge, promise or commitment is objectively [discernible]. It requires affirmative assurance of a particular action. It is a predetermination of the resolution of a case or issue."[82] Thus, "in determining whether a 'pledge, promise, or commitment' has been made, the question is whether 'a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.'"[83] The clause thereby "prohibits a candidate from promising that he will not apply or uphold the law."[84]

There do not appear to be any judicial cases or advisory opinions clarifying what types of statements qualify as "pledges, promises, and commitments" in the specific context of a confirmation hearing for an appointed federal judgeship. However, because the Model Code purports to apply equally to candidates for appointed and elected judgeships alike,[85] cases analyzing the "pledges, promises, and commitments" clause in the context of campaigns for *elected* judgeships are illustrative.

In particular, cases discussing whether a nominee for an elected judgeship may answer surveys from advocacy groups seeking to discern the nominee's views on controversial legal issues can illuminate whether the "pledges, promises, and commitments" rule might likewise constrain a federal judicial nominee from answering similar questions during his or her Senate confirmation hearing. Advocacy groups commonly submit "questionnaires to candidates for election or retention" for state judgeships asking candidates to state their views on disputed legal questions, such as "whether they agree with *Roe v. Wade*, which held many forms of abortion legislation unconstitutional."[86] As the commentary to the Model Code explicitly states, "depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way."[87] Nevertheless, courts generally agree that state ethical canons derived from the Model Code do not *categorically* prohibit candidates from answering such questions in surveys—so long as those candidates do not pledge to issue specific rulings irrespective of the law or the facts.[88]

Confirmation Ethics, *supra* note 19, at 261 ("[T]he United States Judicial Conference deleted the whole of [the pledges, promises, and commitments clause] when it adopted the *Code of Judicial Conduct*.").

[82] Carey v. Wolnitzek, Civil Action No. 3:06-36-KKC, 2012 WL 4597236, at *4 (E.D. Ky. Sept. 29, 2012) (quoting Duwe v. Alexander, 490 F. Supp. 2d 968, 975–76 (W.D. Wis. 2007)).

[83] *Id*. at *5.

[84] *Id*.

[85] *See* MODEL CODE TERMINOLOGY (stating that, for the purposes of the Model Code, the term "judicial candidate" includes "any person, including a sitting judge, who is seeking selection for or retention in judicial office *by election or appointment*") (emphasis added).

[86] *See* Bauer v. Shepard, 620 F.3d 704, 706 (7th Cir. 2010) (internal citations omitted). *Accord* ANNOTATED MODEL CODE, *supra* note 72, at 546 ("[T]here has been an increased use of questionnaires, which special interest groups send to judicial candidates to ask them about their opinions on disputed political or legal issues such as whether *Roe v. Wade* was wrongly decided."). *See also* Penn. Family Inst., Inc. v. Celluci, 521 F. Supp. 2d 351, 365 n.8 (E.D. Pa. 2007) (quoting judicial questionnaire asking candidates whether they "believe[d] that *Roe v. Wade* . . . was correctly or incorrectly decided" (citation omitted)); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1028 (D.N.D. 2005) (excerpts from survey asking judicial candidates to state their views on legal issues relating to abortion, gay marriage, and school prayer).

[87] MODEL CODE RULE 4.1 cmt. [15].

[88] *See, e.g.*, Kan. Judicial Review v. Stout, 196 P.3d 1162, 1176 (Kan. 2008) ("A candidate's decision to respond to a questionnaire asking, 'What is your stance on abortion?' is qualitatively different under the code from a candidate's decision to respond to a question 'Do you vow to overturn *Roe v. Wade*?' While an answer to the first of these questions would likely be a permissible announcement of a personal view on a disputed legal issue, an affirmative response to the second question would impermissibly bind a candidate to a particular legal action."); *Bauer*, 620 F.3d at 715–16 ("Under Indiana's language, judges and candidates can tell the electorate not only their general stance ('tough

However, in order to clarify that such responses represent the candidate's personal views rather than a commitment to rule in specific ways, the Model Code admonishes judicial candidates to "acknowledge the overarching judicial obligation to apply and uphold the law, without regard to [the judge's] personal views," when responding to such questionnaires.[89] Thus, by analogy, federal judicial nominees may be able to generally answer questions about their jurisprudential philosophies during their Senate confirmation hearings without running afoul of the "pledges, promises, and commitments" clause, but they should not commit to reaching particular results in specific cases if they are confirmed.[90]

To that end, state courts and disciplinary bodies most commonly impose discipline under the "pledges, promises, and commitments" clause when a judicial candidate makes campaign promises to favor or disfavor certain classes of litigants in their rulings—such as pledges to rule against criminal defendants and in favor of children, crime victims, and police officers.[91] The rule that a judicial candidate should not attempt to garner a larger share of the popular vote by promising to mechanically rule in particular ways would appear to apply equally to a judicial nominee seeking to induce Senators to vote in favor of his confirmation. Indeed, the drafting history of the Model Code states the following:

> Although candidates for appointive judicial office are by definition not submitting themselves to the voting public at large, they are trying to influence a much smaller "electorate" . . . . It is just as improper in these small-scale "campaigns" to make pledges

on crime' or 'tough on drug companies') but also their legal conclusions ('I would have joined Justice White's dissent in *Roe*' or 'the death penalty should be treated as cruel and unusual punishment') . . . . A judge who promises to ignore the facts and the law to pursue his (or his constituents') ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the former and allow the latter."); Wolfson v. Brammer, 616 F.3d 1045, 1063–64 (9th Cir. 2010) ("The pledges and promises clause prohibits *committing* oneself or *making promises*. The pledges and promises clause does not unambiguously prohibit the expression of one's views on issues that may come before the court . . . [A] candidate may express views on any disputed issue, subject to and consistent with the pledges and promises clause." (internal citations and quotation marks omitted)).

[89] MODEL CODE RULE 4.1 cmt. [13].

[90] *See* Lubet, *Questioning Ethics*, *supra* note 38, at 61 (arguing "that judicial nominees may (and should) properly be asked to explain how they would have decided well-known Supreme Court cases"); Lubet, *Advice and Consent*, *supra* note 35, at 882 (arguing that "a nominee's answers before the Senate Judiciary Committee[] will violate" the applicable codes of judicial conduct "only where they evince a settled intention to decide certain cases in a certain manner," such as "promising to reach a predetermined outcome" in a future case "irrespective of the arguments of the parties or the discrete facts of the presented case").

[91] *See*, *e.g.*, *In re* Kinsey, 842 So. 2d 77, 88 (Fla. 2003) ("Each of the charges addressed above involved implicit pledges that if elected to office, Judge Kinsey would help law enforcement. Through these statements, Judge Kinsey fostered the distinct impression that she harbored a prosecutor's bias and police officers could expect more favorable treatment from her . . . . She also made pledges to victims of crime . . . giving the appearance that she was already committed to according them more favorable treatment than other parties appearing before her."); *In re* Watson, 794 N.E.2d 1, 4–5 (N.Y. 2003) ("[P]etitioner's comments in this case, when viewed in light of his comprehensive campaign theme, violate the pledges or promises prohibition . . . . [P]etitioner's campaign effectively promised that, if elected, he would aid law enforcement rather than apply the law neutrally and impartially in criminal cases."); Judicial Ethics Opinion 2007-1, 162 P.3d 246, 247 (Okla. Judicial Ethics Advisory Panel 2007) ("The campaign statements . . . are committing the judicial candidate, if elected, to favor certain parties in the litigation, i.e., children, victims, which the Code of Judicial Conduct prohibits."). *Cf. In re* Singletary, 967 A.2d 1094, 1098 (Pa. Ct. Judicial Discipline 2009) (disciplining judicial candidate who "promis[ed] that anyone who gave him money" to support his judicial election campaign "would get favorable consideration from him if he was elected judge"). *See also* ANNOTATED MODEL CODE, *supra* note 72, at 551–52 (explaining that "[s]tatements that convey the message that a judge or judicial candidate is predisposed to rule in a certain manner in criminal cases that may come before him or her as a judge violate Rules 4.1(A)(12) and (13)" of the Model Code, but "[a] judicial candidate's statement that he or she will be 'tough on crime' generally does not violate Rule 4.1").

> and promises that are inconsistent with the impartial performance of judicial duties as it is in campaign for elected office, with town meetings and television advertisements.[92]

The commentary to the Model Code emphasizes that "pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited" so long as the judicial candidate also "acknowledge[s] the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views."[93] Thus, according to the drafting history of the Model Code, a nominee may "announce[] his or her personal views—even strongly held personal views—on a matter that is likely to come before the court" without violating the "pledges, promises, or commitments" rule as long as that announcement does not "demonstrate[] a closed mind on the subject" or "include[] a pledge or a promise to rule in a particular way if the matter does come before the court."[94] Some courts interpreting state ethical rules derived from the Model Code have therefore concluded that

> most statements identifying a point of view will not implicate the "pledges or promises" prohibition. The rule precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties . . . .[95]

The foregoing analysis suggests that federal judicial nominees will not violate the "pledges, promises, or commitments" rule if they answer questions regarding their personal opinions on controversial legal or political issues during their confirmation hearing—as long as they do not promise to rule in a particular fashion in future cases presenting those issues.

Critically, however, as explained in the following subsection, a comment by a judicial nominee could conceivably qualify as an impermissible "public statement" under the Model Code even if it does not qualify as an impermissible "pledge, promise, or commitment."[96] Moreover, as discussed in greater detail below,[97] even if a public announcement regarding the candidate's jurisprudential views does not itself violate the "pledges, promises, and commitments" clause, successful candidates may nonetheless potentially be disqualified from hearing certain cases after taking the bench if their prior statements would lead a reasonable person to question their impartiality.[98]

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[92] *See* ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT REPORT, 162 (Nov. 2006).

[93] MODEL CODE RULE 4.1 cmt. [13]. *Accord Kinsey*, 842 So. 2d at 87 ("[A] candidate may state his or her personal views, even on disputed issues. However, to ensure that voters understand a judge's duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law.").

[94] ABA JOINT COMMISSION REPORT, *supra* note 92, at 148–49.

[95] *In re* Watson, 794 N.E.2d 1, 7 (N.Y. 2003).

[96] *See infra* "Public Statements."

[97] *See infra* "Disqualification."

[98] *See* N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1040, 1045 (D.N.D. 2005) (concluding that, even though "judicial candidates must be allowed to impart whatever information they choose about their views on political, legal, and social issues, and their personal philosophy—without restriction," a candidate who exercises that right may nonetheless "create a serious ethical dilemma for himself or herself that would require recusal at a later date"); Penn. Family Inst., Inc. v. Celluci, 521 F. Supp. 2d 351, 387 (E.D. Pa. 2007) (explaining that, although "judicial candidates . . . may answer questionnaires . . . without fear of discipline" under "the pledges and promises and commits clauses," their answers could nonetheless potentially "force them to recuse themselves from future cases"). *But see* Duwe v. Alexander, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007) (concluding that state recusal rule requiring judges to recuse themselves for their past public statements was "unconstitutionally vague and overbroad").

Public Statements

With certain exceptions not relevant here,[99] the Model Code also prohibits judges and judicial candidates alike from making "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending[] or impending[] in any court."[100] This prohibition serves to avoid the public perception that a "judge has either pre-judged [a] matter or that the judge has such a strong bias that he cannot render or provide an arena where the jury can render an impartial decision based solely on the evidence."[101] Because this "public statement" rule applies regardless of the forum in which the judge or candidate makes the statement,[102] the Model Code thereby discourages federal judicial nominees from making certain types of public statements during their confirmation hearings.[103]

The Model Code defines an "impending" matter to include any "matter that is imminent or expected to occur in the near future."[104] Thus, by its plain terms, the "public statement" prohibition appears to apply to a broad array of legal disputes, including those that have not yet ripened into actual lawsuits.[105] Nonetheless, the rule's scope is not unlimited; the annotations to the Model Code[106] clarify that the term "impending" "does not include 'every possible social or community issue that could come before the court.'"[107] Instead, "impending matters are those that if they continue on their regular course will end up in a court."[108]

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[99] *See* MODEL CODE RULE 2.10(D) ("Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity."); MODEL CODE RULE 2.10(E) ("Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter."); ANNOTATED MODEL CODE, *supra* note 72, at 236–39 (explaining these exceptions in greater detail).

[100] MODEL CODE RULE 2.10(A). *See also* MODEL CODE RULE 4.1(A)(12) (referring to "statement[s]" generally, rather than "public statement[s]" specifically).

