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# THE QUESTIONING OF LOWER FEDERAL COURT NOMINEES DURING THE SENATE CONFIRMATION PROCESS

William G. Ross\*

## INTRODUCTION

The U.S. Senate's growing recognition of the political significance of lower federal judges is reflected in its increasing scrutiny of nominations to the U.S. district courts and courts of appeals.<sup>1</sup> In addition to studying information about the nominee provided by the White House, the FBI, the ABA, and various other sources, the Senate Judiciary Committee directly interacts with each nominee through oral and written questions. This questioning process is an increasingly prominent part of the confirmation process.<sup>2</sup>

Each nominee testifies before the Committee to answer questions. Although some hearings are largely ceremonial,<sup>3</sup> other hearings probe various subjects that may concern senators, including a nominee's political predilections, temperament, and character. The Committee also requires all nominees to complete a

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<sup>1</sup> As one commentary has explained, "[l]ower federal court judges are increasingly viewed as having an important policy-making function, and more recent presidents have acted to shape the bench in their policy image." Roger E. Hartley & Lisa M. Holmes, *Increasing Senate scrutiny of lower federal court nominees*, 80 JUDICATURE 274, 274 (1997).

<sup>2</sup> The questioning of nominees has been particularly significant since 1995. Scrutiny of nominees is especially careful during times of divided government when the committee is controlled by a party that is adverse to the president. Senators whose party does not control the White House normally have more incentive to ask questions than does the governing party insofar as the latter generally can assume the president has nominated persons whose views are consistent with their own. During the Clinton Administration, the large majority of questions at confirmation hearings were asked by Republican senators, and most of these questions sought assurances that the nominees were not "activists." Democratic senators generally directed most of their questions to the more controversial nominees in an apparent attempt to elicit comments which would quell the concerns of the Republican senators. Some commentators contend that the Senate was too intrusive in its review of Clinton's nominees. See Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247 (1999). Other commentators contend that it was not tough enough. See Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365 (2000).

<sup>3</sup> See e.g., *Hearing of the Senate Judiciary Committee*, FED. NEWS SERV., July 25, 2000. At this hearing, Senator Kyl explained that "[t]he reason why this hearing is not the highly charged, well attended, difficult grilling of candidates that you've perhaps seen on some occasions, is because these four candidates are of such high quality, they have been vetted with my colleagues, with staff, with outside groups, and there's nothing wrong with them." *Id.*

questionnaire that becomes part of the public record as well as another questionnaire that remains confidential. The public questionnaire is detailed and wide-ranging, containing more than two dozen questions, many with subparts. In addition to asking standard biographical questions about education, employment history, health, and publications, the questionnaire makes detailed queries about the nominee's lawyering experience, finances, and process of selection.<sup>4</sup> The confidential questionnaire inquires about discharges from employment, tax delinquency, investigations for possible violations of any criminal statute or administrative regulation, bankruptcy, and ethical breaches.<sup>5</sup>

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<sup>4</sup> As revised most recently during the autumn of 2001, the questionnaire calls for the following biographical information: 1) full name; 2) position for which nomination was made; 3) current office address and phone number; 4) date and place of birth; 5) marital status, including spouse's occupation, employer's name, and business address; 6) names of each college and law school attended, and titles and dates of degrees; 7) employment record since college; 8) military service, including dates and branch of service, rank and serial number, and type of discharge; 9) honors and awards; 10) bar association memberships; 11) bar and court admissions; 12) memberships in other professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college and whether any such organization formerly discriminated or presently discriminates on the basis of race, sex, or religion; 13) published writings, and copies of speeches in written or videotaped form given during the past ten years; 14) congressional testimony; 15) present state of health and date of last physical examination; 16) (for judges) (a) summary and citations of the judge's ten most significant opinions, (b) summary and citations of all appellate opinions in which the judge's opinion was reversed or affirmed with criticism, and (c) citations for significant opinions on state or federal constitutional issues; 17) federal, state, and local public offices held, memberships and offices held, and unsuccessful candidacies for elected or appointed public offices; and positions held or roles played in political campaigns, including the candidate, dates of campaign, title and responsibilities; 18) professional legal experience, including (a) clerkships, solo practice, law firm affiliations, (b) description of general character of law practice and if and when its character has changed and description of typical former clients and areas of specialization; (c) frequency of court appearances, percentage of court appearances in federal courts, state courts of record, and other courts, number of cases tried to verdict or judgement rather than settled, and percentage of trials that were decided by a jury; 19) description of the ten most significant litigated matters personally handled; 20) criminal conviction record within ten years of nomination, other than "minor" traffic violation; 21) description of all civil or administrative proceedings in which nominee has been a party within ten years; 22) potential conflicts of interest, and proposed manner for their resolution; 23) plans, commitments, or arrangements to pursue outside employment, with or without compensation during service on court; 24) sources of income; 25) statement of net worth; 26) process leading to nomination, including whether selection commission recommended nomination and whether anyone involved in the selection process has discussed cases or legal issues in a manner that might create the appearance of prejudice if the nominee were confirmed. Questionnaire For Nominees Before the Committee on the Judiciary, United States Senate (on file with author) [hereinafter *Questionnaire*].

<sup>5</sup> Questionnaire for Nominees Before the Committee on the Judiciary, United States Senate: Confidential (on file with author) [hereinafter *Confidential Questionnaire*]. The Confidential Questionnaire also asks the nominee to "advise the committee of any

With transfer of the Committee's organization to the Democrats during 2001, the Committee revised the questionnaire for the first time since control of the Committee shifted from the Democrats to the Republicans in 1995. Although the revised questionnaire has retained virtually all of the questions that the old questionnaire asked, it added a query about criminal convictions during the past ten years, other than for traffic violations.

Responses to these questionnaires typically fill dozens of pages. Nominees recognize the need to respond carefully and seriously to the Committee's inquiries. Margaret M. Morrow, for example, sifted through ninety boxes of her old files in preparing for her written and oral testimony.<sup>6</sup>

Despite its importance, the Judiciary Committee's questioning of lower federal court nominees has received scant attention, even though the appointment of lower federal judges has received increasing scholarly attention<sup>7</sup> and the questioning of Supreme Court nominees has received substantial scrutiny.<sup>8</sup> This article will discuss the ways in which oral and written questions have helped, and can continue to help, the Senate decide whether to confirm lower court nominees. This article will argue that the Senate should inquire more aggressively into the backgrounds and opinions of nominees. Although the nominees are properly reluctant to make comments that might indicate how they would rule in particular cases, nominees often could provide more expansive explanations of their views on various legal issues about which they are questioned. Senators, however, have rarely prodded nominees to provide more than perfunctory answers to the wide range of issues that arise at confirmation hearings. Particularly in a time of divided government, the Senate cannot adequately discharge its "advice and consent" function unless it demands to know more about the nominees.

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unfavorable information that may affect your nomination." *Id.*

<sup>6</sup> *Confirmation Hearing on Federal Appointments: 1997 Hearings before the Senate Comm. on the Judiciary, Part 1*, 105th Cong. 41 (1998) [hereinafter *1997 Hearings Part 1*].

<sup>7</sup> For a study of the history of appointments of lower federal judges, see SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997). For a general study of the federal appointments process, see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000).

<sup>8</sup> See Michael Comiskey, *The Real and Imagined Consequences of Senatorial Consent to Silent Supreme Court Nominees*, 11 J.L. & POL. 41 (1995); Stephen J. Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 LAW & CONTEMP. PROBS., Autumn 1993, at 121; Albert P. Melone, *Judicial Discretion and the Senate's Role in Judicial Selection: Questioning Supreme Court Nominees*, 16 S. ILL. U. L.J. 557 (1992); 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*, TUL. L. REV. 109 (1987); Grover Rees, III, *Questions For Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983).

## I. SUBJECTS OF INQUIRY

A. *General Considerations*

In assessing the qualifications of nominees, the Senate must determine what criteria to use in determining whether a nominee deserves confirmation. Although the Senate Judiciary Committee's written questionnaires provide a useful list of factors that the Senate obviously regards as important, the lack of formal criteria makes the evaluation of lower federal nominees as amorphous as the Senate's assessment of Supreme Court nominees. As one scholar has pointed out, no power of the Senate "seems more discretionary than the decision whether to confirm a judicial nominee."<sup>9</sup> Another commentator has ruefully remarked that "[t]he Senate's standards are basically parochial — based on each senator's personal views and partisanship."<sup>10</sup> Although some commentators have proposed that the Senate adopt specific criteria for Supreme Court nominees,<sup>11</sup> the framing of precise guidelines for any federal judicial nominees would be impracticable. There is no way to bind senators to any guidelines, so consideration of nominees would remain idiosyncratic even if specific criteria were announced.<sup>12</sup> Moreover, any formal criteria theoretically would interfere with the independence of individual senators, whose decisions on nominees are ultimately based upon complex and intangible considerations that range from political calculation to personal conscience.<sup>13</sup>

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<sup>9</sup> Christopher H. Schroeder, *Congress Stories*, 65 SO. CAL. L. REV. 1531, 1558 (1992). As Professor Schroeder has observed:

Historically, it has been impossible to define a set of decision criteria for the Senate's decisions on judges and justices, other than to say that each Senator is sensitive to the entire political context of his or her vote — roughly what one would have to say about many other decisions, perhaps all other significant decisions, a Senator makes.

*Id.*

<sup>10</sup> DAVID M. O'BRIEN, *JUDICIAL ROULETTE* 76 (1988).

<sup>11</sup> See William G. Myers, III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 DENV. U. L. REV. 1, 29 (1988); Marilyn J. Ireland, *The Best Person for the Job: Tomorrow's Standard for Selecting Supreme Court Justices*, 7 ST. JOHN'S J. LEGAL COMMENT. 127, 133-37 (1991).

<sup>12</sup> As one commentator has pointed out, "the actual criteria used in evaluating a Supreme Court nominee typically have been a personal, very individual matter for each Senator. Hence, it might be impracticable for the Senate to attempt to establish any criteria designed to be binding upon all its Members." DENIS STEVEN RUTKUS, *THE SUPREME COURT PROCESS: SHOULD IT BE REFORMED?* 81 (1993). There is no reason to suppose that consideration of lower federal nominees is any less individual.

<sup>13</sup> As Senator Edward Brooke explained in 1970 during the debate over the nomination of G. Harrold Carswell to the U.S. Supreme Court:

Despite the absence of formal factors, there is a broad consensus that professional competence, sound health, energy, personal integrity, and judicial temperament are paramount considerations.<sup>14</sup> There is also general agreement that the nominee must demonstrate a commitment to fundamental constitutional values, particularly protection of minority rights. Although the degree to which the Senate may consider a nominee's political and ideological predilections is more controversial, there is no doubt that such considerations are important factors in the confirmation process. These criteria are essentially the same as those used by the Senate in evaluating Supreme Court justices. As one task force on judicial selection explained, "[c]ertain qualities, such as demonstrated disinterestedness and knowledge of the law, are essential for all federal judges."<sup>15</sup> As the task force pointed out, however, "because different skills are required at different levels of the judiciary, different considerations ought to come into play in the selection and confirmation of federal judges at each level."<sup>16</sup>

In particular, the Senate regards trial experience as an important qualification for district court judges. Indeed, Senator Sessions believes that "some experience

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We are not supposed to make a decision based upon whether one is liberal or a moderate or a conservative, a Republican or a Democrat, but based upon our own individual responsibility as U.S. Senators. Each of us, in his own mind and conscience and heart, must ask [ : is ] this a man to sit on the Supreme Court? There is nothing else.

116 CONG. REC. 10160 (daily ed. Apr. 2, 1970).

<sup>14</sup> The District of Columbia Federal Judicial Nominating Commission has listed the following criteria for selection of district court judges:

- a. Integrity — intellectual honesty, moral vigor and professional uprightness.
- b. Professional skills and experience — broad knowledge of the law and substantive legal and legally relevant experience.
- c. Impartiality — the ability to treat cases objectively regardless of the identity of the parties or subject matter in controversy.
- d. Industry — a diligent and energetic worker.
- e. Good health.
- f. High respect in the legal and local community.
- g. Respect for the Bill of Rights and for the rights of all litigants, entities and parties before the court.
- h. Judicial temperament — dignity, sensitivity and understanding.
- i. Ability to communicate effectively orally and in writing.
- j. Demonstrated commitment to equal justice.
- k. Decisiveness — the ability to make difficult decisions quickly and with firmness.

By-Laws and Procedures for the District of Columbia Federal Judicial Nominating Commission, *reprinted in* Carl Tobias, *The D.C. Circuit as a National Circuit*, 48 U. MIAAMI L. REV. 159, 188 (1993).

<sup>15</sup> O'BRIEN, *supra* note 10, at 5.

