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Proper Scope of Questioning of Supreme Court Nominees: The Current Debate

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Summary

A recurring issue has been what kinds of questions are appropriate to pose to a Supreme Court nominee appearing at hearings before the Senate Judiciary Committee. Particularly at issue has been whether questions by committee members should seek out a nominee's personal views on current legal or constitutional issues, or past Supreme Court decisions.

In recent decades, most Supreme Court nominees have undergone rigorous questioning at their confirmation hearings on a wide range of subjects. Committee members have never reached formal agreement among themselves or with the nominees regarding the proper scope of questioning. Nevertheless, at most confirmation hearings the questioning has been relatively uncontroversial when it has focused on the nominee's (1) knowledge of the law, the Constitution, and past Court rulings; (2) "judicial philosophy," including his or her overriding objectives as a judge and general approach to judicial decision-making; (3) past writings or public statements (other than those made in judicial opinions) on social, economic, political, legal, or constitutional issues; and (4) past actions as a public figure.

More controversial, by contrast, has been the propriety of Senators asking, and nominees providing direct answers to, questions concerned with the views of nominees regarding (1) the soundness of particular Supreme Court rulings, including whether they should be overruled; (2) legal or constitutional issues not immediately pending but which might someday come before the Court; (3) the relative weight to give to competing constitutional values; and (4) issues addressed previously by the nominee as a judge (either as a Justice or a lower court judge).

There is general agreement in the Senate that Supreme Court nominees should not, in replying to committee questioning, signal how they might rule on a case that could come before them on the Court. Such constraint on the part of nominees appears called for by a judicial ethics canon which provides that a judge or judicial candidate "shall not ... with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."

The issue of appropriate areas of questioning is set to be revisited on September 6, 2005, when the Senate Judiciary Committee begins confirmation hearings on the nomination of appellate court judge John G. Roberts, Jr., to succeed retiring Associate Justice Sandra Day O'Connor. Some Senators on the committee have said that in order to determine the fitness of nominees to serve on the Court, it is necessary that committee questioning elicit their views on topical legal and constitutional issues, as well as on past Supreme Court rulings involving those issues. Others, however, doubt the propriety of such questioning, maintaining that nominees' answers to questions which convey their personal views would interfere with their obligation to avoid appearing to make commitments, or provide signals, as to how they would vote as a Justice on future cases. This report will be updated at the conclusion of the Roberts confirmation hearings.

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In recent decades, a recurring Senate issue has been what kinds of questions are appropriate to pose to a Supreme Court nominee appearing at hearings before the Senate Judiciary Committee.[1] Particularly at issue has been whether questions by committee members should seek out a nominee's personal views on current legal or constitutional issues and past Supreme Court decisions.

Some Senators on the Judiciary Committee have said that in order to determine the fitness of nominees to serve on the Court, it is necessary that committee questioning elicit their views on topical legal and constitutional issues, as well as on past Supreme Court rulings involving those issues. Others, however, doubt the propriety of such questioning, maintaining that nominees' answers to questions which convey their personal views would conflict with their obligation to avoid appearing to make commitments, or provide signals, as to how they would vote as a Justice on future cases.

The issue of appropriate areas of questioning will likely be revisited on September 6, 2005, when the Senate Judiciary Committee is set to begin confirmation hearings on the nomination of appellate court judge John G. Roberts, Jr., to succeed retiring Associate Justice Sandra Day O'Connor. Various members of the committee have notified the nominee of their intention to question him at the hearings regarding his views on a wide range of legal and constitutional issues and on the soundness of past Supreme Court rulings. Unwillingness by Judge Roberts to be forthcoming in answering their questions, they have said, might prompt them to vote against confirmation. In hearings before the Judiciary Committee in 2003 on his nomination to be a U.S. appellate court judge, Roberts (then a private attorney) declined, in response to repeated requests by some Senators on the committee, to critique past Court rulings and disclose personal views about various topical legal and constitutional issues. He has not indicated whether he will take a similar stance in responding to Senators' questions at hearings on his Supreme Court nomination.

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[1] See archived CRS Report 90-429, *Questioning Supreme Court Nominees — A Recurring Issue*, by Denis Steven Rutkus (out of print; available from author); William G. Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," *Tulane Law Review*, vol. 62, Nov. 1987, pp. 109 (hereafter cited as Ross, "Questioning of Supreme Court Nominees"); and Steven Lubet, "Advice and Consent: Questions and Answers," *Northwestern University Law Review*, vol. 84, Winter 1989, p. 879 (hereafter cited as Lubet, "Advice and Consent").