A matter remains "pending" for the purposes of the Model Code "through any appellate process until final disposition." MODEL CODE TERMINOLOGY.

Note that the public statement rule applies to matters pending or impending in *any* court, not just the specific court to which the judicial candidate seeks to be elected or appointed. *See In re* Judicial Qualifications Comm'n Formal Advisory Op. No. 241, 799 S.E.2d 781, 785 (Ga. 2017) ("The phrase 'in any court' indicates that a judge is not only prohibited from commenting on cases pending in his or her own court, but is also precluded from commenting on matters pending in other courts."); *In re* White, 651 N.W.2d 551, 564 (Neb. 2002) (concluding that state canon's "limitations on public comments apply where a trial judge comments on a matter that is before another trial judge or has been taken to an appellate court").

[101] ANNOTATED MODEL CODE, *supra* note 72, at 235.

[102] *See id*. at 231 ("If a judge's comments fall within the prohibitions of Rule 2.10(A), virtually any public expression in any forum is subject to discipline.").

[103] *See White*, 651 N.W.2d at 564 (concluding that statements or comments are "public" for the purposes of the judicial ethics rules if they are made "in a public forum" and are "part of the public record").

[104] MODEL CODE TERMINOLOGY.

[105] *See* Lubet, *Confirmation Ethics*, *supra* note 19, at 240 ("'[M]ight come before the Supreme Court' is an elastic standard that arguably encompasses all human activity.").

[106] The annotations to the Model Code are published by the ABA and are intended to "present[] an authoritative and practical analysis of the judicial ethics rules and the cases, ethics opinions, and other legal authorities essential to understanding them." ANNOTATED MODEL CODE, *supra* note 72, at ix.

[107] *Id*. at 227. (quoting Marla N. Greenstein, *Commenting on Pending or Impending Matters*, 46 NO. 2 JUDGES' J. 41 (2007)).

[108] *Id*.

The annotations to the Model Code also state that "[o]nce a case is fully resolved and no longer pending, a judge is free to engage in any extrajudicial comments" about the case.[109] One might reasonably interpret this annotation to grant federal judicial nominees some leeway to comment about cases previously decided by the Supreme Court or other courts.[110] Nevertheless, statements about a prior case which implicate issues that are likely to recur in a future case could conceivably still fall within the Model Code's prohibitions.[111]

Neither the case law nor the annotations to the Model Code provide significant guidance regarding what types of public statements made during the federal confirmation process may impermissibly "affect the outcome or impair the fairness" of a pending or impending matter within the meaning of the rule.[112] However, the annotations to the Model Code do at least suggest that "[j]udges may . . . express their disagreement and criticism about the present state of the law as long as they do not appear to substitute their concept of what the law ought to be for what the law actually is."[113]

Nonpublic Statements

Public hearings are not the only occasion where a federal judicial nominee could conceivably make statements that implicate ethical norms or rules. In addition to publicly appearing before the Senate for questioning, it is common for federal judicial nominees to meet privately with Members for courtesy visits in advance of their confirmation hearings.[114] Some commentators have expressed concern that judicial candidates may make "commitments on particular issues or cases" during these meetings.[115] As noted above, the Model Code prohibits judicial nominees from pledging to rule in a certain way, whether they do so publicly in their confirmation hearings or privately during courtesy visits with Members.[116] Additionally, however, the Model Code prohibits nominees who are sitting federal or state judges from "mak[ing] any nonpublic statement that might substantially interfere with a fair trial or hearing."[117] There are no cases applying this "nonpublic statement" rule in the federal judicial confirmation context, and cases interpreting the rule tend to arise in contexts that are not factually analogous to the judicial

[109] *Id*. at 230 (analyzing MODEL CODE RULE 2.10). *Accord id*. at 535 (analyzing MODEL CODE RULE 4.1) ("A judge is not prohibited from speaking publicly on matters that have been concluded and resolved.").

[110] *Cf.* Lubet, *Questioning Ethics*, *supra* note 38, at 61–62 (arguing that the applicable canons of judicial conduct permit judicial nominees to "explain how they would have decided well-known Supreme Court cases").

[111] *See* ANNOTATED MODEL CODE, *supra* note 72, at 227 ("[I]mpending matters are those that if they continue on their regular course will end up in a court." (quoting Greenstein, *supra* note 107)).

[112] *See* MODEL CODE RULE 2.10(A); *see also* ANNOTATED MODEL CODE, *supra* note 72, at 535 (citing cases in which candidates for elected state judgeships criticized criminal sentences handed down by their opponents in cases that were still pending).

[113] ANNOTATED MODEL CODE, *supra* note 72, at 367.

[114] *See* Ronald D. Rotunda, *Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123, 129–30 ("[S]ince the 1970s" it has "been the norm for Supreme Court nominees to pay courtesy calls on selected Senators, moving from office to office . . . . [T]he meetings are held in private . . ."). *See generally* CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion.

[115] Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 468 (2011).

[116] *See supra* "Pledges, Promises, and Commitments."

[117] MODEL CODE RULE 2.10(A). Rule 4.1(A)(12) also prohibits judges and judicial candidates alike from "mak[ing] any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending[] or impending[] in any court," without drawing any explicit distinction between public and nonpublic statements. *See* MODEL CODE RULE 4.1(A)(12).

confirmation process.[118] Moreover, the commentary to the Model Code provides little to no guidance regarding how the prohibition on nonpublic statements applies in the judicial confirmation process.[119] Thus, it is unclear whether and to what extent the Model Code constrains nominees' conduct during private meetings with Members beyond prohibiting them from pledging to rule in particular ways if confirmed.

Disqualification

Beyond the need to comply with specific ethical norms, another reason that some nominees may avoid answering certain questions during their confirmation hearings is the need to refrain from making public statements that would mandate their disqualification[120] from future cases.[121] Several federal statutes,[122] as well as several canons of judicial conduct,[123] require federal judges to recuse themselves from adjudicating particular cases under specified circumstances.[124] Of particular relevance here, 28 U.S.C. § 455(a)—with limited exceptions[125]—affirmatively requires "any justice, judge, or magistrate judge of the United States" to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[126] As explained below,

[118] *See In re* Naranjo, 303 P.3d 849, 851, 854 (N.M. 2013) (state magistrate judge disciplined for vouching for his stepson's character during *ex parte* phone call with state district judge presiding over stepson's child support case); ANNOTATED MODEL CODE, *supra* note 72, at 232–33 ("For instance, a judge was disciplined for commenting on an issue pending in a case during a telephone call with an attorney in a case . . . and for discussing the merits of a trial with other witnesses while subpoenaed as a potential witness in a case." (internal citations omitted)).

[119] ANNOTATED MODEL CODE, *supra* note 72, at 232–33 (not defining "substantially interfere with a fair trial or hearing")

[120] "Traditionally, 'recusal' has referred to a judge's voluntary, discretionary decision to step down in a case, while 'disqualification' refers to a motion for the statutorily or constitutionally mandated removal of a judge from a case." *Id.* at 244. However, "in modern practice the terms 'disqualification' and 'recusal' are frequently viewed as synonymous and are often used interchangeably." *Id.* at 245 (quoting Richard E. Flamm, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1 at 4–5 (1986)). This report therefore uses the two terms interchangeably as well.

[121] *See* Wheeler, *supra* note 39, at 1071 ("Candidates must be aware that any statement made in the course of their confirmation that puts their impartiality reasonably in question may require their disqualification."); Lubet, *Confirmation Ethics*, *supra* note 19, at 253 ("Justice O'Connor argued during her confirmation hearing that a nominee . . . should refrain from making statements that might lead to disqualification in a future case.").

[122] *See* 28 U.S.C. § 144 ("Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice against either him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."); *id.* § 455(a)–(b) (specifying circumstances in which a "justice, judge, or magistrate judge of the United States shall disqualify himself" from a proceeding); *id.* § 47 ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him.").

[123] *See* CODE OF CONDUCT CANON 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."); MODEL CODE RULE 2.11(A) (same).

[124] *See generally* Brown, *supra* note 24, at 2.

Under certain circumstances, constitutional due process principles may likewise mandate a judge's disqualification from particular cases. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009).

[125] *See* 28 U.S.C. § 455(e) ("Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."); Ignacio v. Judges of the U.S. Court of Appeals for the Ninth Circuit, 453 F.3d 1160, 1163 (9th Cir. 2006) (describing the "rule of necessity," pursuant to which "a judge is not disqualified to try a case" under Section 455 "if 'the case cannot be heard otherwise'" (quoting United States v. Will, 449 U.S. 200, 213 (1980))).

[126] 28 U.S.C. § 455(a).

courts have concluded that a judge's extrajudicial statements or comments can sometimes mandate that judge's disqualification from particular cases pursuant to Section 455(a).[127]

The "need to avoid frequent disqualification"—and, by extension, a judicial nominee's need to avoid making public statements that would warrant his or her recusal in future cases—is arguably particularly pressing "in the case of Supreme Court justices."[128] Because "the Supreme Court is the ultimate tribunal on matters that are frequently of urgent public importance," some have argued that "[t]he nation is entitled, where possible, to decisions that are made by a full Court."[129] Unlike in the lower courts, where a district or circuit judge from the same court may step in to take the place of a disqualified judge,[130] neither retired Justices of the Supreme Court nor lower court judges may hear a case in a recused Justice's stead.[131] Thus, the disqualification of a Supreme Court Justice from a particular case increases the likelihood that the Court will be evenly divided and thereby unable to create binding precedent for future cases.[132]

"The standard for disqualification under § 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge's impartiality" as a result of the judge's conduct.[133] Thus, "[t]he judge does not have to be *subjectively* biased or prejudiced" to mandate disqualification under Section 455(a), "so long as he *appears* to be so."[134] "[D]isqualification from the judge's hearing any further proceedings in the case" is "mandatory

[127] *See, e.g.*, *In re* Bos.'s Children First, 244 F.3d 164, 164–71 (1st Cir. 2001) (holding that district judge should have recused herself from a case after making public comments to the media about the case).

[128] Lubet, *Confirmation Ethics*, *supra* note 19, at 254.

[129] *Id*.

[130] *See* Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 915 (2004) (memorandum of Scalia, J.) ("Let me respond, at the outset, to Sierra Club's suggestion that I should 'resolve any doubts in favor of recusal.' That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally.") (internal citations omitted); Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000) (statement of Rehnquist, J.) ("It is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused justice.").

[131] *See* Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 82–84 (2011) (explaining how, under existing law, a retired Supreme Court Justice may not take an active Justice's place on a case in order to avoid a 4-4 split decision); Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646–47 (2002) ("While circuit and district judges may be temporarily assigned to other circuits or districts, there is no authority for their temporary assignment to the Supreme Court. Indeed, the statute authorizing the assignment of retired district and circuit judges to judicial duties specifically excludes assignments to the Supreme Court.") (citing 28 U.S.C. § 294(d)).

[132] *See Cheney*, 541 U.S. at 915 (memorandum of Scalia, J.) (explaining that, when a Supreme Court Justice recuses himself or herself, "the Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case"); *Microsoft*, 530 U.S. at 1303 (statement of Rehnquist, J.) (noting that, following the disqualification of a single Justice, "the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.").

[133] United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir. 2001). *Accord*, *e.g.*, White v. Nat'l Football League, 585 F.3d 1129, 1138 (8th Cir. 2009) ("In analyzing whether recusal is required, we ask 'whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.'" (quoting Moran v. Clarke, 296 F.3d 638, 648 (8th Cir. 2002))); United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1174 (9th Cir. 2017) ("The test for recusal . . . is 'an objective test based on public perception.'" (quoting United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008))).

[134] United States v. Ciavarella, 716 F.3d 705, 718 (3d Cir. 2013) (quoting Liteky v. United States, 510 U.S. 540, 553 n.2 (1994)). *Accord*, *e.g.*, *White*, 585 F.3d at 1138 ("Section 455(a) establishes an objective standard, and the existence of actual bias is irrelevant.").

for conduct that calls a judge's impartiality into question."[135] Significantly, Section 455(a) "is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice."[136] Unjustified recusals "contravene public policy by unduly delaying proceedings, increasing the workload of other judges, and fostering impermissible judge-shopping."[137] As a consequence, in order to avoid undesirable and unwarranted recusals, courts "assume the impartiality of a sitting judge and 'the party seeking disqualification bears the substantial burden of proving otherwise.'"[138]

Section 455 is generally "intended to be self-enforcing, meaning that the recusal issue is supposed to be raised first by the judge and not the parties."[139] Nevertheless, Section 455's "standards are not completely self-policing,"[140] as "a party [to the litigation] certainly may file a motion" to disqualify a judge if appropriate,[141] and "a federal trial judge's refusal to disqualify himself" is subject to appellate review.[142] However, a federal appellate court will generally overturn a district court judge's decision not to recuse himself only if that "decision was not reasonable and [wa]s unsupported by the record."[143]

Section 455(a) is similar to the Code of Conduct discussed above[144] to the extent that both strive to promote impartiality in the federal judiciary.[145] Nonetheless, courts have recognized "that the Code of Judicial Conduct does not overlap perfectly with § 455(a): it is possible to violate the Code without creating an appearance of partiality; likewise, it is possible for a judge to comply with the Code yet still be required to recuse herself."[146] Thus, when assessing whether a federal judge's public statement or comment mandates his or her recusal from a case, courts have

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[135] *Microsoft*, 253 F.3d at 116.