<sup>16</sup> *Id.*

as a trial lawyer is almost required" for a district judgeship.<sup>17</sup> In addition to the obvious technical advantages that such experience affords, trial experience can help make a judge more empathetic with the problems faced by attorneys in trying cases.<sup>18</sup> The importance of trial experience is reflected in the written questionnaire, which requires the nominee to "describe the ten most significant litigated matters which you personally handled" and to list what percentage of his or her appearances in court have been in federal and state court respectively at different periods of the nominee's career, and what percentage were tried by a jury.<sup>19</sup>

### B. *Professional Competence*

Although professional competence may be the cornerstone of the Senate's consideration of judicial nominees, competence is rarely an important issue because presidents seldom nominate anyone who has not achieved a relatively high degree of professional eminence. The Senate nevertheless needs to make an independent evaluation of each nominee's professional competence. This is probably the subject on which face-to-face contacts between the nominee and the Committee are least important. The nominee's resume provides the Senate with basic knowledge of the nominee's credentials, and the ABA, leading attorneys, and other third parties regularly provide assessments of the nominees' professional abilities. The Committee also is able to elicit much useful information directly from the nominee through its questionnaire, which seeks particularly detailed information about the nominee's trial experience, a credential which many senators rightly regard as particularly important in evaluating district court nominees. In various instances, the questionnaire has helped persuade senators that the nominee has the requisite trial experience.<sup>20</sup>

The Senate naturally regards state judicial experience as an excellent qualification for the federal judiciary, although the Senate recognizes that differences between state and federal systems may require some adjustment. The hearings can help assess the degree to which a nominee appreciates the differences between state and federal courts. When asked about the difference between the federal district court to which he had been nominated and the Virginia state court

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<sup>17</sup> *1997 Hearings Part 1*, *supra* note 6, at 521 (remarks of Sen. Sessions). Senator Sessions stated that "it is good to know that [the] judge has been down there, been in the pits, knows what it is like, the difficulties that a lawyer faces in just doing his job every day." *Id.* at 520.

<sup>18</sup> *Id.*

<sup>19</sup> *See Questionnaire*, *supra* note 4.

<sup>20</sup> Senator Feinstein, for example, thought it was significant that Audrey B. Collins had tried more than 200 cases to a verdict during her years as assistant district attorney in Los Angeles, for "[t]his type of experience is invaluable as a judge carefully weighs the facts." *Confirmation Hearing on Federal Appointments: 1994 Hearings before the Senate Comm. on the Judiciary, Part 3*, 103rd Cong. 3 (1996) [hereinafter *1994 Hearings Part 3*].

on which he served, for example, Judge Norman K. Moon explained that the major difference was that federal courts are much more liberal in their use of summary judgment.<sup>21</sup>

If a nominee lacks judicial experience or extensive trial experience, the hearings provide the nominee with an opportunity to persuade the Committee that other experience is relevant. For example, William Fletcher, who had spent most of his career as an academic, acknowledged that his scholarship on such topics as nineteenth century marine insurance would be of little use to him as a judge, but he contended that his authorship of a treatise about civil procedure should be helpful.<sup>22</sup> Judge Ann L. Aiken, an Oregon state judge, testified during the hearings on her nomination to the U.S. District Court that “[f]ederal courts have different issues, more complex issues, resources available to it to decide cases early, to make a difference with alternative dispute resolution and Judge Jerome B. Friedman, a Florida state judge, observed that federal judicial decisions affect a broader range of persons.”<sup>23</sup>

Since many nominees have deep but relatively narrow experience as attorneys, the Senate also seeks assurances from nominees that they will attempt to familiarize themselves with areas of the law that are unknown to them. For example, Audrey B. Collins, a longtime criminal prosecutor, told the Committee that she had begun to study civil law and planned to attend a training session at the Federal Judicial Center.<sup>24</sup> Similarly, Florence Marie Cooper promised that she would attend an in-house training program for judges, attend orientation programs for new judges, and would study materials prepared by the Center.<sup>25</sup> Vanessa D. Gilmore explained that she had sought the assistance of the Center and sitting judges.<sup>26</sup> Various nominees have also indicated that they would participate in a mentoring program.<sup>27</sup>

In the rare instances in which a nominee’s qualifications are an issue, testimony provides the nominee with a useful opportunity to directly address concerns of Committee members. After a majority of the ABA’s Standing Committee on the Federal Judiciary opined that Alexander Williams, Jr. was “not qualified” for a district court judgeship, Williams defended his qualifications in detail before the

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<sup>21</sup> *Confirmation Hearing on Federal Appointments: 1997 Hearings before the Senate Comm. on the Judiciary, Part 2*, 105th Cong. 686 (1998) [hereinafter *1997 Hearings Part 2*].

<sup>22</sup> *Confirmation Hearing on Federal Appointments: 1998 Hearings before the Senate Comm. on the Judiciary, Part 3*, 105th Cong. 1033 (1999) [hereinafter *1998 Hearings Part 3*] (testimony of William A. Fletcher).

<sup>23</sup> *Id.* at 687-88, 90.

<sup>24</sup> *1994 Hearings Part 3*, *supra* note 20, at 5-6.

<sup>25</sup> *Confirmation Hearing on Federal Appointments: 1999 Hearings before the Senate Comm. on the Judiciary, Part 1*, 106th Cong. 127-28 (2000) [hereinafter *1999 Hearings Part 1*].

<sup>26</sup> *1994 Hearings Part 3*, *supra* note 20, at 679.

<sup>27</sup> *Id.*; *see also id.* at 682 (testimony of Terry C. Kern).



Committee.<sup>28</sup> Williams responded to the ABA's report by discussing his experience as a litigator and law professor, as well as his publications. Williams' testimony may have helped overcome reservations about his ability for he was confirmed.<sup>29</sup>

Testimony by nominees has sometimes raised or exacerbated doubts about their familiarity with the law. In 1996, senators expressed disappointment in the testimony of a Court of Appeals nominee who seemed unfamiliar with the Supreme Court's landmark decision on affirmative action in *Adarand v. Peña*<sup>30</sup>, was unable to cite any Fourth Amendment decision concerning search and seizure, and seemed to know little about the constitutional law of capital punishment.<sup>31</sup> This testimony may have reinforced the allegations of critics that the nomination was a political reward for the nominee's success in raising seven million dollars for the 1992 Clinton campaign and \$3.4 million for the Democratic National Committee.<sup>32</sup> After his testimony, the nominee withdrew his name from consideration.<sup>33</sup>

The Committee also may obtain insights into qualifications by inquiring into why the nominee wishes to become a federal judge, a question that senators have asked various nominees.<sup>34</sup> Another useful question concerns the difficulties they expect to encounter in their transition from private practice to a career on the federal bench.<sup>35</sup>

In considering qualifications, it also may be useful for the Committee to assess the extent to which political connections, rather than merit, influenced the

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<sup>28</sup> *Confirmation Hearing on Federal Appointments: 1994 Hearings before the Senate Comm. on the Judiciary, Part 4*, 103rd Cong. 299-305 (1996) [hereinafter *1994 Hearings Part 4*].

<sup>29</sup> See, e.g., Nelson Schwartz, *Prince George's Prosecutor Wins Seat on Federal Bench*, BALT. SUN, Aug. 18, 1994, at 12A.

<sup>30</sup> 515 U.S. 200 (1995).

<sup>31</sup> 142 CONG. REC. S3766 (daily ed. Apr. 22, 1996) (remarks of Sen. Dole). The nominee later told a reporter that he was familiar with the *Adarand* decision but that he did not recognize its name and that Senator Kyl moved on to another topic before he was able to discuss it. Neil A. Lewis, *Judge Nominee Draws Fire From GOP*, PORTLAND OREGONIAN, Apr. 14, 1996, at A8.

<sup>32</sup> See 142 CONG. REC. S3766 (daily ed. Apr. 22, 1996) (remarks of Sen. Dole); *The Wrong One to Judge*, ST. PETERSBURG TIMES, Apr. 27, 1996, at 10A, 1996 WL 7112786.

<sup>33</sup> Joan Biskupic, *Appeals Court Nominee Says No Thanks*, WASH. POST, May 10, 1996, at A17.

<sup>34</sup> *1997 Hearings Part 1*, supra note 6, at 244 (response of Margaret M. Morrow to question from Sen. Thurmond); *id.* at 471 (response to questions for Arthur Joseph Gajarsa from Sen. Thurmond). Ms. Morrow explained that she would like to devote herself "full-time to the judicial process and the administration of justice." Mr. Gajarsa stated that "becoming a judge is a means of becoming a public servant and paying back my community. As a judge, I would be able to fulfill the highest calling of all — that is to be a public servant, to decide cases and to further the administration of justice."

<sup>35</sup> *Id.* at 239 (response of Donald M. Middlebrooks to question from Sen. Thurmond). Mr. Middlebrooks explained that he recognized that he would need to relinquish some of the freedom and privacy that he had enjoyed as a private citizen. *Id.*

nomination. Accordingly, it was encouraging that the Committee's new Democratic leadership tried to sharpen the questionnaire's inquiry into the political activities of nominees. In contrast to the old questionnaire, which merely asked whether the nominee had "ever held a position or played a role in a political campaign" and requested nominees to provide "particulars," the September 2001 revision called for an itemized list of political contributions to political campaigns and political parties during the past ten years.<sup>36</sup> This question would have provided important insights into the political background and predilections of nominees. The omission of this question under pressure from Republican Senators<sup>37</sup> is unfortunate because the public has a right to know the extent that judicial appointments may be rewards for political favors, even if the nominee is otherwise fully qualified.

### C. *Personal Integrity*

Because the backgrounds of potential nominees are carefully studied by the executive branch with the assistance of the FBI, the nomination process normally will eliminate candidates whose records are clouded by issues of personal character. Even this screening process, however, might neglect to uncover significant information. Because the personal integrity of judges is critical to the integrity of the courts, the Senate still needs to conduct its own independent investigation of character issues. Direct communication between senators and nominees can help to facilitate such investigations.

The revised questionnaires promulgated in September 2001 by the Democratic leadership should facilitate such exchanges. In contrast to the old questionnaire, which asked no questions about a nominee's prior arrests or convictions, the new public part of the questionnaire asks the nominee to:

State whether you have ever been convicted of a crime, within ten years of

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<sup>36</sup> As Senator Leahy explained,

This more specific question is similar to information requested and made public by other Senate Committees (*See, e.g.*, Committees on Governmental Affairs; Foreign Relations; Armed Services; Banking Health Education Labor and Pensions; and Veteran's Affairs). Indeed, in a post-Watergate reform, the Congress required that such information be provided by nominees and made public in the Congressional Record for certain nominees. (*See* Department of State Appropriations Authorization Act of 1973, § 6, P.L. 93-126; *Id.*, P.L. 93-475; Foreign Service Act of 1980, § 304, P.L. 96-465; 22 U.S.C. § 3944)."

Letter from Sen. Leahy to Sen. Sessions (Sept. 17, 2001) (on file with author).

<sup>37</sup> *See Confidential Questionnaire, supra* note 5; *see also*, Michael Chidester, *Democrats Try to Bend the U.S. Judiciary Branch*, U-WIRE, Oct. 30, 2001, 2001 WL 29604828; Editorial, *Leahy's War Cover*, WALL ST. J., Oct. 18, 2001, at A26.

your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.<sup>38</sup>

While the Senate ordinarily will already have information about a nominee's criminal record (in the rare instances where such a record exists), the revised form provided the nominee with an opportunity to provide the Senate with his own explanation of what happened.

The confidential questionnaire continues to ask other important questions concerning a nominee's personal integrity. The form asks: whether the nominee has ever been discharged from employment or resigned in order to avoid discharge; whether the nominee has filed and paid all taxes; whether any tax lien ever has been filed against the nominee; whether the nominee ever has "been the subject of any audit, investigation, or inquiry for federal, state, or local taxes;" whether the nominee or his or her spouse ever has declared bankruptcy; whether the nominee has ever been under federal, state, or local investigation for a possible violation of any civil or criminal statute or administrative agency regulation or whether any organization of which the nominee is an officer, director, or active participant has been the subject of such investigation; whether the nominee has "been the subject of a complaint to any court, administrative agency, bar association, disciplinary committee, or other professional group for breach of ethics, unprofessional conduct or a violation of any rule of practice;" and "any unfavorable information that may

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<sup>38</sup> The question originally called for information about arrests and convictions within a twenty-year period. As Senator Leahy has explained in introducing the new question:

Thus, criminal history records that are under seal or that have been expunged would *not* be required to be disclosed by this request. While I appreciate that some Members may want information on *all* arrests and convictions (other than minor traffic violations), as other Committees demand of nominees, I am satisfied that limiting this criminal history information to records already available to the public, and reflecting criminal conduct within 20 years of the nomination, will adequately serve the purposes of this Committee.

Letter from Leahy to Sessions, *supra* note 36.