Historical Background

In 1955, hearings on the Supreme Court nomination of John M. Harlan marked the beginning of a practice, continuing to the present, of each Court nominee testifying before the Senate Judiciary Committee. The principal business of these hearings is the questioning of the nominee by committee members (with the committee thereafter also hearing the testimony of other public witnesses speaking either in favor of or in opposition to the nominee's confirmation). The subject areas covered by those questions have often included the nominees' legal qualifications, private backgrounds, and earlier actions as public figures. Other questions have focused on social and political issues, the Constitution, particular Court rulings, current constitutional controversies, constitutional values, judicial philosophy, and the analytical approach a nominee might use in deciding issues and cases.

For members of the Judiciary Committee, questioning of the nominee may serve various purposes. For Senators who are undecided about the nominee, the hearings may shed light on the nominee's professional qualifications, temperament, and character, and hence on how they should vote on confirmation.[2] Other Senators, as the hearings begin, may already be "reasonably certain about voting to confirm the nominee," yet "also remain reasonably open to counter-evidence," and thus use the hearings "to pursue a line of questioning designed to probe the validity of this initial favorable predisposition."[3] Still others, however, may come to the hearings "having already decided how they will vote on the nomination" and, accordingly, use their questioning of the nominee to try "to secure or defeat the nomination."[4] For some Senators, the hearings may be a vehicle through which to impress certain values or concerns upon the nominee, in the hope of influencing how he or she might approach issues later as a Justice.[5] The hearings also may represent to some Senators an opportunity to draw the public's attention to certain issues, to advocate their policy preferences, or to associate themselves with concern about certain problems. Last, but certainly not least, Senators may hope to glean from the nominee's responses

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[2] At the very least, one scholar maintains, the questioning process "can be useful to Senators if they recognize its limitations and attempt to frame questions that are reasonably calculated to elicit meaningful responses. The questioning process can and has provided useful insights into the general thinking of nominees on important constitutional issues such as the scope of various provisions of the Bill of Rights. The process has also helped to measure the mental acuity of nominees, and to clarify their approach to the process of adjudication." Ross, *Questioning of Supreme Court Nominees*, p. 173.

[3] George L. Watson and John A. Stookey, *Shaping America; the Politics of Supreme Court Appointments* (New York: HarperCollins College Publishers, 1995), p. 150. (Hereafter cited as Watson and Stookey, *Shaping America*.)

[4] Ibid., p. 152.

[5] See Stephen J. Wermiel, "Confirming the Constitution: The Role of the Senate Judiciary Committee," *Law and Contemporary Problems*, v. 56, Autumn 1993, p. 141, in which author maintains that, since the 1987 hearings on Supreme Court nominee Robert H. Bork, a purpose of Senators on the Judiciary Committee has been "to identify points of constitutional concern and pursue those concerns with nominees, with the hope that, once confirmed, the new Justices will remember the importance of the core values urged on them by the senators or at least feel bound by the assurance they gave during their hearings."

signs of how the nominee, if confirmed to the Court, might be expected to rule on particular issues. Senators, it has been noted, "may play multiple roles in any given hearings."[6]

For his or her part, however, a nominee might sometimes be reluctant to answer certain questions that are posed at confirmation hearings. A nominee might decline to answer for fear of appearing to make commitments on issues that later could come before the Court.[7] A nominee also might be concerned that the substance of candid responses to certain questions could displease some Senators and thus put the nominee's chances for confirmation in jeopardy. "Nominees," the current chairman of the Judiciary Committee has reportedly remarked, "tend to answer just as many questions as they have to in order to be confirmed."[8]

The "ground rules" for asking and answering questions at Supreme Court confirmation hearings, one law professor has noted, "are kind of ad hoc." Republicans and Democrats in the Senate, he maintains, have alternately argued for and against expansive questioning over the years, invoking "the history they need for the particular occasion."[9] While Judiciary Committee members have never reached formal agreement among themselves or with Supreme Court nominees regarding the proper scope of questioning and answering, it generally might be said that questioning at most confirmation hearings, in recent decades, has been relatively uncontroversial when it has dealt with the following areas of questioning:

- the nominee's knowledge of the law, the Constitution and past Supreme Court rulings, and the major issues addressed in those rulings;

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[6] Watson and Stookey, *Shaping America*, p. 155.