[136] *White*, 585 F.3d at 1138 (quoting United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993)). *Accord In re* Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001) (expressing "the fear that recusal on demand would provide litigants with a veto against unwanted judges") (internal citations and quotation marks omitted).

[137] ANNOTATED MODEL CODE, *supra* note 72, at 246.

[138] *See White*, 585 F.3d at 1138 (quoting United States v. Denton, 434 F.3d 1104, 1111 (8th Cir. 2006)).

[139] Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 582 (2005). *Accord, e.g.*, United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980) (Kennedy, J.) ("The statute imposes a self-enforcing duty on the judge . . . .").

[140] John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 603 (2000).

[141] Johnathan A. Mondel, Note, *Mentally Awake, Morally Straight, and Unfit to Sit? Judicial Ethics, the First Amendment, and the Boy Scouts of America*, 68 STAN. L. REV. 865, 887 n.111 (2016). *Accord, e.g.*, *Conforte*, 624 F.2d at 880 ("The statute imposes a self-enforcing duty on the judge, but its provisions may be asserted also by a party to the action.").

[142] McGinnis & Movsesian, *supra* note 140, at 603.

[143] United States v. Casey, 825 F.3d 1, 28 (1st Cir. 2016).

[144] *See supra* "The Code of Conduct for United States Judges."

[145] *Compare* 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."), *with* CODE OF CONDUCT CANON 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .").

[146] *In re* Bos.'s Children First, 244 F.3d 164, 168 (1st Cir. 2001). *Accord, e.g.*, United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1175 (9th Cir. 2017) ("[N]ot every violation of the Code of Conduct creates an appearance of bias requiring recusal under § 455(a)."); White v. Nat'l Football League, 585 F.3d 1129, 1140 (8th Cir. 2009) (agreeing that the Code of Conduct and Section 455(a) are not coterminous); United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir. 2001) ("Although this Court has condemned public judicial comments on pending cases, we have not gone so far as to hold that every violation of Canon 3A(6) or every impropriety under the Code of Conduct inevitably destroys the appearance of impartiality and thus violates § 455(a).").

considered—but have not treated as dispositive—whether the statement in question violates Canon 3(A)(6)[147] of the Code of Conduct.[148]

As some courts have observed, however, there is "little guidance on when public comments" made outside the context of a hearing or bench ruling[149] "create an appearance of partiality for which § 455(a) recusal is the appropriate remedy."[150] In particular, there are very few cases analyzing whether a judge's statement in the confirmation context can mandate that judge's disqualification from particular cases once that judge reaches the bench. Instead, the most common scenario in which a judge's public comments disqualify that judge from adjudicating a case is when the judge makes statements to the media about a case over which he or she is presently presiding.[151] Such situations are only minimally illuminating, however, as a judge who volunteers statements to the media about a case over which he is actively presiding would seem to pose a materially greater risk to judicial integrity than a nominee who simply answers questions in the abstract regarding his or her jurisprudential views during a Senate confirmation hearing.

In re African-American Slave Descendants Litigation is one of the few Section 455(a) cases that directly discuss when, if ever, a federal judge must disqualify himself or herself on the basis of statements he or she made during the judicial confirmation process.[152] The plaintiffs in *African-American Slave Descendants* moved to recuse the district judge assigned to the case, claiming that certain "statements [the judge] made to the United States Senate Judiciary Committee during [his] judicial confirmation" reflected "bias against either the [p]laintiffs or their lawsuit."[153] Critically, however, the challenged statements "merely discussed [the nominee's] general legal views" on issues like "judicial restraint and the constitutional doctrine of separation of powers."[154] The district judge therefore reasoned that his prior comments were "not so case-

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[147] *See supra* "The Code of Conduct for United States Judges."

[148] *See Bos.'s Children First*, 244 F.3d at 168 ("Although the 'goal sought to be served by [Canon 3(A)(6)] informs our analysis,' we do not decide the case solely on that basis." (quoting United States v. Cooley, 1 F.3d 985, 995 n.8 (10th Cir. 1993))); *Microsoft*, 253 F.3d at 114 ("Violations of the Code of Conduct may give rise to a violation of § 455(a) if doubt is cast on the integrity of the judicial process."); Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 332 F. Supp. 2d 667, 671 (S.D.N.Y. 2004) ("[E]ven the finding of a violation of Canon 3(A)(6) would not require a conclusion that disqualification is appropriate.").

[149] "Courts are loath to require recusal based on statements made in a judicial context (e.g., in a status hearing or a decision rendered from the bench), even when such statements might suggest, to some extent, pre-determination of the merits" of a case. *Bos.'s Children First*, 244 F.3d at 169 n.9. Statements during Senate confirmation hearings, however, are not "made in a judicial context."

[150] *Id*. at 168–69.

[151] *See, e.g.*, *Microsoft*, 253 F.3d at 107–19 (concluding that district judge violated Section 455(a) "by talking about the case with reporters"); *Bos.'s Children First*, 244 F.3d at 164–71 (holding that district judge should have recused herself from a case after making public comments to the media about the case). *But see White*, 585 F.3d at 1138–41 (concluding although district judge "would have been well advised" not to make "remarks to the press," judge's "statements to the press" nonetheless did not warrant his recusal from case).

[152] 307 F. Supp. 2d 977 (N.D. Ill. 2004).

[153] *Id*. at 981.

[154] *See id*. at 985–86. For instance, the judge stated during the confirmation process that, due to the "danger[s]" inherent whenever a judicial proceeding "is used to accomplish far-reaching societal changes, . . . [t]he judiciary should exercise restraint in the exercise of its power." *Id*. at 985. The district judge rejected the plaintiffs' assertion that this comment somehow rendered him "unable to consider the full range of remedies and available law pertinent to their claims." *Id*. The plaintiffs similarly took umbrage with the judge's prior statement that "[a]ffirmative duties broadly imposed upon governments and society should not be the result of a court order arising out of an individual lawsuit." *Id*. at 986. The judge disagreed with the plaintiffs' contention that this comment evinced a belief that "those who have been systematically the subjects of racism and discrimination [should] be required to win majority support to obtain relief." *Id*. (internal citation omitted).

specific that a reasonable person would believe that they would predetermine his decision in [the plaintiffs' case] some two decades later."[155] The court thus determined that the plaintiffs had failed to "proffer[] any valid reasons for recusal based on [the judge's] statements made in [a] questionnaire submitted to the United States Senate during his judicial confirmation."[156]

Under different circumstances, however, historical practice supports the notion that a judge's prior public comments about disputed and controversial legal issues may warrant that judge's recusal from a future case. In 2003, for instance, Justice Scalia "gave a public speech . . . in which he spoke critically of an interpretation of the Establishment Clause that would disallow the 'under God' phrase to remain in the pledge of allegiance."[157] When the Supreme Court later granted certiorari to decide a case presenting exactly that issue, Justice Scalia "announced that he would not sit on the case."[158] Although Justice Scalia "did not explain why he would not participate" in the case,[159] commentators have almost uniformly surmised that Justice Scalia determined that his prior public comments mandated his recusal.[160]

The "distinction between a federal judge's expression of personal philosophy . . . and his expression of an opinion on some facet of a particular case which is before him"[161] can potentially explain why recusal was warranted in the pledge of allegiance case but not in *African-American Slave Descendants*. Several judges have suggested that non-case-specific comments about jurisprudential philosophy are less likely to mandate recusal in future cases than questions about specific cases or issues that the judge may be called upon to adjudicate in the future.[162] As a result, federal judicial nominees may be more inclined to answer general questions about their legal views than case-specific questions they may need to adjudicate if the Senate ultimately confirms them.

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[155] *Id*. at 984.

[156] *Id*. at 987.

[157] Wheeler, *supra* note 39, at 1071–72 (citing Gina Holland, *Scalia: Courts Wrong on Church/State*, N.Y. SUN, Jan. 13, 2003, at 2).

[158] *Id*. at 1072.

[159] Charles J. Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in American Schools?*, 2004 BYU EDUC. & L.J. 301, 324. *Accord* Caprice L. Roberts, *The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 125 (2004) ("The lack of any reasoned elaboration from Justice Scalia regarding his decision to recuse in *Newdow* leaves the public with a limited understanding of the basis for recusal in the first place.").

Although Justice Scalia noted in a subsequent opinion that he recused himself in *Newdow* because he had "said or done something which require[d]" him to do so, that opinion did not explicitly state the reason for his recusal. *See* Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 916 (2004) (memorandum of Scalia, J.).

[160] *See, e.g.*, Rod Dixon, *Pledging to God While Getting a Public Education: Why a Wall of Separation Divides Ceremonial Celebration from Religious Indoctrination:* Elk Grove United School District v. Newdow *and the Right of Parental Privacy*, 48 J. CATH. LEGAL STUD. 147, 150 n.12 (2009) ("Apparently, Scalia's public comments about the lower court's ruling in *Newdow* were viewed as criticism of the appellate court ruling."); Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 4 n.16 (2004) ("Justice Scalia recused himself from the case apparently due to public comments he had previously made concerning the Ninth Circuit decision in *Newdow*.").

[161] *See* Wilborn v. Wells Fargo Bank, N.A. (*In re* Wilborn), 401 B.R. 848, 865 (Bankr. S.D. Tex. 2009) (quoting Samuel v. Univ. of Pittsburgh, 395 F. Supp. 1275, 1278 (W.D. Pa. 1975)).

[162] *See id*. ("The District Court for the Western District of Pennsylvania aptly described 'the critical distinction between a federal judge's expression of personal philosophy (which is certainly permissible) and his expression of an opinion on some facet of a particular case which is before him (which would be impermissible)' . . . The Court agrees with this logic . . . ." (quoting *Samuel*, 395 F. Supp. at 1278)).

Historical Practice

As explained above, not only are the rules governing judicial ethics largely self-enforcing,[163] they do not always provide clear answers regarding which types of conduct are permissible or impermissible.[164] As a result, judges and judicial candidates often must decide for themselves whether various actions—including answering questions at a confirmation hearing—violate ethical standards.[165] Judicial nominees developing their own standard for responding to Senators' questions may look to historical practice for guidance, customs that are informed by both ethical and constitutional considerations.[166] More generally, historical practice can be an important resource for defining constitutional norms,[167] particularly in interpreting the "scope and exercise" of the "respective powers" of the three branches of government.[168]

For instance, during the hearing on whether to confirm then-Associate Justice William Rehnquist to the position of Chief Justice, the nominee initially declined to respond to a question from Senator Arlen Specter asking whether he thought that Congress could strip the Supreme Court of the ability to hear constitutional challenges.[169] Senator Specter pressed the issue, stating that he believed this was an appropriate question on a fundamental issue.[170] Justice Rehnquist responded by saying that he thought that Justice Sandra Day O'Connor, in her own confirmation hearings, "was asked similar questions" and "took much the same position."[171] The Senator stated that he did not believe this was true.[172] The next day, Justice Rehnquist reversed course, stating that while he continued to "have considerable reservations about" answering the question, he would "try to

[163] *See, e.g.*, MODEL CODE PREAMBLE [1] ("Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."); *id.* [3] ("The Model Code of Judicial Conduct . . . is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards . . . ."); ABA MODEL RULES OF PROFESSIONAL CONDUCT PREAMBLE & SCOPE [10] ("The legal profession is largely self-governing."); White v. Nat'l Football League, 585 F.3d 1129, 1140 (8th Cir. 2009) (explaining that "the Code of Conduct" governing sitting federal judges "relies upon self-enforcement.").

[164] *See supra* "Codes of Judicial Conduct."