Under pressure from Republicans, the committee later amended the question to delete references to arrests, and to shorten the time period to ten years. Questionnaire for Nominees Before the Committee on the Judiciary, United States Senate (Confidential Questionnaire, *supra* note 5. See also, Audrey Hudson, *Bush Nominees Balk at Arrest Query*, WASH. TIMES, Nov. 15, 2001, 2001 WL 4166619. The reduction of the time period from twenty years to ten years is ill-advised because the Senate should certainly want to learn all that it can about the criminal record of anyone who has been nominated to the federal bench. Ideally, the Senate should not place *any* time limitations on this question.

affect your nomination.”<sup>39</sup>

Although the FBI reports presumably would provide information about tax problems, criminal investigations, and bankruptcy, the form provides the nominee with an opportunity to explain these situations in his or her own words. Moreover, the FBI reports are made available only to members of the Judiciary Committee, in contrast to the confidential questionnaire, which will be available to all senators.

As originally drafted in September 2001, the confidential questionnaire also included a question about prior use, possession, purchase or distribution of any illegal substance.<sup>40</sup> This question was deleted at the behest of Senate Republicans who argued that such information would appear in FBI reports and that inclusion of such information even in a confidential form could facilitate leaks that could embarrass a nominee.<sup>41</sup>

Contrary to the contention of Republicans, the now deleted question about illegal substances was so broad that it was likely to uncover information that would be unavailable even to the FBI. As Senator Leahy explained, “the old questionnaire asked no specific question about a nominee’s prior use, possession, purchase or distribution of illegal substances, despite the fact that nominees . . . are intended to . . . serve as federal judges who preside over federal criminal proceedings.”<sup>42</sup> If nominees could have been trusted to answer this question truthfully, it would have enabled senators to adequately assess the fitness of nominees to the bench. The deletion of this question is, therefore, unfortunate. Although critics of the question contended that leakage of the information to the public was likely,<sup>43</sup> the importance of the information in evaluating the fitness of judges who will preside over drug trials surely outweighs any danger and embarrassment to nominees.

#### D. *Temperament*

The oral testimony of nominees is particularly useful in helping the Senate to assess the nominee’s judicial temperament. Senator Biden observed during a recent hearing that temperament is the most important consideration in judicial confirmations for members of the Judiciary Committee.<sup>44</sup> “We worry . . . most about temperament,” Biden explained, “because almost everybody follows precedent.”<sup>45</sup> As Senator Biden pointed out, the unique security of a lifetime

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<sup>39</sup> *Confidential Questionnaire, supra* note 5.

<sup>40</sup> *Id.*

<sup>41</sup> See Hudson, *supra* note 38; Leahy’s War Cover, *supra* note 37.

<sup>42</sup> Letter from Leahy to Sessions, *supra* note 36. Leahy explained that the old questionnaire contained in its “confidential portion a ‘catch all’ request for ‘any unfavorable information’ and [left] to the discretion of the nominee whether to respond with any information about illegal drug use.” *Id.*

<sup>43</sup> Leahy’s War Cover, *supra* note 37.

<sup>44</sup> 1998 Hearings Part 3, *supra* note 22, at 667 (remarks of Sen. Biden).

<sup>45</sup> *Id.* (remarks of Sen. Biden).

appointment has caused a few judges to regard their confirmation "as a beautification, as ascension into heaven, a notion that somehow, when they are no longer answerable, they are no longer required to treat people with courtesy."<sup>46</sup>

Accordingly, senators often ask nominees written and oral questions about their views on judicial temperament.<sup>47</sup> Senator DeConcini succinctly asked one nominee, "How do you keep a level head?"<sup>48</sup> In addition to providing answers to specific questions about temperament, the manner in which the nominee answers questions on other subjects and the nominee's very bearing before the Committee may help the Committee to form opinions about the nominee's judicial temperament.

In evaluating temperament, the Senate also may take into account the extent to which nominees are in touch with the needs of "ordinary" persons who appear as litigants. Some nominees, for example, have explained that their experiences in raising children have helped make them empathetic toward the problems that countless Americans encounter in everyday life.<sup>49</sup> Nominees sometimes have offered thoughtful responses to queries about temperament that have transcended perfunctory professions of humility. Ricardo M. Urbina, for example, explained to the committee that he had tried during his thirteen years as a state trial judge to assure parties and their attorneys that he was listening to them.<sup>50</sup> Senators also may assess temperament by inquiring about a nominee's aspirations. For example, Senator Feinstein asked one nominee how she would like to be regarded as a judge after ten or fifteen years.<sup>51</sup>

Since the concept of judicial temperament is capable of so many definitions, senators have shrewdly perceived that the manner in which nominees themselves define judicial temperament may be more revealing of their temperament than stock answers to boilerplate questions about temperament. At one hearing, for example, Senator DeWine asked a group of nominees to define temperament, which various

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<sup>46</sup> *Id.* (remarks of Sen. Biden). Biden observed that judicial demeanor rather than judicial decisions are what most often makes senators regret the confirmation of judges. *Id.*

<sup>47</sup> *Id.* at 237 (response of Jeffrey T. Miller to written question from Sen. Thurmond).

<sup>48</sup> *1994 Hearings Part 3, supra* note 20, at 946.

<sup>49</sup> *1998 Hearings Part 3, supra* note 22, at 1033 (testimony of William A. Fletcher); *id.* at 1041 (testimony of Chester J. Straub).

<sup>50</sup> *1994 Hearings Part 3, supra* note 20, at 946. Urbina recalled:

[T]hat as a lawyer, at times, one of the most frustrating parts of being an attorney was having a judge who I was not convinced had listened to me. Winning or not prevailing, I think, is a much more tolerable experience if you can be assured that you have a judge who has listened to you.

*Id.*

<sup>51</sup> *1999 Hearings Part 1, supra* note 25, at 387 (testimony of Virginia A. Phillips). The nominee explained that she would want to be seen as hard-working, prepared, willing to listen to both sides, well versed in the law, and respectful of the dignity of all persons with whom she worked. *Id.*

nominees described as commitment to being the best judge possible;<sup>52</sup> dedication to resolving cases and controversies;<sup>53</sup> humility;<sup>54</sup> fairness;<sup>55</sup> courtesy to litigants;<sup>56</sup> thoughtfulness in deliberations;<sup>57</sup> patience;<sup>58</sup> preparation;<sup>59</sup> ability to render timely and well-explained decisions;<sup>60</sup> a sense of humor;<sup>61</sup> and an open mind.<sup>62</sup>

Senators obviously have more of a basis for evaluating a nominee's judicial temperament when the nominee already has served as a judge. Although most such judges receive high accolades for their temperament, the interviews provide an opportunity for senators to assess the personalities of those few nominees for whom temperament is an issue. For example, the hearings allowed senators to probe doubts about the district court nomination of a Pennsylvania state trial judge who told an attorney at a sidebar conference a dozen years earlier to "shut your f----g" mouth and had said "I don't give a f--k" another time in open court.<sup>63</sup> The judge explained to the Judiciary Committee that she "apologized profusely" to the attorney in the sidebar incident and had subsequently worked amicably with him.<sup>64</sup> Not all senators were entirely satisfied with this explanation, however, and they took the "extraordinary step of holding a second hearing to give [the nominee] the opportunity to answer the [C]ommittee's questions and respond to the criticisms made of her."<sup>65</sup> Senatorial concern about these incidents, together with allegations that the nominee identified undercover agents in open court, contributed to opposition to the nomination that culminated in its withdrawal.<sup>66</sup>

Another nominee may have ruined his chances for confirmation when his testimony reinforced widespread suspicions that he was insensitive to racial and ethnic minorities.<sup>67</sup> *The Atlanta Constitution* observed that:

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<sup>52</sup> 1998 Hearings Part 3, *supra* note 22, at 367 (testimony of Charles J. Siragusa).

<sup>53</sup> *Id.* (testimony of Siragusa).

<sup>54</sup> *Id.* (testimony of Siragusa); *id.* at 368 (testimony of Algenon L. Marbley).

<sup>55</sup> *Id.* at 368 (testimony of Algenon L. Marbley); *id.* (testimony of Dale A. Kimball).

<sup>56</sup> *Id.* (testimony of Marbley).

<sup>57</sup> *Id.* (testimony of Marbley).

<sup>58</sup> *Id.* (testimony of Kimball).

<sup>59</sup> *Id.* (testimony of Kimball).

<sup>60</sup> *Id.* (testimony of Kimball).

<sup>61</sup> *Id.* at 369 (testimony of Richard Conway Casey).

<sup>62</sup> *Id.* (testimony of James S. Gwin).

<sup>63</sup> 1997 Hearings Part 2, *supra* note 28, at 1040, 1045 (statements of Judge Frederica Massiah-Jackson).

<sup>64</sup> *Id.* at 1020.

<sup>65</sup> *Nomination of Frederica A. Massiah-Jackson, of Pennsylvania, to be U.S. District Court Judge for the Eastern District of Pennsylvania*, 105th Cong. 1-2 (1998) (opening statement of Sen. Orrin G. Hatch).

<sup>66</sup> *Id.* at 6, 8-12, 15-16; Ed R. Haden, *Judicial Selection: A Pragmatic Approach*, 24 HARV. J.L. & PUB. POL'Y. 531, 500 (2001).

<sup>67</sup> The nomination of U.S. District Court Judge Kenneth E. Ryskamp to a Court of Appeals judgeship had been opposed by a broad spectrum of civil liberties organizations in part because of allegedly insensitive remarks that the nominee had made. David G. Savage

rather than substantially moderating his past cloddishness or putting any uneasy minds to rest, he jumped to his own defense in terms that reasserted the same creepy attitudes that were being questioned. Really, what assurance of understanding could Hispanics expect from a jurist who complains there are too many Spanish foods in grocery stores these days?<sup>68</sup>

Even Senator Specter, who voted for the nominee, conceded that the nominee "stated his own case very inadequately, very, very poorly."<sup>69</sup> The nomination died after the Committee voted eight to six against sending the nomination to the full Senate.<sup>70</sup>

Since racial and gender sensitivity is part of the Committee's evaluation of temperament, the hearings have afforded some nominees an opportunity to explain membership in racially restrictive clubs, which could cast doubts on their ability to administer the laws impartially.<sup>71</sup> Numerous nominees have indicated that they have attempted to eliminate racial restrictions on club membership and to increase the racial diversity of clubs that already admit racial minorities. When questioned about his membership in an Oklahoma country club that had no African-American members, one nominee explained that he had attempted to recruit black members and that he was responsible for persuading the club to remove racial restrictions during the 1970s.<sup>72</sup>

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& Ronald J. Ostrow, *Penchant for Ill-Advised Comments May Scuttle Jurist's Confirmation*, L.A. TIMES, Apr. 7, 1991, 1991 WL 2300349. Similarly, Senator Robert Graham of Ryskamp's home state of Florida was reported to be particularly concerned about Ryskamp's sensitivity toward racial minorities. Sharon LaFraniere, *Graham Joins Opponents of Ryskamp*, WASH. POST, Apr. 11, 1991, at A19. The nominee's remarks on racial issues also inspired a flurry of editorials opposing the nomination. See Sharon LaFraniere, *The Case Against Ryskamp*, L.A. TIMES, Mar. 25, 1991, 1991 WL 2305422; *Other Voices*, ATLANTA CONST., Mar. 27, 1991, 1991 WL 7780653; *Packing the Circuit Courts*, BALT. SUN, Mar. 1, 1991, 1991 WL 5858374.

<sup>68</sup> *Judiciary Committee Drew the Right Line*, ATLANTA J. & CONST., Apr. 14, 1991, at H4.

<sup>69</sup> *Judicial Nominee is Rejected*, S.F. EXAM'R, Apr. 14, 1991, at A12.

<sup>70</sup> Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE, Apr.-May 1993, at 290.

<sup>71</sup> In 1990, the Judiciary Committee adopted a resolution stating that persons who belong to discriminatory clubs where business is conducted should not be nominated to the federal bench unless they have actively engaged in efforts to eliminate discriminatory practices. See Diane Worth & Nancy M. Landis, *Does Membership have its Privileges? The Limits on Permissible Discrimination in Private Clubs*, 60 J. KANSAS CITY BAR ASSOC. 27, 36 n.4 (1991).

<sup>72</sup> *1994 Hearings Part 3*, *supra* note 20, at 682-83.