[7] Illustrative of such a concern was the following statement by nominee David H. Souter, at a September 14, 1990, hearing, explaining his refusal to answer a question concerning the issue of a woman's right, under the Constitution, to have an abortion: "Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off-limits to a judge. Why this kind of discussion would take me down a road which I think it would be unethical for me to follow is something that perhaps I can suggest, and I will close with this question.

"Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience. .... With that in mind can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?" U.S. Congress, Senate Committee on the Judiciary, *Nomination of David Souter To Be Associate Justice of the Supreme Court of the United States*, hearings, 101st Cong., 2nd sess., Sept. 13, 14, 17, 18, and 19, 1990 (Washington: GPO, 1991), p. 194.

[8] Charles Babington, "On Question of Nominee Questions, No Clear Answer; History of Hearings is Decidedly Mixed as Senators Prepare to Probe Roberts's Legal Philosophy," *Washington Post*, July 28, 2005, p. A6, quoting Sen. Arlen Specter of Pennsylvania. (Hereafter cited as Babington, "No Clear Answer.")

[9] Ibid., quoting Carl Tobias, law professor, University of Richmond.

- the nominee's "judicial philosophy," including his or her overriding objectives as a judge and general approach to judicial decision-making;[10]

- the nominee's past writings or public statements (other than those made in judicial opinions) on social, economic, political, legal, or constitutional issues;

- the nominee's past actions as a public figure.

More controversial, by contrast, has been the propriety of Senators asking, and nominees providing direct answers to, questions concerned with the views of nominees on the following subjects:

- the soundness of particular Supreme Court rulings, including whether they should be overruled;

- legal or constitutional issues not immediately pending but which might someday come before the Court;

- the relative weight to give to competing constitutional values;

- issues addressed previously by the nominee as a judge (either as a Justice or lower court judge).

All Senators, one news analysis has generalized, "agree that nominees should not signal how they might rule on a case that could come before them on the Court."[11] Such agreement, it can be assumed, is founded in large part on judicial ethics canons, most notably Canon 5A(3)(d)(ii) of the American Bar Association's Model Code of Judicial Conduct. This canon provides that a judge or judicial candidate "shall not ... with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." Further, Senators on the Judiciary Committee, as well as the nominee, would be aware that a comment by the latter about a pending case at the confirmation hearings, would, under federal law as well as judicial ethical canons, "raise a serious question of bias that might compel recusal."[12]

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[10] See for example, the willingness of Judge Ruth Bader Ginsburg, at her 1993 Supreme Court confirmation hearings, to "state in a nutshell how I view the work of judging," while cautioning, moments later in her testimony, that it would be "injudicious" to "rehearse here what I would say and how I would reason" on questions that the Supreme Court might be called on to decide. U.S. Congress, Senate Committee on the Judiciary, *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States,* hearings, 103rd Cong., 1st sess., July 20-23, 1993 (Washington: GPO, 1994), pp. 51-52.

[11] Babington, "No Clear Answer."

[12] Ross, "Questioning of Supreme Court Nominees," p. 124. Ross cites the governing recusal statute, 28 U.S.C. 455, which provides in part that "[a]ny justice, judge, or (continued...)

For their part, committee members may differ in their assessments of a nominee's stated reasons for refusing to answer certain questions. Some may be sympathetic and consider a nominee's refusal to discuss certain matters as of no relevance to his or her fitness for appointment. Others, however, may consider the nominee's views on certain subjects as important to assessing the nominee's fitness and hence regard unresponsiveness to questions on these subjects as sufficient reason to vote against confirmation.[13] Protracted questioning, occurring over several days of hearings, is likely especially if the nominee is relatively controversial or is perceived by committee members to be evasive or insincere in responding to certain questions.