[165] *See, e.g.*, Wheeler, *supra* note 39, at 1076–77 ("Judicial candidates, like Roberts, make a personal judgment about how to fulfill the ethical requirements of the role of a judge in responding to questions posed by Senators during the confirmation process. . . . [I]t is ultimately the judicial nominee, whose concern should be preparing to serve as a judge, who must decide what standard he or she will use to respond to questions.").

[166] *See, e.g.*, *id.* at 1077. *See also, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 300 (2005) [hereinafter *Roberts Hearings*] (statement of John G. Roberts, Jr., J., U.S. Court of Appeals for the District of Columbia Circuit) ("[I]t's not just a line that I'm drawing. It's a line that, as I've read the transcripts, every nominee who's sitting on the Court today drew.").

[167] *See, e.g.*, Michael Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 715–16 (2008).

[168] Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1773 (1984). *See also, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2559–60 (2014) (noting that the Supreme Court "put[s] significant weight upon historical practice" when interpreting the separation of powers between the political branches and noting more generally that historical practice can inform the Court's interpretation of the Constitution).

[169] *Nomination of Justice William Hubbs Rehnquist To Be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 188 (1986) [hereinafter *Rehnquist Chief Justice Hearings*].

[170] *Id.* at 189–90 (statements of Sen. Arlen Specter).

[171] *Id.* at 190 (statement of William H. Rehnquist).

[172] *Id.* at 190 (statement of Sen. Arlen Specter).

give" an answer in light of the fact that "one of [his] colleagues," Justice O'Connor, "ha[d] felt that [it] was proper" to respond to such questions.[173]

The general standard that many nominees invoke when responding to Senate questioning has come to be known as the "Ginsburg Rule."[174] During then-Judge Ruth Bader Ginsburg's confirmation hearing, she stated that she could offer "no hints, no forecasts, [and] no previews" of how she might rule on questions that would come before the Supreme Court.[175] In her opening statement, she warned Senators that

> Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.
>
> Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.[176]

Although the refusal to stake out a position on matters that are likely to come before the Court has become known as the Ginsburg Rule, the principle precedes Justice Ginsburg's hearing.[177] Indeed, according to one recent study, the three Supreme Court nominees who most frequently "refuse[d] to answer a question on the ground that answering would create the reality or appear of bias, would interfere with judicial independence, or would be inappropriate for some other, similar reason," all predate Justice Ginsburg's hearing.[178]

This section of the report examines nominations to the Supreme Court and describes the norms that have developed surrounding senatorial questioning and nominees' responses. This review focuses on Supreme Court confirmation hearings rather than lower courts, because Supreme Court nominations have traditionally involved a more comprehensive examination of the nominee.[179] This section begins by briefly reviewing the development of the modern judicial confirmation hearing, and then discusses the general constitutional concerns underlying the exchanges between Senators and judicial nominees. Finally, it explores trends in the types of questions that nominees are willing to answer. In considering this final issue, however, it is important to keep in mind that due to the wide variety of senatorial questioning and the inherently

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[173] *Id.* at 268 (statement of William H. Rehnquist). *Cf. The Nomination of Judge Sandra Day O'Connor of Arizona To Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 130–31 (1981) [hereinafter *O'Connor Hearings*] (statement of Sandra Day O'Connor, J., Arizona Court of Appeals) (discussing whether Congress could limit the jurisdiction of the Supreme Court).

[174] *See, e.g.*, Ringhand & Collins, *supra* note 17, at 476.

[175] *Ginsburg Hearings*, *supra* note 14, at 323 (statement of Ruth Bader Ginsburg).

[176] *Id.* at 52.

[177] *See, e.g.*, Wheeler, *supra* note 39, at 1077; Ringhand & Collins, *supra* note 17, at 476, 485.

[178] Ringhand & Collins, *supra* note 17, at 486–87. The hearings in which this "privilege" was invoked most often, as a percentage of all the nominee's answers, were, in order, Justice Abe Fortas's hearing to become Chief Justice, Justice William J. Brennan's hearing to become an Associate Justice, and William H. Rehnquist's hearing to become an Associate Justice. *Id.* at 486. According to this study, out of all Supreme Court nominees subject to confirmation hearings, Justice Ginsburg most frequently gave "firm" answers staking out positions on specific legal issues or cases. *Id.* at 492. *Cf.* Wedeking & Farganis, *supra* note 16, at 345 (tracking "nominee candor" over time).

[179] *See, e.g.*, Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1033 (2007).

personal nature of a candidate's decision to answer a particular question, there will almost always be exceptions to the general tendencies described below.

Historical Background

Nominees to the Supreme Court today go through a confirmation hearing before the Senate Judiciary Committee.[180] But this was not always the case: the modern confirmation hearing, with nominees testifying in person, in a public hearing, before the Committee, is generally traced to the 1955 confirmation hearing of Justice John Marshall Harlan II.[181] Since then, the number of questions that Senators have asked each nominee has increased, as the Senate Judiciary Committee has grown in size and as individual Senators ask more questions of the nominees.[182]

Scholars and jurists have pointed to the failed confirmation of Judge Robert Bork, in 1987, as a watershed moment in the development of the modern confirmation hearing.[183] President Ronald Reagan nominated Bork to the Supreme Court in 1987.[184] The confirmation hearings were highly contentious,[185] and the nomination was ultimately defeated by a vote of 58-42.[186] Many have argued that Bork's nomination failed because he was too forthcoming[187] or because the Senate improperly politicized the confirmation process,[188] and that, as a result, subsequent nominees have been less willing to express their own views on legal issues.[189]

Others have raised, as relevant here, two challenges to this conventional wisdom. First, some have argued that "Bork's nomination did not fail because he answered too many questions; it failed because he gave the wrong answers."[190] Second, as suggested above, nominees have

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[180] See generally, e.g., CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

[181] *See, e.g.*, Dion Farganis & Justin Wedeking, *"No Hints, No Forecasts, No Previews": An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan*, 45 LAW & SOC'Y REV. 525, 527 (2011). However, Harlan Fiske Stone was the first nominee to appear in person before the Senate Judiciary Committee, in 1925, and Felix Frankfurter, in 1939, was "the first nominee to take unrestricted questions in an open, transcribed, public hearing." PAUL M. COLLINS, JR., & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 35 (2013).

[182] *See* Farganis & Wedeking, *supra* note 181, at 528; Wedeking & Farganis, *supra* note 16, at 338–39.

[183] *See, e.g.*, COLLINS & RINGHAND, *supra* note 181, at 196 n.1 (collecting scholarship). *See also, e.g.*, Gregory Korte, *Bork Fight Still Haunts Supreme Court Confirmation Process*, USA TODAY (Mar. 7, 2016, 10:23 PM), https://www.usatoday.com/story/news/politics/2016/03/07/bork-fight-still-looms-over-broken-supreme-court-confirmation-process/81414374; Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, NPR (Dec. 19, 2012, 4:33 PM), https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever [hereinafter Totenberg, *Bork*].

[184] *See, e.g.*, Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 524 (2002).

[185] *E.g.*, *id.* at 524–26.

[186] 133 CONG. REC. S29,121 (daily ed. Oct. 23, 1987).

[187] *See, e.g.*, COLLINS & RINGHAND, *supra* note 181, at 196.

[188] *See, e.g.*, Paul R. Dimond, *Common Sense about an Uncommon Rejection*, 15 LAW & SOC. INQUIRY 767, 768 (1991) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) and ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989)); Frank Guliuzza III, Daniel J. Reagan & David M. Barrett, *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria*, 56 J. POL. 773, 773 (1994) (same); Lily Rothman, *How Robert Bork Helped Make Neil Gorsuch's Supreme Court Confirmation Possible*, TIME (Apr. 7, 2017), http://time.com/4730055/neil-gorsuch-confirmation-robert-bork-history.

[189] *See, e.g.*, COLLINS & RINGHAND, *supra* note 181, at 196; Totenberg, *Bork*, *supra* note 183.

[190] COLLINS & RINGHAND, *supra* note 181, at 197. The scholars Paul Collins and Lori Ringhand have made the case that Bork's nomination was defeated because he "was voicing a constitutional vision that large swaths of America no longer

declined to answer certain questions since the advent of the modern confirmation hearing, predating the Bork hearing by more than thirty years: in 1955, then-Judge Harlan "avoided answering a question on civil rights" a mere "two questions into his" testimony.[191] Studies by legal scholars suggest that as a general matter, judicial candidates' candor, or willingness to be fully forthcoming in response to questions, has not significantly decreased over time.[192] But the types of issues discussed at these hearings have changed.[193] According to one study, Senators today are more likely to ask questions about a nominee's judicial views, seeking a nominee's "opinions, thoughts, assessments, interpretations, or predictions."[194]

Constitutional Justifications

Looking to past confirmation hearings, nominees to the Supreme Court have cited three related but distinct constitutional concerns to justify not answering certain types of questions.[195] First, nominees have voiced concerns about answering specific legal questions outside of the normal adversarial process envisioned by the Constitution. Specifically, Article III of the Constitution provides that judges may hear "cases" and "controversies."[196] The Supreme Court has interpreted this provision to prohibit so-called "advisory opinions" that do not present a true controversy.[197] Instead, judges resolve discrete disputes through the adversarial process.[198] As the Supreme Court explained in one case, standing requirements "tend[] to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[199] Consequently, nominees to the Supreme Court have been reluctant to respond to hypotheticals posed by Senators, citing concerns about their ability to rule on an issue absent briefing and argument from adversarial parties.[200]

The second constitutional concern is grounded in the Constitution's due process guarantees, and specifically in the assurance that cases will be resolved by unbiased judges.[201] An "impartial

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shared." COLLINS & RINGHAND, *supra* note 181, at 200. Others have highlighted that the nominee's views appeared to be inconsistent. *See* Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1221 (1988).

[191] Farganis & Wedeking, *supra* note 181, at 534.

[192] *See id*. at 540; Wedeking & Farganis, *supra* note 16, at 344–45.

[193] *See, e.g.*, COLLINS & RINGHAND, *supra* note 181, at 101, 106.

[194] *See* Farganis & Wedeking, *supra* note 181, at 536.

[195] *Cf., e.g.*, Ringhand & Collins, *supra* note footnote 17, at 478 (identifying two justifications for refusing to answer questions).

[196] U.S. CONST. art. III, § 2.

[197] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 516 (2007).

[198] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96–97 (1968); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937). *See generally, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 514 (2006) [hereinafter *Alito Hearings*] (statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit) (describing his view of the adversarial process).

[199] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982).

[200] *See, e.g.*, *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 248 (2010) [hereinafter *Kagan Hearings*] (statement of Elena Kagan, Solicitor Gen. of the United States); *Ginsburg Hearings*, *supra* note 14, at 178 (statement of Ruth Bader Ginsburg); *Roberts Hearings*, *supra* note 166, at 236 (statement of John G. Roberts, Jr.).

[201] *See generally, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883–84 (2009).

judge" is a "necessary component of a fair trial."[202] Consequently, nominees have avoided giving answers that would appear to "prejudge" future cases that might come before the Court,[203] so as to avoid depriving future parties of impartial due process of law.[204]

The final constitutional justification for declining to respond to certain questions is closely related to this concern about due process, but is grounded in separation-of-powers concerns. As discussed above, Article III is understood to establish an independent judiciary insulated from political pressures.[205] Accordingly, courts have policed attempts by Congress to influence the decision of cases and controversies properly within the purview of the judicial branch, where Congress has "passed the limit which separates the legislative from the judicial power."[206] Citing the importance of judicial independence from the legislative branch, nominees have avoided making any "pledge" or "promise" on how they would rule on a particular case or issue in exchange for confirmation.[207]

The constitutional concerns motivating judicial nominees to decline to answer certain questions, however, must be counterbalanced against the constitutional responsibility of the Senate to give advice and consent[208] to presidential nominees.[209] The Senate essentially holds the power to "veto

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[202] Weiss v. United States, 510 U.S. 163, 178 (1994).

[203] *See, e.g.*, *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 113 (2009) [hereinafter *Sotomayor Hearings*] (statement of Sonia Sotomayor, J., U.S. Court of Appeals for the Second Circuit); *Roberts Hearings*, *supra* note 166, at 229 (statement of John G. Roberts, Jr.); *Ginsburg Hearings*, *supra* note 14, at 253 (statement of Ruth Bader Ginsburg); *The Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, pt. 1, 102d Cong. 180 (1991) [hereinafter *Thomas Hearings*] (statement of Clarence Thomas, J., U.S. Court of Appeals for the District of Columbia Circuit); *Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, To Be Associate Justices of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 193 (1971) [hereinafter *Rehnquist Hearings*] (statement of William H. Rehnquist, Assistant Att'y Gen. of the United States).