## E. *Consideration of Political Philosophies*

### 1. The Legitimacy of Consideration of Political Philosophy

Political factors are a necessary condition for virtually every judicial appointment, even though — fortunately — they are rarely a sufficient condition. Although the overwhelming majority of judicial nominees are qualified by reason of intellect, experience and character, countless attorneys who are well qualified are never considered for a judgeship because they lack the requisite political connections or a political philosophy that appeals to the president. Because, to paraphrase the old saw about judicial decisions, federal judges are “not immaculate conceptions brought by storks,” it is absurd to argue that the pungent political aromas that surrounded the nomination process should suddenly vanish into an antiseptic confirmation process.<sup>73</sup>

Indeed, one could argue that political considerations at the confirmation level are more edifying than are political considerations at the appointment level. Senators who make sincere objections to the political philosophies of nominees are attempting to ensure that the judge’s decisions will conform to the senators’ notions of what is best for the nation. In contrast, the political considerations that affect nominations are rarely so principled. Although the president and the home state senators may try to select nominees whose political views will result in judicial decisions which benefit the nation, they also take account of less high-minded

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<sup>73</sup> The extent to which ideology should be a factor in the confirmation was the subject of hearings during the summer of 2001 before the Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts. Some experts took a relatively broad view of the role of ideology in confirmation. Professor Tribe, for example, testified that nominees should persuade senators that their “experience, writings, speeches, decisions, and actions affirmatively demonstrate not only the exceptional intellect and wisdom and integrity that greatness as a judge demands but also the understanding of and commitment to those constitutional rights and values and ideals that the Senator regards as important for the republic to uphold.” Laurence Tribe, *Ideology & Judicial Nominations*, available at 2001 WL 21756494. Similarly, Professor Levinson contended that “ideology should not be irrelevant even when considering a nominee to a federal district or circuit court.” Sanford Levinson, *Confirmation Process in Review*, available at 2001 WL 26186172. Dean Kmiec, however, warned that “[t]he Senate should not place the burden of proving partisan compatibility upon judicial nominees.” Douglas W. Kmiec, *Confirmation Process in Review*, available at 2001 WL 26186175. Professor Rotunda argued that “the history of the nomination and confirmation process supports the Senate’s current practice of focusing on a nominee’s character and ability to follow the law rather than his or her putative political ideology and reputed view on particular politically hot topics of the day.” Ronald D. Rotunda, *Confirmation Process in Review*, available at 2001 WL 26186173. Senator Schumer, who convened the hearings, stated in an interview in July 2001 that “[w]e ought to have ideology out there. Should it be the sole dominant factor? No . . . . But should it be part of it? Yes.” *NBC News: Meet the Press*, (NBC television broadcast, July 1, 2001), 2001 WL 24103331.



political goals such as personal connections, party service, and the repayment of personal and political favors. Surely it is more acceptable for a senator to vote against a nominee on the basis of his views on capital punishment than for the president to nominate someone because he is the golfing buddy of a senator who is a member of the president's political party.

Accordingly, elimination or minimization of politics at the confirmation stage should require elimination of politics at the appointment stage. If the Senate should not make political inquiries about a nominee, then the home state senators and the President should also be blind to the political connections of the nominee and should select nominees on the basis of anonymous civil service examinations, followed by background checks to ensure that the nominee has not engaged in criminal activities.

As lower federal judges are supposedly bound to follow precedent, their ideologies are sometimes said to be less important than those of Supreme Court justices, who often encounter issues in which precedent is unclear and who face no embarrassing reversals if they ignore or overturn precedent. Federal judges themselves tend to deny that they have any significant discretion in deciding cases,<sup>74</sup> an opinion echoed routinely by nominees at confirmation hearings. In reality, however, lower federal court judges also often encounter issues on which the law is unclear and therefore have much discretion in fashioning the law in a manner in which their own predilections and philosophies inevitably influence their decisions.<sup>75</sup> As Professor Yackle has observed:

The extent to which lower courts are genuinely bound by higher court precedents in close cases may be overstated. Only rarely is a precedent truly on 'all fours' with the case at bar, and more rarely still can the lower court anticipate that its decision will be reviewed — given the physical limits of most appellate courts. Indeed, there is ample evidence that lower court judges feel free to treat precedents as merely elements of the rich mix

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<sup>74</sup> For example, Senior Judge John Keenan of the U.S. District Court for the Southern District of New York recently stated that:

I have about as much policymaking right as my two and a half year old grandson. Every once in awhile, in a certain case, maybe, I can go one way or the other way. That may come up once out of about 2,500 cases on a summary judgment motion or on a motion to suppress where credibility is at issue.

Panel Discussion, *Judicial Efficiency: Is There a Vacancy Crisis Threatening the Nation's Judicial System?*, 26 FORDHAM URB. L.J. 33, 53-54 (1998).

<sup>75</sup> See e.g., Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, Or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 200 WIS. L. REV. 369 (2000).

of materials that must be considered in resolving a new dispute.<sup>76</sup>

Despite the many factors that militate against political extremism in the lower judiciary, there is no doubt that ideology influences decision-making. If lower federal judges are merely receptacles for precedent, then one can only wonder why so many presidential administrations and so many public interest groups have taken such pains to screen the ideologies of judicial nominees. Have so many politically sophisticated persons completely misunderstood how judges decide cases? I think not. Even though fidelity toward precedent discourages the politicization of judicial decision-making and substantially ameliorates the differences between judges appointed by different administrations, no one denies that the judges appointed by President Reagan are different from those appointed by President Clinton. Even though these differences may not manifest themselves in the large majority of cases, they can have a powerful cumulative impact even if they affect only a small number of cases in which judges have considerable discretion. The argument that ideology is irrelevant merely because judges of different political persuasions tend to decide most cases in the same manner is as misleading as are overwrought depictions of Reagan's judicial nominees as a horde of crypto-fascists and Clinton's nominees as a troupe of loony leftists. Although the law changes incrementally, even glacially, it does change, and the political predilections of the judges who make the often subtle rulings that slowly shift the law in new directions are tremendously important.

## 2. Assessing a Nominee's General Political and Judicial Philosophies

Because ideology inevitably influences even lower federal judges, the Senate should, and does, inquire into the general political and judicial philosophies of nominees. Unfortunately, the Senate's inquiries, particularly its oral questions, too often are superficial and encourage rote responses that do not seriously probe the nominee's views.

Between 1995 and 2001, when the nominees of a Democratic president faced a committee with a Republican majority, "judicial activism" became the focal point for Republican senators who wanted to assess the ideological predilections of nominees. Although this emphasis on judicial activism sometimes seemed like a fixation, inquiries about judicial activism can provide useful insights into the manner in which judges would approach their duties.

In the context of the committee hearings during the Clinton Administration, "judicial activism" had a highly political meaning. While the phrase "judicial activism" is capable of many complex definitions,<sup>77</sup> its meaning was relatively

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<sup>76</sup> Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 310 n.124 (1989).

<sup>77</sup> The exchanges between senators and nominees amply illustrate the inherent difficulties

simple and clear in the context of a confirmation process in which a “conservative” Republican Senate reviewed the nominees of a “liberal” Democratic president. In this context, “judicial activism” meant decisions that advanced the broad political goals of liberals and Democrats, particularly the rights of women, racial minorities, and criminal defendants. Because senators often prefer to shun direct discussion of legal issues affecting these groups — probably for fear of alienating constituents — discussions of judicial restraint sometimes became something of a charade. All too often, senators asked perfunctory questions about a straw man called “judicial activism” and nominees provided ritualistic answers that often appeared to tell Republican senators only what they presumably wanted to hear. In responding to oral and written questions about judicial activism, nominees almost unfailingly abjured activism and pledged their fealty to judicial restraint. In a typical response, one nominee declared that “it would be wrong for a judge to ignore precedent, *stare decisis*, to usurp the power of the legislative branch of government. Judges are not there to make law. We are there to interpret and apply law.”<sup>78</sup> Similarly, nominees routinely averred that the plain language of the Constitution should be the starting point for any constitutional interpretation.<sup>79</sup>

As circuit judges are not necessarily bound by the precedents of their own circuits, questions to circuit court nominees about their fidelity to precedent are perhaps more meaningful than are questions to district judges about whether they would abide by the precedents of higher courts. Here again, however, denials of judicial activism tend to be perfunctory. Unwilling to risk the potentially fatal stigma of judicial activism, circuit court nominees routinely have insisted that they would not even consider altering the precedent of their circuit. For example, one nominee averred that “I do not foresee any precedent, any situation that would justify a circuit court judge overturning the prior decision of[f] his or her own circuit.”<sup>80</sup>

During a number of hearings, Republican senators have practically invited rote responses to questions about fidelity to precedent insofar as they have asked panels of several nominees to respond seriatim. For example, nominees at one hearing gave the following responses to Senator Hatch’s inquiry about whether they were

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of defining “judicial activism,” much less identifying this supposed virus in nominees. For example, Senator Ashcroft expressed fear that repeated assurances by one group of nominees that they would follow Supreme Court precedent suggested that they were elevating Supreme Court precedents over the Constitution. Upon further questioning, the nominees naturally insisted that they would follow the Constitution as interpreted by the Supreme Court. *1997 Hearings Part 1, supra* note 6, at 507 (questioning by Sen. Ashcroft of Judge Kennedy & Mr. Droney).

<sup>78</sup> *1999 Hearings Part 1, supra* note 25, at 126; *see also 1994 Hearings Part 3, supra* note 20, at 753; *id.* at 873-74.

<sup>79</sup> *1997 Hearings Part 1, supra* note 6, at 46 (testimony of Margaret M. Morrow); *1997 Hearings Part 2, supra* note 21, at 10 (testimony of Marjorie O. Rendell).

<sup>80</sup> *1994 Hearings Part 3, supra* note 20, at 675.

“all committed to following existing precedent” with regard to affirmative action:

Mr. KING. Yes, I am, Mr. Chairman.

Ms. RAWLINSON. I am, Mr. Chairman.

Mr. SLEET. Yes, Mr. Chairman.

Mr. DAWSON. Yes, Mr. Chairman.

Judge LIPEZ. Yes, Mr. Chairman.<sup>81</sup>

Similarly, Democratic senators have sometimes relied on rote responses in an apparent effort to assuage the fears of Republicans. The following is a typical exchange:

Sen. LEAHY. And I understand . . . that you do not plan to legislate from the bench?

Judge MILLER. That is correct, Senator Leahy.

Mr. PRATT. Yes.

Sen. LEAHY. Ms. Morrow.

Ms. MORROW. Absolutely.

Sen. LEAHY. And you understand the inherent limitations the Constitution places, especially for district judges?

Judge MILLER. Yes, Senator.

Mr. PRATT. I do.

Sen. LEAHY. Ms. Morrow.

Ms. MORROW. Yes, Senator.<sup>82</sup>

Even the boldest nominee hardly can be blamed for eschewing nuanced remarks if her reply would be immediately compared with those of her fellow nominees. Seated alongside nominees who dutifully denied that a lower federal judge has the slightest discretion in applying the law, a nominee who dared to suggest that such a judge is more than a marionette of the Supreme Court would call forth the Committee’s wrathful scrutiny and almost certainly jeopardize her confirmation.

Clinton nominees often seemed so eager to convince Republican senators that they would abide by precedent that their answers sometimes may have gone too far even for the most conservative senators. In an amusing irony, Senator Hatch gently reproved six nominees who rotely provided negative responses to Hatch’s question about whether they would have “any difficulty” enforcing capital punishment. Hatch explained that he himself “would have difficulty enforcing the death penalty” because he “would want it used very sparingly.”<sup>83</sup>

While pledges to follow precedent are appropriate on their face, they fail to

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<sup>81</sup> 1998 Hearings Part 3, *supra* note 22, at 665.

<sup>82</sup> 1997 Hearings Part 1, *supra* note 6, at 26.

<sup>83</sup> 1999 Hearings Part 1, *supra* note 25, at 39.

consider what happens in the fairly common situation in which the law is uncertain, incomplete, or ambiguous. As Hatch correctly reminded one group of nominees who had insisted that they would only rely on precedent, “you are going to find cases . . . of first impression and you are going to have to make the law in those cases.”<sup>84</sup>

Because rote renunciations of judicial activism and promises to follow precedent provide no insights into the nominee’s philosophies, senators could perhaps more usefully ask what a nominee would do if there were no precedent. Senator Hatch asked precisely this question during at least one recent hearing, but the answers were so vague as to reveal very little. After explaining that she rarely had been faced with this problem because “there is such an enormous body of law,” one nominee said that she would look to the “plain language of the statute” and “look through any other analogous analyses that have been made by the circuit courts and the Supreme Court and apply those.”<sup>85</sup> Although this answer failed to explain how the nominee would approach a common law question of first impression or how she would draw analogies, the senator did not press the point with this nominee or with two other nominees who provided similarly opaque responses.<sup>86</sup>

Moreover, counter-majoritarianism was a taboo topic among the Clinton nominees who faced a Republican Judiciary Committee. In discussing the role of the federal courts in response to written and oral questions, only a daring handful of nominees even hinted that the federal courts can or should exercise the counter-majoritarian function which these courts have performed so actively for the past sixty years. In reciting their monotonous paeans to judicial restraint and pledging to dispense justice like robots, Clinton nominees almost completely omitted any reference to the rich tradition in which federal courts have protected “discrete and insular minorities,” lubricated clogged political processes, and guarded against violations of fundamental rights by other branches of the federal government and the states.