Past Comments of John G. Roberts, Jr., on Proper Scope of Questioning

His Advice in 1981 to Nominee Sandra Day O'Connor. In August 1981, after a one-year clerkship to then-Associate Justice William H. Rehnquist, John Roberts began service in the Reagan Administration as Special Assistant to Attorney General William French Smith. Ironically, his first Department of Justice assignment was to prepare draft answers to questions that were likely to be asked during the Supreme Court confirmation hearings for Sandra Day O'Connor. In a Department of Justice memo recapping that assignment, Roberts said his "approach was to avoid giving specific response to any direct questions on legal issues likely to come before the Court, but demonstrating in the response a firm command of the subject area and awareness of the relevant precedents and arguments."[14]

In a September 9, 1981, memo to O'Connor, Roberts disagreed with a law school professor who, in Roberts' words, had argued that "the only practical manner in which Senators can discharge their responsibility to ascertain the views of a nominee is to ask specific questions on actual (though nonpending) or hypothetical cases." According to this argument, Roberts said, "statements after nomination would not be disqualifying if the nominee and Senators understood that no promises on future votes were intended." Roberts, however, advised O'Connor that the "suggestion that a simple understanding that no promise is intended when a nominee

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[12] (...continued)
magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

[13] In this vein, one Senator has written that, in his judgment, "the Senate should resist, if not refuse, to confirm Supreme Court nominees who refuse to answer questions on fundamental issues. In voting on whether to confirm a nominee, senators should not have to gamble or guess about a candidate's philosophy but should be able to judge on the basis of the candidate's expressed views." Arlen Specter with Charles Robbins, *Passion for Truth*, 1st Perennial ed. (New York: Perennial, 2001), p. 342.

[14] "Internal History of Supreme Court Appointment," Department of Justice memorandum, from John Roberts, Special Assistant to the Attorney General, to Kenneth W. Starr, Counselor to the Attorney General, Sept. 17, 1981, available at [http://www.archives.gov/news/john-roberts/accession-60-88-0498].

answers a specific question will completely remove the disqualification problem is absurd. The appearance of impropriety remains."[15]

Questions He Declined to Answer as Court of Appeals Nominee in 2003. On May 8, 2003, John Roberts was confirmed by the Senate as a circuit court judge on the U.S. Court of Appeals for the District of Columbia Circuit. Earlier, at his confirmation hearings, and in written replies to questions submitted to him prior to the hearings, Roberts refused to answer questions seeking his views on particular Supreme Court decisions or asking him to single out particular Supreme Court rulings with which he might disagree. A series of questions, for example, asked Roberts "what is your position" on *Roe v. Wade*,[16] the 1973 Supreme Court decision that found in the Constitution a right of privacy protecting a woman's decision to terminate a pregnancy. At one point (and consistent with his replies to similar questions regarding the abortion issue), Roberts replied that *Roe v. Wade* is "the settled law of the land. There's nothing in my personal views that could prevent me from fully and faithfully applying that precedent."[17]

Prior to the hearings, a committee member's written question had asked Roberts to identify three Supreme Court cases that had not been reversed with which he disagreed. Roberts declined to respond, citing for support the remark of the late Washington, D.C., attorney Lloyd Cutler that judicial candidates "should decline to reply when efforts are made to find out how they would decide a particular case."[18] Roberts elaborated on this position at the hearings, maintaining that Judge Ruth Bader Ginsburg at the 1993 hearings on her Supreme Court nomination "on numerous occasions said it would not be proper for her to comment on particular Supreme Court precedents."[19]

Later in the hearings, in a similar vein, Roberts replied to a Senator:

> With respect, Senator, you're getting back to the area of asking me to criticize particular Supreme Court precedents. Justice Ginsburg thought that was inappropriate because it would be harmful to the Supreme Court. I think it's inappropriate because it would be harmful to the independence and integrity of the Federal judiciary. The reason I think key to the independence and strength of the Federal judiciary is that judges come to the cases before them, unencumbered by prior commitments, beyond the commitment to apply the rule of law and the oath that they take. I think that is essential. And if you get into the business where hints, forecasts are being required of a nominee because you need to know

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[15] "Rees Memorandum," Department of Justice memorandum, from John Roberts, Special Assistant to the Attorney General, to Sandra Day O'Connor, Sept. 9, 1981, available at [http://www.archives.gov/news/john-roberts/accession-60-88-0498].

[16] 410 U.S. 113 (1973).

[17] U.S. Congress, Senate Committee on Judiciary, *Confirmation Hearings on Federal Appointments*, hearings, 108th Cong. 1st sess., Apr. 30, May 7, May 22, June 25 and July 9, 2003 (Washington, GPO, 2004), p. 56.

[18] Ibid., p. 65.

[19] Ibid., pp. 66-67.