[204] *See Ginsburg Hearings*, *supra* note 14, at 52 (statement of Ruth Bader Ginsburg). At least one scholar has argued that this "'prejudging' objection" should not prevent nominees from commenting on past Supreme Court cases, relying in part on the Supreme Court's decision in *Republican Party of Minnesota v. White*. Amar, *supra* note 20; *see also* Republican Party of Minn. v. White, 536 U.S. 765 (2002). In *Republican Party of Minnesota v. White*, the Supreme Court rejected the contention that judicial "impartiality" provided a governmental interest sufficiently compelling to uphold under the First Amendment a state ethical standard prohibiting judicial candidates from announcing their views on disputed legal or political issues. 536 U.S. at 775–84. In reaching this conclusion, the majority opinion made a number of statements regarding judicial impartiality and the types of statements judges should be able to make while running for office. *See id.* However, this decision might be distinguishable from the context of the federal selection process, because federal judges are not elected to office. *See id.* at 787–88. Further, the fact that a judicial candidate has a First Amendment right to make a certain statement does not necessarily mean that the candidate *should* or *must* make that statement. *See* N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1040, 1045 (D.N.D. 2005) (concluding that, even though "judicial candidates must be allowed to impart whatever information they choose about their views on political, legal, and social issues, and their personal philosophy—without restriction," a candidate who exercises that right may nonetheless "create a serious ethical dilemma for himself or herself that would require recusal at a later date").

[205] *See, e.g.*, United States v. Hatter, 532 U.S. 557, 568 (2001).

[206] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

[207] *See, e.g.*, *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 101, 258 (2017) [hereinafter *Gorsuch Hearings*] (statement of Neil M. Gorsuch, J., U.S. Court of Appeals for the Tenth Circuit); *Kagan Hearings*, *supra* note 200, at 57 (statement of Elena Kagan); *Ginsburg Hearings*, *supra* note 14, at 265 (statement of Ruth Bader Ginsburg).

[208] U.S. CONST. art. II, § 2.

[209] *See, e.g.*, *Ginsburg Hearings*, *supra* note 14, at 114–15 (statement of Sen. Joseph R. Biden, Jr., Chairman, S.

. . . the President's power of appointment."[210] Senators have stated that candidate evasiveness frustrates their ability to perform their constitutional role—and in some cases, have in fact withheld votes because a candidate declined to answer questions.[211] Nominees themselves have acknowledged that Senators may feel obligated to ask questions that the nominees nonetheless believe that they may not answer.[212]

General Trends in Questions and Answers

Supreme Court nominees have generally declined to stake out positions on issues or factual circumstances that are likely to come before the Court in future cases, resulting in a practice referred to by some as the Ginsburg Rule.[213] This standard has required nominees to assess whether various issues *are* likely to come before the Court, and nominees may disagree with Senators regarding that likelihood.[214] Nominees have also typically declined to answer questions that do not expressly ask for their views on a particular case, if answering would nonetheless "suggest[]" that the nominee has prejudged a case.[215]

Because nominees are unlikely to answer direct questions regarding their views on particular issues, to attempt to determine how a nominee might resolve cases if appointed to the Supreme Court, Senators have instead asked about a nominee's

- judicial philosophy,
- prior statements on various issues,
- views on previously decided cases of the Supreme Court, and
- views on particular issues relating to the Court's procedures.

Comm. on the Judiciary).

[210] Myers v. United States, 272 U.S. 52, 120 (1926).

[211] *See, e.g.*, Wheeler, *supra* note 39, at 1068 (discussing confirmation of Chief Justice Roberts). *But see* Wedeking & Farganis, *supra* note 16, at 362 (showing that statistically, a nominee's lack of candor does not seem to cause Senators to vote against that nominee).

[212] *See, e.g.*, *Sotomayor Hearings*, *supra* note 203, at 375 (statement of Sonia Sotomayor); *Nomination of William Joseph Brennan, Junior, of New Jersey, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 85th Cong. 18 (1937) [hereinafter *Brennan Hearings*] (statement of William J. Brennan).

[213] *See generally, e.g.*, Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 22 (2013) (statement of Ruth Bader Ginsburg, J., Supreme Court of the United States) (describing the "Ginsburg rule, invoked in Senate Judiciary Committee confirmation hearings," as "Please do not ask me about a case that is before the Court or an issue that may come before the Court."). *See also, e.g.*, *Sotomayor Hearings*, *supra* note 203, at 113 (statement of Sonia Sotomayor) (declining to respond because "the Supreme Court has not addressed this question yet, and there's a strong likelihood it may in the future").

[214] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 268 (statement of Neil M. Gorsuch) (declining to discuss the emoluments clause); *Kagan Hearings*, *supra* note 200, at 84 (statement of Elena Kagan) (declining to discuss *Bush v. Gore*, 531 U.S. 98 (2000)); *Roberts Hearings*, *supra* note 166, at 300 (statement of John G. Roberts, Jr.) (declining to discuss *United States v. Morrison*, 529 U.S. 598 (2000)).

[215] *E.g.*, *Sotomayor Hearings*, *supra* note 203, at 433 (statement of Sonia Sotomayor) (declining to discuss the arguments regarding a constitutional right to same sex marriage because, in the nominee's view, "[t]his is the type of situation where even the characterizing of whatever the court may do as one way or another suggests that I have both prejudged an issue and that I come to that issue with my own personal views suggesting an outcome").

This section of the report explores each of these categories of questions in more depth, but as a general matter, nominees are more willing to talk about issues or cases that they believe are "settled"[216] or "fundamental."[217]

One exchange from the 1971 hearing on then-Assistant Attorney General Rehnquist's confirmation to the Court as an Associate Justice illustrates this dynamic.[218] A Senator noted that the nominee had stated during the hearings that it "would be inappropriate to advance a definition of due process."[219] The Senator contrasted this reluctance with a prior statement of the nominee: in a 1959 law review article, Rehnquist had argued that the Senate should "thoroughly inform[] itself on the judicial philosophy of a Supreme Court nominee,"[220] asking, in reference to the 1957 confirmation of Justice Charles Evans Whittaker, "what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process?"[221]

In response, the nominee said that he had not "changed [his] mind that the Senate ought to be interested in a nominee's views," but said that he had gained "an increasing sympathy for the problem of the nominee to respond to very legitimate questions from the Senators without in some way giving the appearance of prejudging issues that might come before him."[222] He was willing to respond to the Senator's question by "advert[ing] to settled doctrines of due process," affirming doctrines that were "so well settled" that a nominee "need have no reservation" about stating them.[223] In response to further questioning,[224] Rehnquist also generally described how he would approach any case presenting an *un*settled question of due process, stating that he would look to precedent and ratification debates, but would not rule on the basis of his "subjective notions of fairness."[225]

Other nominees may stake out clear "lines" regarding the types of questions they are willing to answer and refuse to transgress those lines even with respect to settled issues.[226] Some nominees

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[216] *See, e.g.*, *Alito Hearings*, *supra* note 198, at 352 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 207 (statement of John G. Roberts, Jr.). *See generally, e.g.*, *Alito Hearings*, *supra* note 198, at 561 (statement of Sen. John Cornyn) ("[W]hat I have concluded . . . is the more settled, . . . the more accepted in the society, in our culture, the more free nominees feel to talk about it . . . ."). *Cf., e.g.*, *Nomination of Anthony M. Kennedy To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 233 (1987) [hereinafter *Kennedy Hearings*] (statement of Anthony M. Kennedy, J., U.S. Court of Appeals for the Ninth Circuit) ("Well, I guess we have a disagreement as to whether or not [the constitutionality of capital punishment] is well settled, Senator.").

[217] *See, e.g.*, *Alito Hearings*, *supra* note 198, at 318–19 (statement of Samuel A. Alito, Jr.); *see also Ginsburg Hearings*, *supra* note 14, at 161 (statement of Ruth Bader Ginsburg); *Rehnquist Hearings*, *supra* note 203, at 39 (statement of William H. Rehnquist). Senator Arlen Specter often asked for nominees' opinions on certain "rockbed" issues, most frequently seeking their opinion on *Marbury v. Madison* and other doctrines concerning the power of the courts. *See, e.g.*, *Ginsburg Hearings*, *supra* note 14, at 187, 291 (statements of Sen. Arlen Specter); *Thomas Hearings*, *supra* note 203, at 495–96 (statement of Sen. Arlen Specter); *Kennedy Hearings*, *supra* note 216, at 223–24 (statement of Sen. Arlen Specter); *Scalia Hearings*, *supra* note 15, at 83 (statement of Sen. Arlen Specter).

[218] *Rehnquist Hearings*, *supra* note 203, at 189 (statement of William H. Rehnquist).

[219] *Id*. (statement of Sen. John V. Tunney). *See also id.* at 157 (statement of William H. Rehnquist) (declining to respond to question about his views on due process).

[220] *Id*. at 154–55 (statement of Sen. Charles McC. Mathias, Jr.) (quoting the law review article).

[221] *Id*. at 189 (statement of Sen. John V. Tunney) (internal quotation marks omitted).

[222] *Id*. (statement of William H. Rehnquist).

[223] *Id*. at 189–90 (statement of William H. Rehnquist).

[224] *Id*. at 190 (statement of Sen. John V. Tunney) ("[W]hat standard would you utilize in deciding a totally unprecedented due process case?").

[225] *Id*. (statement of William H. Rehnquist).

[226] *See, e.g.*, *Roberts Hearings*, *supra* note 166, at 300 (statement of John G. Roberts, Jr.) (stating that he is unwilling

taking this position have stated concerns about a "slippery slope."[227] Then-Judge Samuel Alito invoked this view to avoid taking a position on a hypothetical that, from his perspective, "seem[ed] perfectly clear."[228] A Senator had asked whether it would be constitutional for the Senate to require sixty votes, rather than a majority, to confirm a nominee to the Supreme Court.[229] Alito responded by saying that he did not think that he should answer "constitutional questions like that."[230] The Senator pressed him, asking whether it would be constitutional for the Senate to allow a majority vote rather than a two-thirds vote for impeachment.[231] Judge Alito at first seemed about to answer the question, saying, "there are certain questions that seem perfectly clear, and I guess there is no harm in answering," but ultimately declined to do so, saying that this was a "slippery slope," and if he "start[ed] answering the easy questions," he would then "be sliding down the ski run and into the hard questions."[232]

Then-Judge Ginsburg made a similar statement in her confirmation hearing when she declined to discuss a certain case involving an executive branch policy that she believed might be adopted again by a future Administration.[233] She said:

> I sense that I am in the position of a skier at the top of that hill, because you are asking me how I would have voted in *Rust v. Sullivan* . . . . Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. So I believe I must draw the line at the cases I have decided.[234]

To take another example, then-Judge Antonin Scalia refused to state his opinion on any prior Supreme Court decisions, declining even to discuss *Marbury v. Madison*, the foundational case establishing the power of courts to review laws under the Constitution.[235] He acknowledged that other nominees had "tried to answer some questions and not answered the other," but concluded that he would not take that path.[236] He reasoned that if his answer would be obvious—as if he were to endorse the holdings of *Marbury v. Madison*—then the Senators "do not need an answer, because your judgment of my record and my reasonableness and my moderation will lead you to conclude, heck, it is so obvious, anybody that we think is not a nutty-nutty would have to come

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"to comment on the correctness o[r] incorrectness of a particular decision" and asserting that this is a "line" that "every nominee who's sitting on the Court today drew").

[227] *See, e.g.*, *Scalia Hearings*, *supra* note 15, at 58, 85 (statements of Antonin G. Scalia, J., U.S. Court of Appeals for the District of Columbia Circuit).

[228] *Alito Hearings*, *supra* note 198, at 430 (statement of Samuel A. Alito, Jr.).

[229] *Id*. (statement of Sen. Lindsey O. Graham).

[230] *Id*. (statement of Samuel A. Alito, Jr.).

[231] *Id*. (statement of Sen. Lindsey O. Graham). *Cf.* U.S. CONST. art. I, § 3 ("The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

[232] *Alito Hearings*, *supra* note 198, at 430–31 (statement of Samuel A. Alito, Jr.) (internal quotation marks omitted).

[233] *Ginsburg Hearings*, *supra* note 14, at 288 (statement of Ruth Bader Ginsburg).

[234] *Id.* (citing Rust v. Sullivan, 500 U.S. 173 (1991)).

[235] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803); *Scalia Hearings*, *supra* note 15, at 33 (statement of Antonin G. Scalia) ("I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*."). However, like other nominees, Justice Scalia was willing to describe certain decisions as "fundamental," *see id.*, or as "settled," *see id.* at 87–88.