Similarly, Clinton nominees tended either to ignore or to abjure the concept of a “living Constitution.” Insisting that the text of the Constitution and the intent of the Framers provide the sole basis for constitutional interpretation, most nominees seem to have forgotten the ancient doctrine that the Constitution must, in the language of Oliver Wendell Holmes, Jr., be adapted to the “felt necessities of the times.”<sup>87</sup> One nominee, for example, expressed disagreement with Justice Brennan’s observation that the ultimate question of constitutional interpretation is

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<sup>84</sup> *Id.* at 181.

<sup>85</sup> *Hearing of the Senate Judiciary Committee*, FED. NEWS SERV., May 25, 2000 (testimony of Beverly B. Martin) [hereinafter *May 25, 2000 Hearings*].

<sup>86</sup> *Id.* (testimony of Jay A. Garcia-Gregory and Laura Taylor Swain).

<sup>87</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

what the “words and the text mean in our time.”<sup>88</sup> Likewise, other nominees appear to have advocated strict adherence to the text of the Constitution. A few Clinton nominees, however, have been so bold as to acknowledge that the Constitution is not a static document.<sup>89</sup>

Senatorial questions about the fluidity of the Constitution, like so many other queries at confirmation hearings, often brush aside subtleties. Questions about constitutional interpretation often imply that there is no middle ground between wanton activism and wooden adherence to the text.<sup>90</sup> Given the choice between these two stark alternatives, it is hardly surprising that nominees have opted to endorse strict construction. On the rare occasions in which senators have more deeply probed the thinking of nominees, the nominees have generally taken a more nuanced view of the judicial role. For example, when Republican Senator Ashcroft asked Judge Stanley Marcus whether rights could “suddenly appear in the Constitution” or whether judges can “amend the Constitution,” Marcus naturally assured Ashcroft of his fidelity to the text.<sup>91</sup> In response to additional questioning by Democratic Senator Durbin, however, Marcus affirmed his fidelity to U.S. Supreme Court decisions which have found an implicit right to privacy in various amendments.<sup>92</sup>

Another problem is that senatorial questions are sometimes phrased in an ambiguous manner that permits ambiguous answers. For example, Senator Ashcroft asked some nominees to name “the single most important right not protected by the Constitution.”<sup>93</sup> If this question was designed to determine whether a nominee is an “activist” who would create rights which are not specifically spelled out in the Constitution, the question is unlikely to ferret out such activism. Even the most exotic rights discovered by an “activist” judge would need to have their origin in the Constitution. Legally protected “rights” by definition find their origin in the Constitution. Therefore, a nominee who believed in the expansion of constitutional rights could reply with perfect candor that there are no rights which the Constitution does not protect.<sup>94</sup> Indeed, the seemingly “restrained” response that there are no

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<sup>88</sup> *1997 Hearings, Part 2, supra* note 21, at 354-55 (response of Judge Sonia Sotomayor to question from Sen. Thurmond).

<sup>89</sup> *Id.* (testimony of Ronald Lee Gilman). Mr. Gilman stated “[t]he words are important and I think that if the Constitution is to have enduring meaning, those concepts obviously have to be applied to current circumstances.”

<sup>90</sup> For example, Senator Ashcroft asked Judge Ann L. Aiken whether “there are rights that do not exist in the Constitution which . . . exist independent of the Constitution.” *1997 Hearings Part 2, supra* note 21, at 688. There is a general consensus that rights do not exist independent of the Constitution, this question evaded the real issue of the extent to which judges may invoke rights which are not explicitly specified in the Constitution.

<sup>91</sup> *Id.* at 681-82.

<sup>92</sup> *Id.* at 682.

<sup>93</sup> *1997 Hearings Part 1, supra* note 6, at 245.

<sup>94</sup> *Id.*

rights which the Constitution does not protect alternatively could be read as an "activist" answer to the extent that the nominee regarded the constitutional protection of rights as unbounded. If this question was designed to gauge how expansively the nominee would interpret the Constitution, the question ought to ask whether the nominee believes that there are rights which have not been recognized by the courts and/or rights which are not specifically prescribed by the text of the Constitution.<sup>95</sup>

In a few instances, senators have moved beyond shibboleths about judicial activism to ask questions that more specifically test a nominee's views about the role of a judge. For example, some senators have inquired about nominees' attitudes toward structural injunctions.<sup>96</sup> Although nominees have naturally assured senators that they disfavor expansive use of structural injunctions and have been vague about the circumstances that might require such an injunction, these questions have at least afforded an opportunity for dialogue about judicial activism that moves a step or two beyond generalities. Similarly, the Committee has asked circuit court nominees whether they would regard themselves as bound by the precedents of their own circuit on matters on which the Supreme Court has not spoken.<sup>97</sup> Senators have also tried to ascertain the extent to which nominees would use Rule 11 as a basis for discouraging lawyers from advancing novel legal theories.<sup>98</sup> Asked by Senator Thurmond whether the courts should try to correct social problems on which the legislature had failed to act, Judge James G. Carr replied that "the last thing any court should be doing is acting either in response to its perception of some social problem or its personal view or outlook as to how things ought to be."<sup>99</sup> Senators have sometimes asked intelligent questions about judicial philosophy, such as whether constitutional rights may "grow or shrink with

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<sup>95</sup> Senator Ashcroft provided this type of clarity in one of his written questions to Richard Paez: "What in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?" *1998 Hearings Part 3, supra* note 22, at 624 (responses of Richard Paez to questions from Sen. Ashcroft).

<sup>96</sup> See *1997 Hearings Part 1, supra* note 6, at 33 (questioning by Sen. Ashcroft of Jeffrey T. Miller & Robert W. Pratt).

<sup>97</sup> *1994 Hearings Part 3, supra* note 20, at 118. In response to Senator Kohl's question about whether "an appellate judge should overturn precedent within his or her own circuit," Stewart replied that he would regard himself as bound by the precedent of the Fifth Circuit unless he joined in an *en banc* reversal of precedent. *Id.*

<sup>98</sup> *Id.* at 118, 526; *1997 Hearings Part 1, supra* note 6, at 727 (response of Judge Katherine Sweeney Hayden to questions From Sen. Thurmond). For example, Judge Carl E. Stewart stated that Rule 11 "requires a balancing test" that recognizes the need to control litigation but that allows for the growth of the law. *1994 Hearings Part 3, supra* note 20, at 118. Batts expressed hope that she would be able to distinguish "between novel and frivolous" litigation, examining each case on its facts. *Id.* at 526.

<sup>99</sup> *1994 Hearings Part 3, supra* note 20, at 122.

changing historical circumstances<sup>100</sup> and whether substantive due process is a legitimate constitutional doctrine.<sup>101</sup>

In responding to questions about activism, a handful of nominees have offered thoughtful comments about the judicial decision making process that might have helped the Senate to evaluate how the nominee would approach the task of judging. Diana G. Motz, for example, expressed her opinion that "the loose dicta that passes for enunciation of general principles does not really help litigants in future cases . . . Moreover, often dicta simply confuses litigants and less sophisticated lawyers into following a course that . . . a court may find ill conceived."<sup>102</sup> In addition to standard general rejections of activism, Jeffrey T. Miller thoughtfully pointed out that the doctrine of exhaustion of administrative remedies and remand of state claims to state courts are means by which federal courts may exercise restraint.<sup>103</sup>

Although Republican senators generally have sought assurances that nominees would follow precedent, Senator Smith has tested attitudes on abortion by asking how nominees would respond if *Dred Scott* were a controlling precedent.<sup>104</sup> Given this challenging question, some nominees have provided answers that were not completely perfunctory. Marsha Berzon, for example, pointed out that there might be more leeway for judicial discretion in interpreting a federal statute than in interpreting the Constitution because "Congress can alter the statute more easily than it can alter the Constitution."<sup>105</sup> Similarly, Robert E. Katzmann pointed out the Supreme Court would have more warrant to overturn precedent than would an appellate court.<sup>106</sup> Most nominees merely have insisted that they would follow even such a repugnant precedent.<sup>107</sup>

For a while during the 1990's, the questionnaire also asked nominees to discuss their views about "judicial activism," including dilution of standing and ripeness requirements and substitution of a "problem-solving" approach for one of grievance resolution.<sup>108</sup> It hardly needs to be said that most Clinton nominees duly recited the

<sup>100</sup> 1999 Hearing Part 1, *supra* note 25, at 138 (question by Sen. John Ashcroft).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1003.

<sup>103</sup> 1997 Hearings Part 1, *supra* note 6, at 93.

<sup>104</sup> *Id.* at 30. Senator Smith's question apparently was designed to test the nominees' attitude toward *Roe v. Wade*. See *id.* at 31.

<sup>105</sup> *Id.* at 30.

<sup>106</sup> *Id.* at 31.

<sup>107</sup> *Id.* at 168 (testimony of Raymond C. Fisher & Maryanne Trump Barry); *id.* at 391-92 (responses of Anne C. Williams to questions from Sen. Smith).

<sup>108</sup> The questionnaire elicited the nominee's response to the following statement:

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.



orthodox response presumably demanded by the committee's catechism, affirming the creed of judicial restraint and abjuring the heresy of judicial activism.<sup>109</sup> Because it referred to some of the most profound political and jurisdictional issues, the question could have called forth book-length responses. In an apparent recognition that anything that they say might be held against them, most nominees limited themselves to very brief averments of their fidelity to judicial restraint, submitting statements that rarely exceeded three short paragraphs and which typically were shorter than the lengthy, multi-part question.<sup>110</sup>

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Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad affirmative duties upon government and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

1994 *Hearings Part 3*, *supra* note 20, at 50.

<sup>109</sup> For example, Margaret M. Morrow declared that:

[t]he separation of powers doctrine is fundamental to American jurisprudence. The Constitution carefully spells out the delicate balance of powers that characterizes the unique American system. The role of the judiciary is to decide cases in controversy, not to legislate or make policy. Thus, it is inappropriate for courts to usurp legislative or executive powers by interpretation that disregards the constraints of the Constitution, precedent, statute or legislative intent (including Congressional intent to leave states or the executive branch with the freedom to exercise reasonable judgment in interpreting and administering particular acts).

1997 *Hearings Part 1*, *supra* note 6, at 86; *see also* Thomas L. Jipping, *Judicial Legacy in the Political Balance*, WASH. TIMES, Dec. 13, 1998, at B4 (expressing frustration over the vagueness of such answers, Jipping complained that the "questionnaire remains as useless as ever for determining the kind of judge nominees will be").

<sup>110</sup> Eric L. Clay provided a fairly typical response:

I believe it is the responsibility of the legislative branch of government to determine governmental policy, and it is primarily the task of the courts to interpret the legislative intent in conformity with the statutory framework as established by legislators. In general, it is not necessary for the courts to issue broad pronouncements that are not dictated or required by the issues and facts framed by the specific matters before the court. The U.S. Court of Appeals is bound by the rulings of the United States Supreme Court, and where the Supreme Court has not spoken on a matter, in most instances, some guidance has been provided by either

A few Clinton nominees dared to admit, however, that lower federal judges actually have some discretion in their decisions. For example, William F. Downes stated that "[o]ften, there are conflicting rules of law which may or may not apply to a given factual situation,"<sup>111</sup> and Arthur J. Gajarsa acknowledged that "[a] judge cannot be entirely automatic in the performance of his or her duties."<sup>112</sup> Similarly, Judge Stanley Marcus tempered his expressions of fidelity to judicial restraint by admitting that "[t]his is not to say that broad judicial remedies are always wrong. . . . Where such remedies are clearly necessary to the vindication of fundamental constitutional rights, they may be unavoidable."<sup>113</sup> Paul Borman stated that "if a significant constitutional issue of far-reaching import comes before the Court, the judge should not avoid fulfilling the obligation to render justice, and if there is no binding precedent, to interpret the Constitution."<sup>114</sup> Some nominees even more boldly stated that judicial "activism" may be warranted when the other branches of government derogated constitutional rights.<sup>115</sup>

A few nominees even dared to point out the hypocrisy of much of the criticism of "judicial activism." Downes, for example, stated that "[s]ometimes, critics of the federal courts define the legitimate exercise of judicial discretion as activism when the decision of the court does not suit them. 'Judicial activism' is often in the eyes of the beholder."<sup>116</sup> Similarly, Collins candidly observed that much of the criticism of the courts may "be based upon disagreements with either individual rulings or the legislative decision to increase the court's jurisdiction in the area of Constitutional civil rights."<sup>117</sup> Likewise, Algenon L. Marbley stated that allegations of judicial activism arise partly from growing public expectations of the judiciary, which "are

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the legislature, or other courts.