> what he thinks about this case or that case, that will be very harmful to the judiciary.[20]

Pre-Hearing Debate Over Proper Scope of Questioning for Roberts as Supreme Court Nominee

Chairman Sets Stage for Committee Questioning. On July 24, 2005, less than a week after President Bush's announcement of John Roberts's nomination to the Supreme Court, Senator Arlen Specter, chairman of the Judiciary Committee, provided an overview, in a newspaper op-ed piece,[21] of the kinds of questions he anticipated would be asked of John Roberts at his confirmation hearings in September.

> In this battle, the central issue remains *Roe v. Wade*, which established a woman's right to choose. Both sides are looking for assurances that Judge Roberts will side with them. Some senators have stated their intention to directly ask the nominee if he would overrule Roe v. Wade. While senators may ask any question they choose, the nominee may answer or not as he sees fit.
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> The confirmation precedents forcefully support the propriety of a nominee declining to spell out how he or she would rule on a specific case. Abraham Lincoln is reputed to have said pretty much the same thing: "We cannot ask a man what he will do, and if we should, and he should answer us, we would despise him. Therefore, we must take a man whose opinions are known."
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> This, of course, does not foreclose probing inquiries on the nominee's general views on jurisprudence. For example, it would be appropriate to ask how to weigh the importance of precedent in deciding whether to overrule a Supreme Court decision. Some legal scholars attach special significance to what they call superprecedents, which are decisions like *Roe v. Wade* that have been reaffirmed in later cases.
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> Beyond the range of social issues, the hearings for Judge Roberts will doubtless focus on other key matters like First Amendment rights, presidential authority, Congressional power under the Constitution's Commerce Clause, judicial restraint, civil rights, environmental law, eminent domain and the rights of defendants in criminal cases.

While praising Judge Roberts for his "outstanding character and admirable record of achievement," which Senator Specter said "had disarmed critics on all sides," he said that Judge Roberts, nevertheless, "must do more," and allow the Judiciary Committee and the Senate "to know much more about his judicial philosophy." To that end, Senator Specter said, the committee would "conduct a full and thorough hearing that will allow sufficient time for senators to prepare and to

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[20] Ibid., p. 72.

[21] Arlen Specter, "Bringing the Hearings to Order," *New York Times*, July 24, 2005, sec. 4, p. 12.

satisfy themselves that the nominee will uphold our constitutional values of equality, liberty and justice."[22]

Calls for Roberts to Answer Questions about Current Issues. In the weeks following President Bush's selection of John Roberts to be his Supreme Court nominee, various Senators announced their intention to question the nominee at his confirmation hearings on a range of legal and constitutional issues. On July 21, 2005, a member of the Judiciary Committee, Senator Charles E. Schumer of New York, when paid a "courtesy call" visit by the nominee, handed the nominee more than 70 written questions that he said he would ask at the hearings. These, a press release stated, presented Roberts "with a number of questions on his judicial philosophy ranging from the First Amendment to the Commerce Clause to the environment."[23] Questions included whether Judge Roberts agreed with the rulings or reasoning of various specified Supreme Court decisions,[24] the proper role of government in enacting laws to protect or promote various specified rights or values, whether in certain specified cases the Supreme Court engaged in "judicial activism," and which Supreme Court Justices Judge Roberts believed his jurisprudence most closely resembles. Senator Schumer declared that federal court candidates "should be prepared to explain their views of the Constitution, of decided cases, of federalism, and a host of other issues relevant to that lifetime post."[25]

For his part, during the Senate's August 2005 recess, Senator Specter, Chairman of the Judiciary Committee, sent two separate letters to Judge Roberts to give advance notice regarding questions the Chairman would be posing at the confirmation hearings in September. In his first letter,[26] the Chairman pointed to a a 5-4 ruling by the Court that invalidated legislation to regulate, under the Interstate Commerce Clause, gender-motivated crimes of violence. Senator Specter stated that Members of Congress were "irate about the Court's denigrating and, really, disrespectful statements about Congress's competence" expressed in that opinion. The Chairman's letter concluded with four questions to Judge Roberts, including one asking "for your thinking on the jurisprudence" of two recent Court decisions "which overturned almost 60 years of Congress's power under the Commerce Clause." In his second letter,[27] Senator Specter drew Judge Roberts's attention to two Court

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[22] Ibid.

[23] Sen. Charles E. Schumer, "Schumer Meets Judge Roberts, Hands Him List of Questions He Will Ask at Judiciary Committee Hearings," July 21, 2005 news release, available at [http://schumer.senate.gov/SchumerWebsite/pressroom/pr-latest_news.html].