[236] *Scalia Hearings*, *supra* note 15, at 86 (statement of Antonin G. Scalia). In his own hearing, Chief Justice Roberts discussed the difficulty of deciding which cases he could discuss, contrasting his approach to that of Justice Scalia. *See Roberts Hearings*, *supra* note 166, at 261–64.

out that way."[237] On the other hand, if his views on an issue were not obvious, then he believed that his announcement of those views would "really prejudice[e] future litigants."[238]

General Judicial Philosophy

Nominees seem most willing to discuss their general philosophies of law,[239] including their approaches to constitutional[240] and statutory[241] interpretation. Thus, for example, then-Judge Clarence Thomas was asked repeatedly whether he believed in natural law[242] as a principle of constitutional interpretation, to which he responded in the negative.[243] Similarly, then-Judge Neil Gorsuch was asked to explain his commitment to originalism.[244] And in response to a line of questioning that asked whether she believed in the idea of a living Constitution, then-Solicitor General Elena Kagan responded by explaining that while she believed the Constitution's general principles may be applied to new circumstances in new ways, she did not "like what people associate" with the term "living Constitution."[245] Prior Supreme Court nominees have also given examples of jurists whom they admire[246]—although then-Judge Ginsburg, at least, "stay[ed] away from the living" when naming her legal role models.[247]

Judicial candidates may also discuss their general approach to evaluating precedent and stare decisis, the doctrine governing when courts should adhere to previously decided cases.[248] Senators will sometimes ask for a nominee's views on stare decisis as a way of gauging whether he or she would be willing to overturn certain, often controversial, Supreme Court cases. For example, Senator Arlen Specter engaged in a lengthy discussion with then-Judge John Roberts about stare decisis in the context of the two primary Supreme Court cases establishing a right to an abortion.[249] The nominee spoke generally about the principles of stare decisis, going so far as

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[237] *Scalia Hearings*, *supra* note 15, at 87 (statement of Antonin G. Scalia).

[238] *Id*. (statement of Antonin G. Scalia).

[239] *See, e.g.*, *Kagan Hearings*, *supra* note 200, at 103, 149–50 (statements of Elena Kagan); *Gorsuch Hearings*, *supra* note 207, at 130–31 (statements of Neil M. Gorsuch); *Roberts Hearings*, *supra* note 166, at 158 (statement of John G. Roberts, Jr.); *Rehnquist Hearings*, *supra* note 203, at 19–20 (statements of William H. Rehnquist).

[240] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 156–58 (statements of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 61–63, 81–82 (statements of Elena Kagan); *Alito Hearings*, *supra* note 198, at 429, 465 (statements of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 182 (statement of John G. Roberts, Jr.); *Thomas Hearings*, *supra* note 203, at 112–14 (statement of Clarence Thomas); *Kennedy Hearings*, *supra* note 216, at 85–86 (statement of Anthony M. Kennedy); *Scalia Hearings*, *supra* note 15, at 48–49, 108 (statements of Antonin G. Scalia).

[241] *See, e.g.*, *Kagan Hearings*, *supra* note 200, at 150 (statement of Elena Kagan); *Gorsuch Hearings*, *supra* note 207, at 131, 340 (statement of Neil M. Gorsuch); *Ginsburg Hearings*, *supra* note 14, at 161, 224 (statements of Ruth Bader Ginsburg); *Scalia Hearings*, *supra* note 15, at 65–67 (statement of Antonin G. Scalia).

[242] *See generally* CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill (discussing the natural law theory of constitutional interpretation, along with other constitutional theories).

[243] *See, e.g.*, *Thomas Hearings*, *supra* note 203, at 112–14, 128–29, 147–48.

[244] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 155–57, 242.

[245] *Kagan Hearings*, *supra* note 200, at 159 (statement of Elena Kagan).

[246] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 65 (statement of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 56 (statement of Elena Kagan).

[247] *Ginsburg Hearings*, *supra* note 14, at 214 (statement of Ruth Bader Ginsburg).

[248] *See, e.g.*, *Kagan Hearings*, *supra* note 200, at 177, 194–95 (statement of Elena Kagan); *Roberts Hearings*, *supra* note 166, at 180–81 (statement of John G. Roberts, Jr.); *Ginsburg Hearings*, *supra* note 14, at 197 (statement of Ruth Bader Ginsburg); *Thomas Hearings*, *supra* note 203, at 134–35 (statement of Clarence Thomas); *Rehnquist Hearings*, *supra* note 203, at 19 (statement of William H. Rehnquist).

[249] *Roberts Hearings*, *supra* note 166, at 142–48.

to say that certain factors in the analysis were "critically important,"[250] but repeatedly declined to say how he would apply principles in a particular case—or whether he agreed or disagreed with those prior Supreme Court cases.[251]

Nominee's Prior Statements

Supreme Court nominees are generally willing to discuss their own prior work,[252] including both prior judicial opinions[253] and extra-judicial statements.[254] If nominees have written about a particular issue, they may explain their position on that topic even if they otherwise would have declined to stake out positions on issues that are likely to come before the Court.[255] This practice may also account for some variance in the topics that different nominees are willing to discuss: in his hearing, then-Judge John Roberts explained that he was unwilling to comment on whether particular decisions were correctly decided, notwithstanding the fact that Justice Ginsburg in her confirmation hearing had discussed some particular issues—namely, her view of *Roe v. Wade*—because she, unlike Judge Roberts, "had written extensively on that subject and she thought that her writings were fair game for discussion."[256]

Sometimes nominees use the hearing to disclaim prior statements or explain that they would not adhere to a particular view as a Supreme Court Justice.[257] For example, Chief Justice Roberts was asked in his confirmation hearing about certain memoranda he wrote while working in the Reagan Administration expressing the view "that bills stripping the Court's jurisdiction were constitutionally permissible."[258] The nominee said that if he "were to look at the question today," he did not "know where [he] would come out."[259] He later added, "I certainly wouldn't write everything today as I wrote it back then, but I don't think any of us would do things or write things today as we did when we were 25 and had all the answers."[260] At times, nominees have explained that they took certain positions only because they were acting as an advocate,

[250] *Id*. at 143 (statement of John G. Roberts, Jr.).

[251] *See id*. at 142–48.

[252] *See generally, e.g.*, *Alito Hearings*, *supra* note 198, at 38 (statement of Sen. Charles E. Schumer) ("Even under the so-called Ginsburg precedent, which was endorsed by Judge Roberts, Republican Senators and the White House, you have an obligation to answer questions on topics that you have written about.").

[253] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 302–04 (statement of Neil M. Gorsuch); *Alito Hearings*, *supra* note 198, at 466 (statement of Samuel A. Alito, Jr.); *Ginsburg Hearings*, *supra* note 14, at 196 (statement of Ruth Bader Ginsburg); *Scalia Hearings*, *supra* note 15, at 87 (statement of Antonin G. Scalia).

[254] *See, e.g.*, *Kagan Hearings*, *supra* note 200, at 121 (statement of Elena Kagan); *Alito Hearings*, *supra* note 198, at 432 (statement of Samuel A. Alito, Jr.).

[255] *Compare, e.g.*, *Ginsburg Hearings*, *supra* note 14, at 205–08 (statements of Ruth Bader Ginsburg) (discussing her writings on the subject of abortion), *with id.* at 265 (statement of Ruth Bader Ginsburg) (declining to state whether capital punishment is constitutional because she had "never ruled on a death penalty case," had "never written about it," and had "never spoken about it in the classroom"). *See also, e.g.*, *id.* at 221–22.

[256] *Roberts Hearings*, *supra* note 166, at 376 (statement of John G. Roberts, Jr.).

[257] *But see, e.g.*, *Scalia Hearings*, *supra* note 15, at 59 (statement of Antonin G. Scalia) (declining to say whether or not he still held views announced in a prior article).

[258] *Roberts Hearings*, *supra* note 166, at 210 (statement of Sen. Herbert H. Kohl).

[259] *Id*. (statement of John G. Roberts, Jr.).

[260] *Id*. at 212 (statement of John G. Roberts, Jr.).

distinguishing that role from the role of a judge.[261] Other times, however, nominees have adhered to and explained their prior non-judicial statements.[262]

Notwithstanding the fact that nominees will usually discuss their previously expressed views, most Supreme Court candidates are reluctant to discuss their personal opinions on various issues.[263] In two relatively recent hearings, when then-Judge Gorsuch was asked about his personal views on marriage equality and when then-Solicitor General Kagan was asked whether she personally believed that individuals possess a fundamental right to bear arms, both nominees declined to answer the questions and instead stated only that they accepted prior Supreme Court decisions on these issues.[264] This approach likely stems from the modern belief, frequently echoed by nominees, that a judge's personal views should not provide a basis for deciding a case.[265] Senators have asked generally whether nominees' personal or political views will influence their decisions in particular cases,[266] including whether nominees' religious faith would influence their decisions.[267]

However, nominees' personal lives have, at times, became a central subject in their confirmation hearings.[268] Perhaps the most obvious example comes from Justice Thomas's confirmation hearings, which were extended to examine sexual harassment allegations.[269] Justice Anthony Kennedy was questioned at length regarding his memberships in clubs that restricted membership to white males—and on what that membership implied about his views on discrimination more

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[261] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 273–74 (statement of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 92–93 (statement of Elena Kagan); *Sotomayor Hearings*, *supra* note 203, at 143 (statement of Sonia Sotomayor); *Alito Hearings*, *supra* note 198, at 322–23 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 210 (statement of John G. Roberts, Jr.).

[262] *E.g.*, *Ginsburg Hearings*, *supra* note 14, at 243–44 (statements of Ruth Bader Ginsburg). *See also, e.g.*, *Kagan Hearings*, *supra* note 200, at 226 (statement of Elena Kagan); *Kennedy Hearings*, *supra* note 216, at 121 (statement of Anthony M. Kennedy).

[263] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 75 (statement of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 123–24 (statement of Elena Kagan); *Ginsburg Hearings*, *supra* note 14, at 263–64 (statements of Ruth Bader Ginsburg). *See generally* Farganis & Wedeking, *supra* note 181, at 543 (showing that in general, "questions directed towards a nominee's beliefs and ideas are more likely to trigger nonforthcoming responses than questions about basic factual information."). *But see, e.g.*, *Kagan Hearings*, *supra* note 200, at 71 (statement of Elena Kagan) (affirming previously stated personal opposition to "the 'Don't ask, don't tell' policy"); *O'Connor Hearings*, *supra* note 173, at 125 (statement of Sandra Day O'Connor) (stating personal opposition to abortion).

[264] *Gorsuch Hearings*, *supra* note 207, at 173; *Kagan Hearings*, *supra* note 200, at 284–85.

[265] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 65–66 (statement of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 69 (statement of Elena Kagan); *Alito Hearings*, *supra* note 198, at 355–56 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 205 (statement of John G. Roberts, Jr.); *Kennedy Hearings*, *supra* note 216, at 91 (statement of Anthony M. Kennedy). *See generally, e.g.*, *Ginsburg Hearings*, *supra* note 14, at 52 (statement of Ruth Bader Ginsburg) ("[B]ecause you are considering my capacity for independent judging, my personal views on how I would vote on a publicly debated issue were I in your shoes—were I a legislator—are not what you will be closely examining.").

[266] *See supra* note 265.

[267] *See, e.g.*, *Alito Hearings*, *supra* note 198, at 566–67; *Roberts Hearings*, *supra* note 166, at 146; *Brennan Hearings*, *supra* note 212, at 34. *Cf. Gorsuch Hearings*, *supra* note 207, at 243; *Kagan Hearings*, *supra* note 200, at 129, 144–45.

[268] One well-known example comes from the confirmation hearings of Robert Bork: a local reporter had procured a list of the nominee's video rentals from a D.C. video store. *See, e.g.*, Michael Dolan, *Borking Around*, THE NEW REPUBLIC (Dec. 20, 2012), https://newrepublic.com/article/111331/robert-bork-dead-video-rental-records-story-sparked-privacy-laws. However, Senators largely condemned this tactic as an improper invasion of privacy during the confirmation hearings. *See The Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, pt. 3, 100th Cong. 2819 (1987).