*1997 Hearings Part 1, supra note 6, at 311.*

<sup>111</sup> *1994 Hearings Part 3, supra note 20, at 1259.*

<sup>112</sup> *1997 Hearings Part 1, supra note 6, at 352.*

<sup>113</sup> *1997 Hearings Part 2, supra note 21, at 747-48 (response to questionnaire).*

<sup>114</sup> *1994 Hearings Part 4, supra note 28, at 39.*

<sup>115</sup> Clarence Sundram, for example, declared that:

Federal courts are sometimes criticized for 'judicial activism' and for prescribing sweeping and affirmative duties upon governments by the very governments that have been found to violate the laws or the constitutional rights of citizens, that have been afforded the opportunity to fashion acceptable remedies and have either refused to do so, or have done so and then failed to implement them. In these cases, unless the federal court is willing to deny a remedy for the legal or constitutional violation, it is forced to craft a remedy itself or call upon experts in the particular field to assist in doing so.

*1997 Hearings Part 1, supra note 6, at 704.*

<sup>116</sup> *1994 Hearings Part 3, supra note 20, at 1259.*

<sup>117</sup> *Id.* at 51.

now required to review more administrative agency decisions, to interpret statutes containing remedies unknown at common law, and fashion class action relief."<sup>118</sup>

Even though the answers to questions about activism may seem rote, there may be some benefits to asking general questions about fidelity to precedent, separation of powers, and other fundamental issues, if only as a way of reminding nominees of their importance. As Senator DeWine explained before he asked nominees about their respect for precedent:

Sometimes people may wonder why these questions are asked. I think that it is necessary to ask them, even if we can pretty much figure out what your answers are going to be. I think it is important to have it on the record, and I think it is important in a public hearing to have these questions asked and answered.<sup>119</sup>

### 3. Comments About Issues that Nominees Might Need to Adjudicate

Perhaps one of the reasons why senators have asked so many questions about judicial activism and other issues of process is that nominees are so reluctant to discuss substantive legal issues. Like Supreme Court nominees, lower federal nominees should refrain from providing testimony that suggests how they would rule in a particular manner on a particular issue. Such testimony could require the judge to recuse herself pursuant to the federal recusal statute, which provides in part that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>120</sup>

Moreover, the ABA Model Code of Judicial Conduct prohibits a judge from making "any public comment that might reasonably be expected to affect" the outcome of "a fair trial or hearing."<sup>121</sup> This rule may apply even to nominees who are not yet judges.<sup>122</sup> The Code also provides that a "judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control."<sup>123</sup> At least one nominee has expressed concern that the judicial conduct rule which prohibits judges from commenting on pending cases might apply to judicial nominees.<sup>124</sup>

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<sup>118</sup> 1997 Hearings Part 2, *supra* note 21, at 568 (statement of Marbley).

<sup>119</sup> 1998 Hearings Part 3, *supra* note 22, at 1033 (remarks of Sen. DeWine).

<sup>120</sup> 28 U.S.C. § 455(a) (2000).

<sup>121</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (2000).

<sup>122</sup> Steven Lubet, *Confirmation Ethics: President Reagan's Nominees to the United States Supreme Court*, 13 HARV. J.L. & PUB. POL'Y 229, 246-59 (1990); Steven Lubet, *Advice and Consent: Questions and Answers*, 84 NW. U. L. REV. 879, 880-85 (1990).

<sup>123</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3A(6) (2000).

<sup>124</sup> 1997 Hearings Part 1, *supra* note 6, at 506 (testimony of Judge Anthony W. Ishii). Judge Ishii explained that he would prefer to "err on the side of caution" in refusing to

Although lower federal court nominees are less inclined than Supreme Court nominees to completely refuse to answer questions on the grounds that the issues may come before them in court, they generally avoid answers that would suggest that they are pre-judging any issue. At the very least, judicial nominees who are already federal or state judges are constrained from discussing issues that might appear before them prior to their confirmation or if they are not confirmed. Indeed, the Judiciary Committee's questionnaire recognizes the danger of bias from such discussion in its question asking the nominee whether "anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking . . . how you would rule on such case, issue, or question."<sup>125</sup>

Accordingly, nominees generally refrain from making comments at confirmation hearings about cases that are presently pending before them if they are judges. For example, Judge Richard A. Paez made it clear that he would not discuss his award of a preliminary injunction against an anti-panhandling ordinance because the case was still pending before him.<sup>126</sup> Similarly, nominees have properly refused to comment on cases that are presently *sub judice* in other courts. For example, when Clarence Sundram was asked whether a court could properly invalidate California's anti-affirmative action Proposition 209, Sundram properly limited himself to generalities about judicial review since Proposition 209 was being challenged in the federal courts.<sup>127</sup> Moreover, nominees sometimes have invoked the Canons in refusing to discuss specific legal issues because they might need to adjudicate the same issue. For example, Judge Clarence Cooper refused to express an opinion about Senator Kohl's legislation to prohibit judges from allowing confidentiality orders when the information sought to be made secret relates to public health and safety.<sup>128</sup> Similarly, several nominees have refused to offer an

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discuss cases which come before him on the state bench, or on the federal bench if he were confirmed as a U.S. district judge. *Id.*

<sup>125</sup> *Questionnaire, supra* note 4.

<sup>126</sup> *1998 Hearings Part 3, supra* note 22, at 329, 331. Judge Paez acknowledged that he was aware of the public problems created by panhandling. *Id.* at 331.

<sup>127</sup> *1997 Hearings Part 1, supra* note 6, at 518.

<sup>128</sup> *1994 Hearings Part 3, supra* note 20, at 125. Cooper explained that:

I don't want to prejudge what might be before me as a Federal district court judge, and that very issue might arise and I don't want to commit myself at this time. I can only say that I would balance the competing interests and make a decision that I think would be fair to the parties involved, but I don't want to commit myself to a position at this time.

*Id.* See also *1994 Hearings Part 3, supra* note 20, at 677 (refusing to answer question about federal sentencing guidelines because "those issues that I might be speculating on now could conceivably come before me in the form of a challenge to the guidelines, no matter what form they might take.").

opinion about the constitutionality of the capital punishment of minors and the Partial-Birth Abortion Act.<sup>129</sup> Respectful of these ethical considerations, senators have assured nominees that questions about specific legal issues are designed to test the way in which they approach issues rather than to elicit predictions of how they would actually rule.<sup>130</sup>

Many nominees have been similarly reticent or opaque even in response to questions that do not suggest how they would rule in specific cases. In many instances, nominees have provided responses which have been so perfunctory that they are meaningless. Instead of providing direct responses to queries about specific legal issues, nominees likewise tend to beg the questions of senators. Nominees provide answers that recite the general procedures by which the judge would decide an issue, without offering any pronouncement on how the judge would actually apply such procedures in a given case, much less how the judge would decide substantive issues. Asked to explain how difficult it is for a statute to survive analysis under a strict scrutiny standard of review, nominees have limited themselves to the hornbook statement that such legislation must be narrowly tailored to meet a compelling governmental interest.<sup>131</sup> Asked about the constitutionality of various types of controversial legislation, many nominees have limited themselves to an acknowledgment that there is a presumption in favor of the constitutionality of any legislation. For example, numerous nominees have finessed questions about the constitutionality of a ban on partial birth abortions by pointing out that all legislation is entitled to the presumption of constitutionality.<sup>132</sup> Asked to express their views on the constitutionality of the Prison Litigation Reform Act and the Habeas Corpus Reform Act, nominees likewise have replied that they are presumed to be constitutional.<sup>133</sup> Similarly, M. Margaret McKeown stated that any judicial interference with an initiative “needs to be with very, very, extreme caution.”<sup>134</sup> Another nominee responded to a question about the constitutionality

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<sup>129</sup> See *1999 Hearings Part 1, supra* note 25, at 72 (Stephan R. Underhill refused to comment on constitutionality of Partial Birth Abortion Ban Act in part “because it might come before me . . . if I were to be confirmed.”; *1997 Hearings Part 1, supra* note 6, at 503 (testimony of Katherine Sweeney Hayden & Judge Ishii); *id.* at 504 (testimony of Harold Kennedy, Jr.).

<sup>130</sup> *Id.* at 509 (remarks of Sen. Torricelli).

<sup>131</sup> *1998 Hearings Part 3, supra* note 23, at 301 (testimony of Mr. Shea); *id.* at 306 (Judge Jeremy D. Fogel).

<sup>132</sup> *E.g., 1999 Hearings Part 1, supra* note 25, at 242 (responses of Richard K. Eaton to questions from Sen. Smith); *id.* at 244 (responses of Ellen Degal Huvelle to questions from Sen. Smith); *id.* at 245 (responses of Charles A. Pannell, Jr., to questions from Sen. Smith); *id.* at 293 (Richard Linn’s responses to follow-up questions from Sen. Smith); *id.* at 296 (responses of Ronald A. Guzman to follow-up questions of Sen. Smith); *id.* at 299 (Barbara M. Lynn’s response to follow-up questions from Sen. Smith).

<sup>133</sup> *1998 Hearings Part 3, supra* at note 22, at 264, 279 (testimony of Judge Richard L. Strauss & Susan Oki Molloway).

<sup>134</sup> *Id.* at 21-22.

of school vouchers by reciting analogous Supreme Court precedents and pointing out that statutes are presumed to be constitutional.<sup>135</sup>

Nominees likewise have not offered insights into their opinions about specific cases when senators have asked whether they would abide by the precedent of such decisions, and neither have senators requested such insights. Prime examples are the perfunctory exchanges between senators and nominees about willingness to follow the Supreme Court's decision in *Adarand v. Peña*<sup>136</sup> by subjecting racial preferences in federal programs to strict judicial scrutiny.<sup>137</sup>

Other nominees also have properly contended that they could not comment about a case without having more information about it. For example, Robert E. Katzmann blunted Senator Smith's question about the constitutionality of a ban on partial birth abortion by explaining that "I would really have to evaluate that issue in the context of a law that is actually passed, and then in terms of a case or a controversy."<sup>138</sup>

The difficulty of achieving meaningful dialogue on complex issues was illustrated when Senator Kohl asked Judge W. Louis Sands whether he would refuse

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<sup>135</sup> *Id.* at 140 (responses of Charles Wilson to questions by Sen. Ashcroft). In explaining their general theory of judicial review, nominees have likewise emphasized that all legislation is entitled to a presumption of constitutionality. *Id.* at 342 (testimony of Hilda G. Tagle & Sam A. Lindsay).

<sup>136</sup> 515 U.S. 200 (1995) (adopting strict scrutiny for affirmative action in federal government programs).

<sup>137</sup> *See, e.g., 1998 Hearings Part 3, supra* note 22, at 1203 (responses to questions asked by Sen. Sessions by William A. Fletcher). Professor Fletcher replied that "I will follow the *Adarand* decision scrupulously, as I will follow all Supreme Court precedent." *Id. See also id.* at 1211 (responses of Chester J. Straub to follow-up questions from Sen. Sessions). Mr. Straub stated that "[y]es, I shall follow *Adarand* and subject racial classifications to strict scrutiny." *Id.* Similarly, the following dialogue occurred at a 1999 hearing:

The CHAIRMAN. Now, will you follow . . . the Supreme Court's decisions in *Adarand v. Peña* and *City of Richmond v. J.A. Croson and Company* with respect to affirmative action and other race-based classifications?

Mr. LORENZ. I certainly would follow that Supreme Court case. The strict scrutiny standard is the highest, and you would have to have any exception to be a very narrow, tailored and focused decision that would be in a compelling State interest. I would certainly follow that decision.

The CHAIRMAN. Judge Hurd.

Judge HURD. Yes, I would.

The CHAIRMAN. Judge Buchwald.

Judge BUCHWALD. Absolutely.

Mr. STEWART. Absolutely.

Mr. MARRERO. Yes, Senator.

*1999 Hearings Part 1, supra* note 25; at 180.