[24] One set of questions included: "Do you believe that Roe v. Wade (1973) was correctly decided? What is our view of the quality of the legal reasoning in that case? Do you believe that it reached the right result?" Ibid.

[25] Ibid.

[26] Sen. Arlen Specter, letter to Hon. John G. Roberts, Jr., Aug. 8, 2005, available at [http://www.cq.com/flatfiles/editorialFiles/temporaryItems/20050808-8roberts-letter.pdf].

[27] Sen. Arlen Specter, letter to Hon. John G. Roberts, Aug. 23, 2005, available at [http://www.cq.com/flatfiles/editorialFiles/temporaryItems/mon20050823-23court-letter.pdf].

decisions on the Americans with Disabilities Act, "which I intend to ask you about at your confirmation hearings."

In a "P.S." to his second letter, Senator Specter commented that, following the release of his first letter to Judge Roberts, "there were misrepresentations that my questions asked how you would have decided specific prior cases. That is not true. The questions were carefully crafted to elicit your thinking on your jurisprudence and judicial philosophy as opposed to how you would have decided specific cases."

Other Senators, meanwhile, have said that Judge Roberts should be prepared to express his views on particular Court rulings. Specifically, a number of Senators have reportedly said they want Judge Roberts to answer whether he believes the Supreme Court's decision in *Roe v. Wade* should be overturned, indicating that a negative answer to the question likely would be necessary if they were to vote for Roberts's confirmation.[28]

Advocates that Judge Roberts should express his views on Court rulings or constitutional issues have rejected the notion that to do so would be prejudging, or making a commitment as to how he would vote if the issues or rulings came up before the Court in the future. In a newspaper op-ed piece,[29] for example, Walter Dellinger, law professor and former Acting Solicitor General in the Clinton Administration, characterized as "unpersuasive" the "standard objections" to asking a Supreme Court nominee "directly what he or she thinks about contentious social and legal issues," explaining:

> It is said, for example, that a judge should be open-minded and that it is inconsistent with the obligation to answer a question such as whether *Roe v. Wade* was rightly decided. But having views doesn't preclude an open mind — nor ... does hiding your views make them go away.
>
> Why would it be inappropriate to know as much about Roberts's views on controversial legal issues as we know about Justice John Paul Stevens's views? What is wrong with asking a nominee whether he or she agrees with Justice Antonin Scalia's dissenting opinion in *Planned Parenthood v. Casey* when we know that Scalia agrees with it and Scalia will be able to take part in future related cases without anyone suggesting that to be a problem?
>
> There are legitimate concerns that should make some questions off limits, such as a question about an actual case coming before the court. More generally, nominees should answer questions about past cases and not future ones. And everyone involved in the process should make clear that by answering questions about his views on contentious legal and social issues such as abortion or affirmative action, the nominee is not making any commitment about how he or she would vote on any future case. A nominee may well come to a different view after having read the briefs and heard arguments or may find that his general

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[28] See, for example, Bob Egelko, "Boxer Threatens to Slow Senate Activity over Court Pick; She'll Vote 'No' Unless Roberts Backs Right to Abortion," *San Francisco Chronicle*, Aug. 11, 2005, p. A9; Gary Delsohn, "Feinstein to Seek Roberts' Abortion Views," *Sacramento Bee*, Aug. 25, 2005, p. A1.

[29] Walter Dellinger, "Fair Questions for Roberts," *Washington Post*, July 27, 2005, p. A21.

views do not determine how to resolve the issue raised in a particular case. But with that important understanding, there is no reason why a nominee cannot answer questions that will give senators a meaningful sense of what kind of person the nominee is."[30]

Criticism of Calls for Roberts to Answer Questions about Current Issues. Within a week of President Bush's selection of John Roberts for appointment to the Court, the Senate Republican Policy Committee issued a six-page statement criticizing calls for the nominee at the confirmation hearings to discuss his views on current constitutional controversies.[31] The statement objected to what it said were the demands of some Senators that Supreme Court nominee Roberts "announce his positions on constitutional questions that he may decide as a judge after he is confirmed." These demands, the statement stated, were improper for the following reasons:

- "Making such demands threatens to radically politicize the confirmation process, turning judicial nominees into mere 'candidates' who must make political promises in order to be confirmed."