[269] *See generally Thomas Hearings*, *supra* note 203, pt. 4.

generally.[270] Justice Sonia Sotomayor was questioned about her membership on the board of the Puerto Rican Legal Defense Fund and her involvement with the various cases that the group supported.[271]

Previously Decided Supreme Court Decisions

Senators generally recognize that they should not ask nominees about pending cases, but will sometimes ask nominees about previously decided cases. Senators may hope that nominees' views on past cases reveal their beliefs on issues that are still contested.[272] Nominees' willingness to respond to these types of questions varies widely. As mentioned above, then-Judge Scalia refused as a general rule to give his opinion on any previously decided cases of the Supreme Court,[273] going so far as to refuse to state whether he agreed with *Marbury v. Madison*,[274] a case that he nonetheless acknowledged in the hearing as "fundamental"[275] and one he had previously cited in his capacity as a federal appellate judge.[276] Other Supreme Court nominees have felt free to agree with *Marbury v. Madison*.[277]

As with other issues, nominees' willingness to give their opinions on whether a prior case was correctly decided may turn on how likely they believe the issue presented in that case is to recur.[278] Thus, a nominee might decline to discuss a case that presents historically unique *factual* circumstances if they believe that the *legal* issues or principles in that case may come again before the Supreme Court. For example, then-Solicitor General Kagan was asked for her "view of"[279] *Bush v. Gore*, the decision of the Supreme Court that reversed the Florida Supreme Court's

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[270] *See Kennedy Hearings*, *supra* note 216, at 104–11, 195. Justice Alito was, somewhat similarly, questioned about his affiliation with Concerned Alumni of Princeton. *Alito Hearings*, *supra* note 198, at 333–36, 455–57, 495–98, 512–13.

[271] *Sotomayor Hearings*, *supra* note 203, at 140–45, 351, 426–27.

[272] To take just one example, during Justice Kagan's confirmation hearing, Senator Lindsey Graham questioned Justice Kagan about the overturning of *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Brown v. Board of Education*, 347 U.S. 483 (1954), and then pivoted to questions about *Roe v. Wade*, 410 U.S. 113 (1975), asking whether subsequent developments in the law and world at large were similar to those that had occurred between *Plessy* and *Brown*. *Kagan Hearings*, *supra* note 200, at 261–62. *See generally*, *e.g.*, *Gorsuch Hearings*, *supra* note 207, at 75 (statement of Sen. Charles E. Grassley) (stating that questions "about old cases, whether they were correctly decided" is "another way of asking" the nominee "to make promises and commitments about how you will rule on particular issues").

[273] *Scalia Hearings*, *supra* note 15, at 33 (statement of Antonin G. Scalia).

[274] 5 U.S. (1 Cranch) 137 (1803).

[275] *Scalia Hearings*, *supra* note 15, at 33 (statement of Antonin G. Scalia). *See also id.* at 88 ("*Marbury v. Madison* is a pillar . . . I would just say it is a very accepted and settled part of our current system, and it would be an enormous change to go back.").

[276] *See* Moore v. U.S. House of Representatives, 733 F.2d 946, 958 (D.C. Cir. 1984) (Scalia, J., concurring).

[277] *See Gorsuch Hearings*, *supra* note 207, at 91 (statement of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 181 (statement of Elena Kagan); *Alito Hearings*, *supra* note 198, at 409, 538 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 261, 342 (statement of John G. Roberts, Jr.); *Ginsburg Hearings*, *supra* note 14, at 198 (statement of Ruth Bader Ginsburg); *Kennedy Hearings*, *supra* note 216, at 93 (statement of Anthony M. Kennedy).

[278] *See*, *e.g.*, *Kagan Hearings*, *supra* note 200, at 84 (statement of Elena Kagan); *Alito Hearings*, *supra* note 198, at 454 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 261 (statements of John G. Roberts, Jr.); *Ginsburg Hearings*, *supra* note 14, at 288 (statement of Ruth Bader Ginsburg); *O'Connor Hearings*, *supra* note 173, at 108 (statement of Sandra Day O'Connor). *See generally*, *e.g.*, Lori A. Ringhand, *"I'm Sorry, I Can't Answer That": Positive Scholarship and the Supreme Court Confirmation Process*, 10 U. PA. J. CONST. L. 331, 340–44 (2008) (noting that nominees have stated that "they will discuss 'settled' cases but are unwilling to discuss 'unsettled' cases because such cases raise issues that are likely to come before the Court in the future," but casting doubt on whether their actual practice is consistent with this rule).

[279] *Kagan Hearings*, *supra* note 200, at 84 (statement of Sen. Herbert H. Kohl).

order requiring a recount of ballots in the 2000 presidential election.[280] Kagan agreed that the particular circumstances of that case would "never come before the Court again," but said that "the question of when the Court should get involved in election contests in disputed elections is . . . one of some magnitude that might well come before the Court again."[281] She said that if that were to occur, she would consider such a case "in an appropriate way."[282]

The correctness or incorrectness of some cases appears to be so well established—at least in the minds of some nominees—that some Supreme Court candidates are willing to affirm or disavow those cases without discussing how likely an issue is to recur. Such cases include not only *Marbury v. Madison*, but also cases in the "anti-canon," such as *Dred Scott v. Sanford*,[283] *Plessy v. Ferguson*,[284] and *Korematsu v. United States*,[285] that almost all modern lawyers agree were wrongly decided.[286] Of course, if a case is considered to be well established as part of either the canon or the anti-canon, prevailing views about that case are unlikely to be challenged, indicating that even if they do not expressly say so, nominees may be willing to comment on these settled cases *because* challenges are unlikely to arise.[287]

Because nominees are more likely to discuss cases that are generally considered to be well-established law, nominees' willingness to embrace certain cases may vary over time. Questions about the Supreme Court's decision in *Brown v. Board of Education*, the 1954 case that functionally overturned *Plessy v. Ferguson* and announced that "separate educational facilities" for children of different races "are inherently unequal,"[288] provide one example of how attitudes may shift over time. In the 1955 confirmation hearing of Justice Harlan and the 1959 hearing for

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[280] 531 U.S. 98, 111 (2000) (per curiam).

[281] *Kagan Hearings*, *supra* note 200, at 84 (statement of Elena Kagan). *Cf. Alito Hearings*, *supra* note 198, at 386 (statement of Samuel A. Alito, Jr.) (agreeing that the issue in *Bush v. Gore* probably would not "come before the Supreme Court again," but noting that "the Equal Protection ground that the majority relied on in *Bush v. Gore* does involve principles that could come up in future elections and in future cases," and refusing to say whether he believed the Supreme Court should have taken the case on the grounds that he had not sufficiently studied it).

[282] *Kagan Hearings*, *supra* note 200, at 84 (statement of Elena Kagan).

[283] 60 U.S. 393, 403–04 (1857) (holding that slave descendants are not "citizens of a State" for constitutional purposes). Nominees who have addressed *Dred Scott* have generally denounced it. *See, e.g.*, *Roberts Hearings*, *supra* note 166, at 180, 241 (statement of John G. Roberts, Jr.); *Ginsburg Hearings*, *supra* note 14, at 126, 188, 210 (statements of Ruth Bader Ginsburg); *Thomas Hearings*, *supra* note 203, at 464 (statement of Clarence Thomas); *Kennedy Hearings*, *supra* note 216, at 175 (statement of Anthony M. Kennedy).

[284] 163 U.S. 537, 547, 551 (1896) (upholding law that provided "equal, but separate, accommodations for the white and colored races"). By and large, nominees who have addressed *Plessy* have agreed that it was wrongly decided. *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 211, 335 (statements of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 262 (statement of Elena Kagan); *Sotomayor Hearings*, *supra* note 203, at 117 (statement of Sonia Sotomayor); *Alito Hearings*, *supra* note 198, at 463, 601 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 241 (statement of John G. Roberts, Jr.); *Kennedy Hearings*, *supra* note 216, at 149 (statement of Anthony M. Kennedy); *Rehnquist Hearings*, *supra* note 203, at 167 (statement of William H. Rehnquist).

[285] 323 U.S. 214, 217–18 (1944) (upholding order excluding citizens of Japanese ancestry from certain areas of the United States). Generally, nominees who have addressed *Korematsu* have said that it was wrongly decided or that they would not follow it. *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 180, 226 (statements of Neil M. Gorsuch); *Sotomayor Hearings*, *supra* note 203, at 117 (statement of Sonia Sotomayor); *Alito Hearings*, *supra* note 198, at 418 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 241 (statement of John G. Roberts, Jr.).

[286] *See, e.g.*, Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998).

[287] *See, e.g.*, *Roberts Hearings*, *supra* note 166, at 154–55, 241 (statements of John G. Roberts, Jr.) (stating that he "would be surprised to see" a case involving the internment of a group of people based solely on their nationality or ethnic or religious group, and later stating that "it's hard for [him] to comprehend the argument that [*Korematsu*] would be acceptable these days").

[288] 347 U.S. 483, 495 (1954).

Justice Potter Stewart, some Senators announced their disagreement with the Court's decision and attempted to discern whether these nominees agreed with the Court's result or reasoning.[289] The nominees avoided giving their opinions on the case.[290] Over the following decades, Senators continued to hold up *Brown* as an example of improper judicial legislating, pushing nominees to answer questions regarding the proper role of judges.[291]

But as attitudes towards *Brown* shifted, so did its treatment in confirmation hearings.[292] By Chief Justice Rehnquist's 1971 hearing for confirmation to the Court, he was willing to say that *Brown* was "the established constitutional law of the land."[293] In response to a question about whether *Brown* represented "lawmaking," he stated that "if nine Justices . . . all unanimously decide that the Constitution requires a particular result . . . . that is not lawmaking. It is interpretation of the Constitution just as was contemplated by John Marshall in *Marbury* versus *Madison*."[294] In her 1981 hearing, then-Judge O'Connor was asked whether she would characterize *Brown* "as judicial activism," and if so, whether that was right.[295] She responded by noting that "[s]ome have characterized" *Brown* "as judicial activism," but observed that the decision was unanimous and stated that she assumed the Court had been "exercising its constitutional function to determine the meaning . . . of the Constitution."[296] But she later declined to state whether she agreed with the statement in Justice John Marshall Harlan's[297] dissenting opinion in *Plessy* characterizing the Constitution as colorblind, noting that "litigation in the area of affirmative action is far from resolved."[298] Since then, Supreme Court nominees have more readily endorsed *Brown*.[299]

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[289] COLLINS & RINGHAND, *supra* note 181, at 163–65.

[290] *Id*. at 163–65.

[291] *Id*. at 166–71.

[292] *Id*. at 171–74.

[293] *Rehnquist Hearings*, *supra* note 203, at 76 (statement of William H. Rehnquist).

[294] *Id*. at 167 (statement of William H. Rehnquist). He was subsequently questioned about a memorandum he had written while clerking for Justice Robert Jackson that stated that *Plessy* "was right and should be reaffirmed," and said that the memorandum did not represent his own views on the subject. *See Texts of Rehnquist Letter to Senator Eastland and Memo of 1952 on Rights Cases*, N.Y. TIMES, Dec. 9, 1971, https://www.nytimes.com/1971/12/09/archives/texts-of-rehnquist-letter-to-senator-eastland-and-memo-of-1952-on.html; *Rehnquist Chief Justice Hearings*, *supra* note 169, at 223–24.

[295] *O'Connor Hearings*, *supra* note 173, at 66 (statement of Sen. Joseph R. Biden, Jr.).

[296] *Id*. at 66–67 (statements of Sandra Day O'Connor).

[297] This was the first Justice John Marshall Harlan, the grandfather of the John Marshall Harlan who was confirmed to the Court in 1955.

[298] *O'Connor Hearings*, *supra* note 173, at 84 (statement of Sandra Day O'Connor).

[299] *Gorsuch Hearings*, *supra* note 207, at 335 (statements of Neil M. Gorsuch) (describing *Brown* as a "seminal decision" and saying that it "vindicated . . . the correct original meaning . . . of the Fourteenth Amendment, and is one of the shining moments of constitutional history of the U.S. Supreme Court"); *Kagan Hearings*, *supra* note 200, at 262 (statement of Elena Kagan) (describing the decision as one of "Thurgood Marshall's . . . greatest accomplishment[s]"); *Sotomayor Hearings*, *supra* note 203, at 398–99 (statement of Sonia Sotomayor) (describing *Brown* as one of the circumstances in which it was appropriate to overrule precedent); *Alito Hearings*, *supra* note 198, at 462–63, 601 (statement of Samuel A. Alito, Jr.) (responding "certainly" to question asking whether he supports the overruling of *Plessy*); *Roberts Hearings*, *supra* note 166, at 204 (statement of John G. Roberts, Jr.) (describing *Brown* as "more consistent with the 14th Amendment and the original understanding of the 14th Amendment than *Plessy v. Ferguson*"); *Ginsburg Hearings*, *supra* note 14, at 312 (statements of Ruth Bader Ginsburg) (listing *Brown* as one of the Court's most important cases); *Kennedy Hearings*, *supra* note 216, at 149 (statement of Anthony M. Kennedy) (stating that *Brown* was "right when it was decided" and consistent with the 14th Amendment). Note, however, that one Member stated that Judge Gorsuch was "averse to saying" that the *Brown* Court came to the "right result." *Gorsuch Hearings*, *supra* note 207, at 335 (statement of Sen. Richard Blumenthal). At least two recent nominees to the lower federal courts, Wendy Vitter and Andrew Oldham, have refused to say whether they believed *Brown* was correctly decided.