<sup>138</sup> *Id.* at 33.

to maintain the confidentiality of settlement agreements in defective product litigation in order to facilitate public health and safety.<sup>139</sup> After acknowledging a need to balance privacy expectations with the public interest, Sands explained that he would not pre-judge how he would rule in a particular case but that

I certainly would listen to all of the facts, take into consideration all of the circumstances on both sides of the case, as I have tried to do in all cases in the past, and make a decision which I believed was fair and consistent with the public interest, as well as to abide fully with whatever law did apply.<sup>140</sup>

Although Sands' answer was a model of equivocation, one cannot blame him for failing to provide a more specific response about so subtle a question and one perhaps should praise him for avoiding ill-considered comment on a complex subject. Similarly, Senator Metzenbaum's question about whether judges gave too many suspended sentences was so abstract that Solomon Oliver properly limited his response to a superfluous pledge that he would treat all defendants fairly.<sup>141</sup>

Many questions are virtually impossible for nominees to answer because the hearings do not provide enough time for a thoughtful exploration of complex issues, and a thorough discussion would perhaps require a nominee to make statements which would appear to pre-judge issues that might come before her on the bench. For example, Senator Torricelli asked a group of several nominees to "quickly" explain how they would interpret the constitutional scope of congressional re-districting "mathematically and on a racial basis."<sup>142</sup> When no nominee spoke up, the committee proceeded to other questions. As Senator Sessions aptly remarked, "[s]mart group; nobody volunteered."<sup>143</sup>

Even when nominees refuse to discuss issues that might come before them, they may make general comments that offer insights into the manner in which they would approach the case. For example, Judge Anthony W. Ishii refused to explain how he would rule in a case in which a landowner challenged government environmental limitations on the use of his property, but he assured the Committee that he would be faithful to the Constitution, statutory law, and decisional precedent.<sup>144</sup> Similarly, nominees have sometimes offered other insights into legal issues without revealing how they would rule. Asked, for example, about the conflict between free speech and parental responsibility to protect children from offensive internet communications, Thomas W. Thrash, Jr. expressed hope that increasingly sophisticated parental screening devices would obviate the

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<sup>139</sup> *1994 Hearings Part 3, supra* note 20, at 132.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 532.

<sup>142</sup> *1997 Hearings part 1, supra* note 6, at 510 (remarks of Sen. Torricelli).

<sup>143</sup> *Id.* (remarks of Sen. Sessions).

<sup>144</sup> *Id.* at 513-14 (testimony of Judge Ishii).

constitutional dilemma.<sup>145</sup>

When asked about controversial legal issues, nominees also understandably try to take refuge in settled law. Asked, for example, whether racial preferences are constitutional, Paez pointed out that the Supreme Court's decisions in *Adarand* and *City of Richmond v. J.A. Croson Co.*<sup>146</sup> make clear that such preferences must be subjected to strict scrutiny.<sup>147</sup> Similarly, Bonnie J. Campbell explained that *Adarand* "is clearly controlling law. Any remedial statute would have to be very narrowly tailored to promote a compelling state interest. And any review of that by a court would apply a strict scrutiny test. I think that's a very, very tough standard."<sup>148</sup> Campbell's promise to follow *Adarand* was immediately echoed by three other nominees who were testifying at the same hearing.<sup>149</sup> Nominees at other hearings have made similarly general responses.<sup>150</sup>

Even though nominees are willing to cite judicial decisions, they are rarely willing to discuss them. For example, Morrow refused to comment on the decision of U.S. District Judge Thelton Henderson in blocking implementation of California's anti-affirmative action proposition, explaining that she was "not familiar with the evidence presented to Judge Henderson, with the legal arguments made by the parties to the action, or with the case law on which Judge Henderson relied in reaching his decision."<sup>151</sup> Nominees also have refused to comment about various politically-charged issues, including school vouchers<sup>152</sup> and moments of silence in public schools.<sup>153</sup>

Nominees normally have failed to offer more than wooden textbook comments about Supreme Court precedents about which they have been questioned. Asked to explain her understanding of *United States v. Lopez*<sup>154</sup> and *United States v. Morrison*,<sup>155</sup> for example, one nominee commented that "the Supreme Court requires a truly economic activity before Congress can rely on the interstate commerce clause to pass a law in an area" and that she would "have to follow the law handed down in those cases."<sup>156</sup> This response, of course, begged the question of what may constitute an "economic activity," and no senator attempted to elicit

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<sup>145</sup> *Id.* at 280.

<sup>146</sup> 484 U.S. 1058 (1988).

<sup>147</sup> 1998 *Hearings Part 3*, *supra* note 22, at 324.

<sup>148</sup> *May 25, 2000 Hearings*, *supra* note 85.

<sup>149</sup> *Id.* (testimony of Jay A. Garcia-Gregory, Beverly B. Martin, & Judge Laura Taylor Swain).

<sup>150</sup> *E.g.*, 1999 *Hearings Part 1*, *supra* note 25, at 27-28; *id.* at 38-39 (testimony of Karen E. Schreier); *id.* at 167 (testimony of Raymond C. Fisher & Maryanne Trump Barry).

<sup>151</sup> 1997 *Hearings Part 1*, *supra* note 6, at 246-47.

<sup>152</sup> 1998 *Hearings Part 3*, *supra* note 22, at 26 (testimony of M. Margaret McKeown).

<sup>153</sup> *Id.* at 29.

<sup>154</sup> 514 U.S. 549 (1995) (nullifying the federal Gun-Free School Zones Act).

<sup>155</sup> 529 U.S. 598 (2000) (nullifying the federal Violence Against Women Act).

<sup>156</sup> *May 25, 2000 Hearings*, *supra* note 85 (testimony of Campbell).



any more specific response. In responding to a question about the scope of *Lopez*, another nominee similarly explained that “[t]he test to determine if a statute exceeds the power of Congress to enact under the Commerce Clause is whether the activity ‘substantially affects’ interstate commerce.”<sup>157</sup> Another nominee testified that the death penalty is constitutional because the Court has stated that it is constitutional.<sup>158</sup>

Asked under what circumstances a federal judge should apply federal common law, one nominee stated that “[a] federal judge should follow the Supreme Court’s decision in *Erie v. Tompkins* [sic] . . . and its progeny.”<sup>159</sup> Asked in a written question to state his opinion of Federal Rule of Civil Procedure 11, another nominee replied that “Rule 11 is an important tool for use in the appropriate case. It would be appropriate in a frivolous case.”<sup>160</sup>

Senators often could do more to elicit more specific responses. One nominee replied to a senator’s query about how RICO might be used more effectively by explaining that “RICO, as it stands, is a powerful deterrent to white-collar criminal activities because it has been used by prosecutors and by the private bar to bring cases that have potentially ruinous consequences to individuals, and I think it serves that purpose admirably.”<sup>161</sup> Rather than encourage the nominee to propose constructive suggestions for the improvement of what he regarded as an effective statute, the senator went on to ask a question on an entirely different subject. Similarly, Kohl asked a thoughtful question to a nominee who had served as a magistrate judge about “how to improve magistrates’ current role in the judicial system,” but Kohl failed to press for a more responsive answer after the nominee merely replied that he had been well treated as a magistrate by the district judges.<sup>162</sup> In other instances, senators fail to press nominees to explain provocative statements that cry out for additional comment. For example, when Jerome B. Friedman replied to Senator Ashcroft’s question about the viability of the Tenth Amendment by explaining that he had “no problem” with the Tenth Amendment’s application to “very limited areas,” Ashcroft failed to ask the nominee to identify such areas.<sup>163</sup>

Asked whether they would apply the Second Amendment to the states, four nominees merely assured the committee that they would seek guidance from Supreme Court decisions.<sup>164</sup> Since the Court’s relevant decisions are few, old, and

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<sup>157</sup> 1999 Hearings Part 1, *supra* note 25, at 139.

<sup>158</sup> 1998 Hearings Part 3, *supra* note 22, at 27 (testimony of M. Margaret McKeown).

<sup>159</sup> 1997 Hearings Part 1, *supra* note 6, at 718 (reply of Anthony T. Droney).

<sup>160</sup> 1998 Hearings Part 3, *supra* note 22, at 1015 (reply to questions of Sen. Thurmond by Arthur J. Tarnow).

<sup>161</sup> 1994 Hearings Part 4, *supra* note 28, at 9.

<sup>162</sup> 1994 Hearings Part 3, *supra* note 20, at 121.

<sup>163</sup> 1997 Hearings Part 2, *supra* note 21, at 689.

<sup>164</sup> May 25, 2000 Hearings, *supra* note 85 (testimony of Campbell, Garcia-Gregory, Martin, & Swain). Similarly, a nominee at another hearing explained that he would look to Supreme Court precedent and “the plain language of the Second Amendment as starting

unclear, this would have provided an excellent opportunity for Senator Hatch to finally call the bluff of nominees who take refuge in the Supreme Court and to try to probe the opinions of the nominees on this subject.<sup>165</sup> Hatch asked no follow-up questions.

This question, however, might have been objectionable because it was too hypothetical. When asked about how they would rule in hypothetical cases in which the law is unsettled, nominees have wisely tended to explain that they would need to study the issue. For example, Ishii and Hayden properly refused to assure Senator Hatch of how they would rule in a case involving the constitutionality of affirmative action by a private employer. Judge Ishii pointed out that the issue had not been settled by the Supreme Court's decision in *Adarand*,<sup>166</sup> and Judge Kennedy agreed, explaining that the lack of any settled Supreme Court precedent "would require me to search the law and to decide the question."<sup>167</sup> Since part of the reluctance of nominees to speak freely about issues appears to arise out of a desire to avoid alienating senators, nominees can sometimes satisfy liberals and conservatives alike by responding to questions about the same issue from senators of different parties. Some of the more liberal senators have sometimes prodded nominees who have provided "conservative" responses to questions from conservative senators to acknowledge the "liberal" side of issues. After Christina A. Snyder assured Senator Sessions in response to his question that there is no constitutional right to sleep in parks,<sup>168</sup> for example, she assured Senator Feingold in response to his questions that persons who sleep in parks have the same constitutional and legal rights of other Americans and that this is one of the reasons why she had participated in *pro bono* work on behalf of such persons.<sup>169</sup>

Senators generally understand and respect the refusal of nominees to comment on issues that might come before them on the bench or to challenge settled law. After Senator Smith expressed disappointment that Marsha S. Berzon and Prof.

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points." *1999 Hearings Part 1, supra* note 25, at 143 (responses of Charles Wilson to questions from Sen. Smith). Likewise, another recent nominee explained that he would follow the text of the Constitution, the intent of the Framers, and the precedents of the Supreme Court. *Id.* at 239 (responses of Ronald M. Gould to questions from Sen. Smith).

<sup>165</sup> Questions about interpretations of the Second Amendment would have provided an especially rich opportunity for probing the views of lower federal court nominees because, as Professor Denning has pointed out, lower federal judges have exercised a high level of discretion in interpreting the Second Amendment. See Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 969-72, 998-1004 (1995-96). As Denning has observed, "[p]recedent is no obstacle to determined federal courts. This is nowhere better illustrated than in the Second Amendment cases." *Id.* at 1002.

<sup>166</sup> 515 U.S. 200 (1995); *1997 Hearings Part 1, supra* note 6, at 500 (testimony of Judge Ishii).

<sup>167</sup> *1997 Hearings Part 1, supra* note 6, at 500 (testimony of Harold Kennedy, Jr.).

<sup>168</sup> *Id.* at 779 (exchange between Sen. Sessions and Christina A. Snyder).

<sup>169</sup> *Id.* at 782 (exchange between Sen. Feingold and Christina A. Snyder).

Robert A. Katzmann were willing to say that abortion was “wrong,” Senator Hatch rose to their defense, pointing out that their refusal to declare their opinion on abortion “without hearing all the facts and evidence” was “different from saying that they would not find that process unconstitutional.”<sup>170</sup> Hatch added that “I don’t know how they could say much more than that at this point.”<sup>171</sup>

The reticence of nominees naturally frustrates senators, even though they understand that it may be proper. At a recent hearing, Senator Smith explained that “it’s awfully frustrating for us in the advise and consent role how we can advise and consent if we don’t even know whether someone would be willing to vote one way or the other on a precedent or at least conceptually. Not a case, but a precedent, the issue of precedent.”<sup>172</sup> Smith went on to complain that:

[W]hen it comes down to really the reason why we want you on the courts, we can’t ask questions because it might be some case before you. Well, hello? That’s the whole point. There may be a case coming up on some of these issues and we would like to know what your thoughts are, not what the decision is.<sup>173</sup>

In an effort to try to elicit more revealing responses, Senator Smith sent a detailed questionnaire to nominees asking whether they believe that it is legitimate for senators to inquire about the views of nominees on constitutional matters; to explain the purpose of confirmation hearings; and to ask whether any questions are off-limits. Although nominees have duly acknowledged that the Senate has the right to make broad inquiries, they have not retreated from their refusal to respond to questions that are inappropriate. In response to Smith’s question about off-limits questions, Faith S. Hochberg appropriately stated that:

There are no questions that are off limits for a Senator to ask, and it is the duty of the nominee to answer any questions posed in such a manner that his or her answer could never be construed to violate or undermine an Article III Judge’s obligation to follow the Constitution, the precedent of the Supreme Court and the Third Circuit, and the laws duly enacted by Congress. It is important that no nominee give the appearance that he or she has pre-judged any issue that might come before the court in any future case or controversy.<sup>174</sup>

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<sup>170</sup> *1999 Hearings Part 1, supra note 25, at 34-35.*

<sup>171</sup> *Id.* at 35.