- "No judicial nominee should be compelled to answer any question that would force him or her to prejudge or signal future conclusions regarding any case or issue."

- "Any demand that Judge Roberts prejudge cases or issues threatens the independence of the federal judiciary and jeopardizes Americans' right to fair and impartial judges."[32]

Calling on judicial nominees to announce their positions on constitutional questions "as a condition of confirmation," the statement added, was contrary to "settled standards and longstanding practice." The requirement, it said, would be contrary to the proscription of Canon 5A(3) of the ABA Model Code of Judicial Conduct, mentioned above, against judges or judicial candidates making "pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." The statement also provided quotations from all nine of the Supreme Court's current Justices, made either at their own confirmation hearings or in other official remarks, in which they, according to the statement, disagreed "with requiring nominees to prejudge issues and cases."

A day later, in a Senate floor statement, a member of the Judiciary Committee, Senator John Cornyn of Texas, also criticized the idea of requiring Judge Roberts to state his positions on current constitutional issues as a condition of receiving Senate confirmation votes. In a reference to the written questions that, as mentioned above,

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[30] Ibid.

[31] U.S. Congress, Senate Republican Policy Committee, "The Proper Scope of Questioning for Judicial Nominees," July 26, 2005, 6 p., available at [http://kyl.senate.gov/legis_center/rpc/rpc_072605.pdf].

[32] Ibid.

Senator Schumer of New York provided to Judge Roberts earlier, in advance of the confirmation hearings, Senator Cornyn said:

> Any of our colleagues can, of course, ask whatever questions they want, but the notion that Judge Roberts puts his confirmation at risk if he does not answer the questions on the list from the Senator from New York is contrary to the traditional practice of this body. Nearly every single one of the questions on that list involves an issue that is likely to come before the Supreme Court during Justice Roberts's tenure. Every single Justice confirmed in recent memory has declined to answer questions of the sort contained on that list.[33]

Joining this side of the debate, a legal commentator has criticized "pressuring nominees to answer long lists of questions." This, he maintains, poses "five grave dangers" to "judicial integrity and independence":

> First, candor could be fatal. Second, nominees — like politicians making campaign promises — would be powerfully tempted to misrepresent their inner thoughts. Third, this dynamic would favor people of malleable integrity. Fourth, once on the Court, they would feel pressure to conform to the insincere views expressed in their testimony.[34]

Worst, in the commentator's view, expectations of demands of full disclosure from Senators would encourage judicial candidates to make secret commitments to the White House in order to be nominated (in contrast to the understood White House practice of avoiding asking potential nominees questions about their views on current constitutional controversies).[35]

Conclusion

When the Senate Judiciary Committee begins its confirmation hearings for Supreme Court nominee John Roberts, set for September 6, 2005, a substantive issue likely will be the proper scope of questions for committee members to pose to the nominee. A recurring interest underlying the questions of many Senators at the hearings likely will be to shed light on how the nominee, if confirmed, might, as the newest of the Court's nine Justices, affect the philosophical "balance" of the court and the future direction of its rulings.

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[33] Sen. John Cornyn, "Nomination of Judge John Roberts," remarks in the Senate, *Congressional Record*, vol. 151, July 27, 2005, p. S9072.

[34] Stuart Taylor, Jr., "A Time To Keep Silent," *Legal Times*, vol. 28, Aug. 1, 2005, p. 53.

[35] Ibid. For recent presidential administrations, a deterrent to asking potential nominees questions about their views on current constitutional controversies is the questionnaire that the Senate Judiciary Committee requires a Supreme Court nominee to fill out. The questionnaire for recent Supreme Court nominees, including John Roberts, has included the question, "Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to any member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question?"

The imperative of committee members to question the nominee is almost certain, at various points in the hearings, to come into tension with the nominee's objectives as a prospective Supreme Court Justice. The nominee's objectives, at such points, might be pragmatic in nature (for instance, to provide responses calculated not to offend committee members) and/or principled and constitutionally based (for instance, to take care that answers not call into question his integrity, his ability in the future to judge cases impartially, and his commitment to the ideal of judicial independence).

The nominee, for his part, it can be argued, may want to temper his understandable inclination to be reticent about divulging personal views concerning current legal and constitutional issues with an appreciation that many of the committee's members will be seeking to use the hearings to reach important insights about the nominee — insights not only about the soundness of his professional qualifications, but also about what special presence or influence he will bring to the Court if confirmed.