As mentioned, if a prior case is not considered settled law and if a nominee thinks issues from that case are likely to recur, the nominee may be unwilling to discuss the case at all.[300] Alternatively, a nominee may merely acknowledge the existence of the case.[301] Even then-Judge Scalia, who generally declined to express his views on cases,[302] was willing to say that certain cases decided by the Supreme Court were "an accepted part of current law."[303] For example, when Justice Kagan was pressed for her views on *District of Columbia v. Heller*, in which the Supreme Court recognized an individual right to keep and carry arms,[304] Justice Kagan merely described the holding of the case and said that it was "settled law."[305] At other times, nominees may be willing to discuss the general framework they would apply to analyze a given issue.[306]

Judicial Procedure

Finally, nominees are sometimes asked questions relating to judicial procedure, and are often willing to speak generally on these matters.[307] To take one recurring issue, Supreme Court nominees will generally offer their views on whether they support filming Supreme Court proceedings.[308] Then-Judge Roberts and then-Judge Scalia both responded to questions regarding whether they believed the Supreme Court was overworked.[309]

Supreme Court candidates have also discussed the issues of judicial misconduct. In this vein, a number of nominees have been questioned about the process to impeach judges.[310] For example,

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See Ariane de Vogue, *Brown v. Board Takes Center Stage at Hearing for Trump's Judicial Nominees*, CNN (May 17, 2018 5:59 PM), https://www.cnn.com/2018/05/17/politics/judicial-nominees-senate-committee-brown-v-board-of-education/index.html.

[300] *See, e.g.*, *Roberts Hearings*, *supra* note 166, at 300–01 (statement of John G. Roberts, Jr.).

[301] For example, in discussing *Roe v. Wade*, many nominees have only been willing to say that it is precedent of the Supreme Court or to describe the holdings of the case. *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 77, 280 (statements of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 96, 262 (statements of Elena Kagan); *Sotomayor Hearings*, *supra* note 203, at 82 (statement of Sonia Sotomayor); *Alito Hearings*, *supra* note 198, at 401, 454–55 (statements of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 145 (statement of John G. Roberts, Jr.). *Cf. Scalia Hearings*, *supra* note 15, at 37 (statement of Antonin G. Scalia) (declining to respond to question asking whether he would overrule *Roe v. Wade*).

[302] *See Scalia Hearings*, *supra* note 15, at 85–87.

[303] *Id*. at 87 (statement of Antonin G. Scalia) (discussing incorporation doctrine cases).

[304] 554 U.S. 570, 592 (2008).

[305] *Kagan Hearings*, *supra* note 200, at 247 (statement of Elena Kagan). *See also id.* at 284 (declining to state whether she believed there was a fundamental right to bear arms but saying, "I accept *Heller*") (statement of Elena Kagan).

[306] *See, e.g.*, *Kagan Hearings*, *supra* note 200, at 115–16 (statement of Elena Kagan) (describing considerations under current law in deciding "what level of constitutional scrutiny to apply to gun regulations"); *Roberts Hearings*, *supra* note 166, at 242–43 (statement of John G. Roberts, Jr.) (describing approach to analyzing constitutionality of presidential actions); *Ginsburg Hearings*, *supra* note 14, at 182 (statement of Ruth Bader Ginsburg) (describing precedent governing First Amendment rights in the context of the military).

[307] *See generally, e.g.*, *O'Connor Hearings*, *supra* note 173, at 140 (statement of Sandra Day O'Connor) (suggesting that "it is appropriate for judges to be concerned and, indeed, to express themselves in matters relating to the administration of justice in the courts, and as to matters which would improve that administration of justice in some fashion," even while they should not speak out about other policy issues).

[308] *See, e.g.*, *Kagan Hearings*, *supra* note 200, at 83 (statement of Elena Kagan); *Sotomayor Hearings*, *supra* note 203, at 83 (statement of Sonia Sotomayor); *Alito Hearings*, *supra* note 198, at 480 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 239–40 (statement of John G. Roberts, Jr.); *Ginsburg Hearings*, *supra* note 14, at 198–99, 262 (statements of Ruth Bader Ginsburg). *Cf. O'Connor Hearings*, *supra* note 173, at 143 (statement of Sandra Day O'Connor) (discussing the demands of a free press versus the importance of affording a fair trial).

[309] *Roberts Hearings*, *supra* note 166, at 309; *Scalia Hearings*, *supra* note 15, at 60.

[310] *Ginsburg Hearings*, *supra* note 14, at 327–29; *Kennedy Hearings*, *supra* note 216, at 215–17; *Scalia Hearings*,

Justice Kennedy, who had previously opposed legislation proposing reforms to the impeachment process, explained his position during his hearing.[311] And then-Judge O'Connor spoke about her experience as a state court judge subject to different processes.[312] Moreover, then-Judge Scalia stated that he believed the impeachment process was appropriately a "cumbersome process."[313] Conversely, then-Judge Ginsburg largely demurred, stating that she believed "there may be a real conflict of interest, possibility of bias and prejudice on my part" in responding to questions about the impeachment process.[314]

Finally, Senators have sometimes asked Supreme Court nominees whether they would recuse themselves under certain circumstances.[315] Then-Solicitor General Kagan committed to recusing herself from any case in which she had been "counsel of record" and suggested that she might recuse herself "in any case in which [she had] played any kind of substantial role in the process."[316] Similarly, then-Judge Sotomayor said that she would recuse herself from consideration of any decisions she had authored as a federal appellate judge.[317] In his hearing, then-Judge Roberts stated that the fact that he had previously taken one position on an issue as an advocate would not require him to recuse himself in any future cases presenting the same issue.[318] At other times, nominees have discussed cases in which they had previously recused themselves as lower court judges[319] or spoken more generally about their views on recusal.[320]

Conclusion

In sum, the applicable codes of judicial conduct and historical practice provide some guidance regarding what sorts of questions a nominee may permissibly answer during his confirmation hearing. Scholars,[321] nominees,[322] and even Members of Congress[323] generally agree that under

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supra note 15, at 99–100; *O'Connor Hearings*, *supra* note 173, at 98–100.

[311] *Kennedy Hearings*, *supra* note 216, at 216 (statement of Anthony M. Kennedy).

[312] *O'Connor Hearings*, *supra* note 173, at 99–100 (statements of Sandra Day O'Connor).

[313] *Scalia Hearings*, *supra* note 15, at 99–100 (statements of Antonin G. Scalia).

[314] *Ginsburg Hearings*, *supra* note 14, at 328 (statement of Ruth Bader Ginsburg).

[315] *See, e.g.*, *O'Connor Hearings*, *supra* note 173, at 138–39.

[316] *Kagan Hearings*, *supra* note 200, at 64 (statement of Elena Kagan).

[317] *Sotomayor Hearings*, *supra* note 203, at 113, 118–19 (statement of Sonia Sotomayor).

[318] *Roberts Hearings*, *supra* note 166, at 307–08 (statement of John G. Roberts, Jr.). *See also Sotomayor Hearings*, *supra* note 203, at 394 (statement of Sonia Sotomayor) (stating that she would not recuse herself in any cases presenting the question whether the right of an individual to bear arms was fundamental, notwithstanding her previous statements regarding the issue).

[319] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 238 (statement of Neil M. Gorsuch); *Alito Hearings*, *supra* note 198, at 337–40, 492–94 (statement of Samuel A. Alito, Jr.); *Ginsburg Hearings*, *supra* note 14, at 156–58 (statement of Ruth Bader Ginsburg); *Scalia Hearings*, *supra* note 15, at 72 (statement of Antonin G. Scalia).

[320] *See, e.g.*, *Kagan Hearings*, *supra* note 200, at 119 (statement of Elena Kagan); *Kennedy Hearings*, *supra* note 216, at 217 (statement of Anthony M. Kennedy); *Scalia Hearings*, *supra* note 15, at 44 (statement of Antonin G. Scalia).

[321] Amar, *supra* note 20 (concluding that "[e]xplicit or implicit promises" to rule in a certain way in future cases "would . . . compromise judicial independence and due process of law"); Lubet, *Confirmation Ethics*, *supra* note 19, at 235 ("[I]t may seem to future litigants that a justice is bound to a predetermined outcome as a consequence of commitments apparently made during confirmation. This appearance of partiality should be avoided in its own right." (footnote omitted)).

[322] *See supra* note 203.

[323] *See, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 55–56 (statement of Sen. John Kennedy); *id.* at 177 (statement of Sen. Ben Sasse); *Sotomayor Hearings*, *supra* note 203, at 574 (statement of Sen. Sheldon Whitehouse); *Alito Hearings*, *supra* note 198, at 13 (statement of Sen. Charles E. Grassley); *Roberts Hearings*, *supra* note 166, at 20 (statement of

ethical rules as well as norms like the Ginsburg Rule a nominee should refrain from pledging to uphold or overturn particular precedents or to decide cases in certain ways. Nominees likely need to avoid making statements that could mandate their recusal from future cases under the federal judicial disqualification statute or under applicable canons of judicial ethics.[324] Beyond that, however, the boundaries between permissible and impermissible responses are murky—and still contested during confirmation hearings. Historical practice suggests that nominees will not only avoid clear commitments to resolve future cases in certain ways, but in many circumstances, will avoid even giving "hints" about how they may view potential disputes.[325] General questions relating to the nominee's jurisprudential philosophy are more likely to elicit forthcoming responses than specific questions about how the nominee intends to rule in particular categories of cases. However, nominees have been more likely to speak about particular legal issues if they have previously commented on that issue, such as in judicial opinions or extra-judicial statements.[326] Ultimately, however, there are few available remedies when a nominee refuses to answer a particular question. Although a Senator may vote against a nominee who is not sufficiently forthcoming,[327] as a matter of historical practice the Senate has rarely viewed lack of candor during confirmation hearings as disqualifying,[328] and it does not appear that the Senate has ever rejected a Supreme Court nominee solely on the basis of evasiveness.[329]

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Sen. Jon Kyl); *Ginsburg Hearings*, *supra* note 14, at 265 (statement of Sen. Orrin G. Hatch). *Cf., e.g.*, *Kennedy Hearings*, *supra* note 216, at 25 (statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary) (noting that no "promises" would "be sought or secured" at the confirmation hearing, but stating that he expected "that within reasonable limits of propriety, you will respect the Senate's constitutional role of advice and consent, by being as forthcoming and responsive as possible").

[324] *See supra* "Disqualification."

[325] As discussed, Justice Ginsburg famously stated that she would give "no hints, no forecasts, no previews," in declining to respond to a question that she thought presented "a burning question virtually certain to come before the Court." *Ginsburg Hearings*, *supra* note 14, at 323 (statement of Ruth Bader Ginsburg). *Accord, e.g.*, *Gorsuch Hearings*, *supra* note 207, at 77 (statement of Neil M. Gorsuch); *Kagan Hearings*, *supra* note 200, at 64 (statement of Elena Kagan); *Alito Hearings*, *supra* note 198, at 627 (statement of Samuel A. Alito, Jr.); *Roberts Hearings*, *supra* note 166, at 188 (statement of John G. Roberts, Jr.).

[326] *See supra* "Nominee's Prior Statements."

[327] *See* Lubet, *Confirmation Ethics*, *supra* note 19, at 236 (observing that a nominee's "decision to refrain from answering" a question at his or her confirmation hearing "carries with it the possibility of prompting a negative vote on confirmation").

[328] *See, e.g.*, Ringhand, *supra* note 278, at 351 (noting that Justice Scalia "breezed through [his] confirmation hearings and was approved by the Senate by a 98 to 0 vote" despite answering "very few difficult or 'political' questions").

[329] *See, e.g.*, Jeff Bliech, Aimee Feinberg, Michelle Friedland & Dan Powell, *Advice and Consent on Supreme Court Justices*, 32 S.F. ATT'Y 50 (2006).