<sup>172</sup> *Hearing of the Senate Judiciary Committee, FED. NEWS SERV., July 12, 2000.*

<sup>173</sup> *Id.*

<sup>174</sup> *1999 Hearings Part 1, supra note 25, at 395-96 (responses of Faith S. Hochberg to questions from Sen. Smith).*

#### 4. Personal Opinions

In addition to discussing their judicial philosophies, nominees also are sometimes asked to reveal their personal opinions about a wide range of social and political issues. Once again, the Canons of Judicial Conduct may prohibit comment on pending or impending cases. Accordingly, one recent nominee explained that her oath as an Oregon state judge prevented her from expressing her personal beliefs and opinions on matters that reasonably might come before the court, including abortion and the scope of the Second Amendment.<sup>175</sup>

When pressed by senators to provide their personal views on controversial issues, nominees have generally limited themselves to assuring senators that they would adhere to settled precedent.<sup>176</sup> Asked whether they would follow even precedents with which they personally disagreed, nominees have consistently assured senators that they would faithfully apply the precedent.<sup>177</sup> Similarly, nominees have assured senators that they would follow even the precedents of cases which they believed were wrongly decided.<sup>178</sup> Senators have also asked nominees whether there is any issue on which they are in such substantial personal disagreement with the law of the United States that they could not in good conscience apply the law.<sup>179</sup> In particular, senators have often inquired about whether a nominee would have moral qualms about following the law on capital punishment<sup>180</sup> and enforcing federal sentencing guidelines.<sup>181</sup> Again, the questions

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<sup>175</sup> *Id.* at 240 (responses of Anna J. Brown to questions from Sen. Smith).

<sup>176</sup> An example is the following exchange between Senator Sessions and Margaret M. Morrow:

Sen. SESSIONS. [C]learly at the time the Constitution was adopted, the framers . . . contemplated that the death penalty was legitimate under the Constitution. Would you agree with that philosophy?

Ms. MORROW. I think it is now settled law that that is the case.

Sen. SESSIONS. And would you disagree with the position of Brennan and Marshall?

Ms. MORROW. Senator, I have to confess to you that I have not read or studied those opinions, although I am generally familiar with the statement as you make it. I really could not express an opinion regarding their reasoning. What I can say is that that reasoning is not the law of the land, and as a trial judge, the law of the land prevails and the death penalty would be imposed in appropriate cases.

*1997 Hearings Part 1, supra* note 6, at 47.

<sup>177</sup> *1997 Hearings Part 2, supra* note 21, at 11 (testimony of Marjorie O. Rendell).

<sup>178</sup> *Id.* at 16 (testimony of Bruce W. Kauffman).

<sup>179</sup> *1997 Hearings Part 1, supra* note 6, at 32 (exchange between Sen. Ashcroft and Donald W. Middlebrooks).

<sup>180</sup> *Id.*; *see also id.* at 49 (exchange between Sen. Ashcroft and Margaret M. Morrow); *id.* at 265 (exchange between Sen. Ashcroft and Eric L. Clay); *1997 Hearings Part 2, supra* note 21, at 11 (testimony of Marjorie O. Rendell); *id.* at 16 (testimony of Bruce W. Kauffman);

and answers have been perfunctory, as occurred at a hearing in 2000:

Sen. HATCH. Do any of you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a federal judge?

Ms. CAMPBELL. No.

Mr. GARCIA-GREGORY. No.

Ms. MARTIN. No.

Judge TAYLOR SWAIN. No.<sup>182</sup>

Senator Smith has sometimes asked nominees orally or in writing whether they personally believe that an unborn child is a human being. Nominees have invariably refrained from expressing any personal opinion on this issue, explaining that their role as a judge would be to apply the law without reference to their personal feelings.<sup>183</sup> As Berzon testified, “my role as a judge is not to further anything that I personally believe or don’t believe. . . .”<sup>184</sup> Similarly, Maryanne Trump Barry declared that “[m]y personal opinions on any subject are really not relevant, not important. And to the extent I might interject them, I am acting improperly either as a district court judge or an appellate judge.”<sup>185</sup> Such responses are appropriate because comments by a nominee about her personal views concerning highly sensitive legal issues could be construed as indicating how a nominee would rule on a particular issue, thereby placing a nominee in jeopardy of violating the Code of Judicial Conduct and making the nominee vulnerable to a recusal motion if the issue later came before her in court.

In asking about personal opinions in order to elicit information about judicial philosophy, senators sometimes have asked nominees to name judicial decisions that they particularly admire or that they especially question. It is remarkable, but maybe not surprising, that Clinton nominees tended to express admiration for decisions in which the Supreme Court circumscribed federal power and criticized decisions expanding federal power, perhaps, at least in part, because this is what

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*1998 Hearings Part 3, supra* note 22, at 664 (testimony of Garr M. King, Johnnie B. Rawlinson, Gregory M. Sleet, Richard T. Dawson, & Kermit Lipez).

<sup>181</sup> *1997 Hearings Part 1, supra* note 6, at 268 (exchange between Sen. Ashcroft and Eric L. Clay); *1997 Hearings Part 2, supra* note 21, at 17 (exchange between Sen. Kohl and Bruce W. Kauffman); *1998 Hearings Part 3, supra* note 22, at 665 (testimony of Garr M. King and Johnnie B. Rawlinson).

<sup>182</sup> *May 25, 2000 Hearings, supra* note 85.

<sup>183</sup> *1999 Hearings Part 1, supra* note 25, at 32 (testimony of Marsha S. Berzon & Robert E. Katzmann).

<sup>184</sup> *Id.* at 32 (testimony of Marsha S. Berzon).

<sup>185</sup> *Id.* at 169. When Senator Smith continued to press Barry for her personal opinion, she replied, “*Casey* is the law that I would look to. If I had a personal opinion – and I am not suggesting that I do — it is irrelevant because I must look to the law which binds me.” *Id.*

Republican senators presumably wanted to hear. One nominee praised *Lopez*, which held that Congress exceeded its power under the Commerce Clause in banning firearms from the vicinity of schools.<sup>186</sup> Several other nominees have hailed *Erie Railroad v. Tompkins*<sup>187</sup> for its imposition of restraints on the federal courts.<sup>188</sup> One nominee was sure to please Republican senators in naming the Supreme Court's decision restraining affirmative action in *Adarand*.<sup>189</sup> And another nominee expressed "trepidation" about the Court's decision in *Griswold v. Connecticut*,<sup>190</sup> which revived the doctrine of substantive due process to strike down a Connecticut ban on the sale of contraceptives. Similarly, the choice of *United States v. Nixon*<sup>191</sup> by at least two nominees<sup>192</sup> might have been pleasing both to Democratic senators who remembered how the decision led to Nixon's resignation and Republican senators who recognized the relevance of its holding for circumscribing the legal immunity of President Clinton.

Asked to name decisions with which they disagreed, nominees have tended to tilt against the straw men of discredited decisions such as *Plessy v. Ferguson*,<sup>193</sup> *Korematsu v. United States*,<sup>194</sup> and *Lochner v. New York*.<sup>195</sup> In the wake of criticisms of *Korematsu* and *Lochner* at one hearing, Senator Hatch, with perhaps unintended humor, reminded the nominees not to "forget *Dred Scott*."<sup>196</sup> Other

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<sup>186</sup> 1997 Hearings Part 1, *supra* note 6 at 275 (testimony of Alan S. Gold).

<sup>187</sup> 304 U.S. 64 (1938).

<sup>188</sup> 1998 Hearings Part 3, *supra* note 22, at 827 (responses of Gregory M. Sleet to Sen. Ashcroft's follow-up questions).

<sup>189</sup> 1997 Hearings Part 2, *supra* note 21, at 15 (testimony of Bruce W. Kauffman).

<sup>190</sup> 381 U.S. 479 (1965).

<sup>191</sup> 418 U.S. 683 (1974) (doctrine of presidential immunity did not excuse President Nixon from complying with subpoena issued by the Watergate special prosecutor).

<sup>192</sup> 1997 Hearings Part 1, *supra* note 6, at 278 (testimony of Thomas W. Thrash, Jr.); 1998 Hearings Part 3, *supra* note 22, at 263 (questions from Sen. Sessions answered by Judge Richard L. Young).

<sup>193</sup> 163 U.S. 537 (1896) (upholding the constitutionality of a state statute that required railroads to provide "equal but separate accommodations" for whites and blacks); 1997 Hearings Part 2, *supra* note 21, at 11 (testimony of Marjorie O. Rendell); *id.* at 16 (testimony of Bruce W. Kauffman); 1998 Hearings Part 3, *supra* note 22, at 254 (response of M. Margaret McKeown to question from Sen. Sessions).

<sup>194</sup> 323 U.S. 214 (1944) (sustaining the constitutionality of executive order excluding Japanese-Americans from certain West Coast regions). See 1997 Hearings Part 1, *supra* note 6, at 499 (testimony of Anthony W. Ishii); *id.* at 769-70 (testimony of Joseph F. Bataillon); 1998 Hearings Part 3, *supra* note 22, at 263 (questions from Sen. Sessions answered by Judge Richard L. Young).

<sup>195</sup> 198 U.S. 45 (1905) (nullifying a New York statute that limited the number of hours that bakery employees could work); 1998 Hearings Part 3, *supra* note 22, at 499 (testimony of Droncy); *id.* at 853 (testimony of George Caram Steeh, III).

<sup>196</sup> *Id.* at 499 (remarks of Sen. Hatch). And indeed some nominees have mentioned *Dred Scott*. See 1997 Hearings Part 2, *supra* note 21, at 16; 1998 Hearings Part 3, *supra* note 22, at 300; *id.* at 305.

Supreme Court decisions criticized by nominees have included the nullification of prohibition of advertising by lawyers,<sup>197</sup> and one nominee even expressed reservations about *Marbury v. Madison*.<sup>198</sup> At least in written questions, however, some nominees have refused to state their opinion even of such decisions as *Dred Scott* and *Plessy*.<sup>199</sup>

Of course, the tendency of nominees to refrain from naming controversial cases is prudent — “a wise decision,” as Senator Biden has somewhat ruefully acknowledged.<sup>200</sup> Asked to name their favorite recent decisions, a few Clinton nominees, however, dared to express approval of some “liberal” decisions, including the Court’s decisions permitting indigents to obtain copies of criminal files,<sup>201</sup> holding that appeal of a child custody decision cannot be conditioned upon the capacity to pay,<sup>202</sup> and requiring federal prosecutors to provide exculpatory evidence to the defense.<sup>203</sup> In a few instances, nominees have dared to name decisions which are examples of judicial activism. One example was Arthur Gajarsa’s reference to *Baker v. Carr*,<sup>204</sup> the Supreme Court’s 1962 decision holding that the political question doctrine did not bar its adjudication of the constitutionality of congressional apportionment.<sup>205</sup>

Similarly, when asked to name the judges they most admire or which judge has most influenced their views on judicial restraint or separation of powers, many

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<sup>197</sup> 1998 Hearings Part 3, *supra* note 22, at 278-79 (criticizing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

<sup>198</sup> 5 U.S. (1 Cranch) 137 (1803); 1998 Hearings Part 3, *supra* note 22, at 254 (response of M. Margaret McKeown to question from Sen. Sessions).

<sup>199</sup> 1999 Hearings Part 1, *supra* note 25, at 392 (responses of Anne C. Williams to questions from Sen. Smith). Williams, a judge, contended that answering the question about *Plessy* would constitute an advisory opinion.

<sup>200</sup> 1997 Hearings Part 2, *supra* note 21, at 22. When Senator Kohl pointed out that none of the nominees at a recent hearing had mentioned *Roe v. Wade*, 410 U.S. 113 (1973), Senator Biden stated:

I suspect the reason why none of you mentioned *Roe*, although all of you probably in your hearts know it is probably one of the most significant decisions, whether you agreed with it or not, is because you have all been attuned to make sure not to mention *Roe* because you know that it is a flash point, the one thing that will get everyone’s interest. I wish one of you had . . . . At any rate, a wise decision.

*Id.*

<sup>201</sup> *Meyer v. City of Chicago*, 397 U.S. 1024 (1970). See 1998 Hearings Part 3, *supra* note 22, at 853 (testimony of Arthur J. Tarnow).

<sup>202</sup> *MLB v. SLJ*, 519 U.S. 102 (1996). See 1998 Hearings Part 3, *supra* note 22, at 852 (testimony of A. Howard Matz).

<sup>203</sup> 1999 Hearings Part 1, *supra* note 25, at 70 (response of Karen Schreier to a general question, citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

<sup>204</sup> 369 U.S. 186 (1962).

<sup>205</sup> 1997 Hearings Part 1, *supra* note 6, at 271-72, 274 (testimony of Arthur Gajarsa).

Clinton nominees prudently named jurists who favored judicial restraint even though their personal political predilections were liberal. Felix Frankfurter<sup>206</sup> and Learned Hand<sup>207</sup> have been popular choices. Hand may be particularly appropriate choice since he was himself a lower federal judge rather than a Supreme Court justice. Placed in the more parlous position of naming the present Supreme Court justice that they most admire, some nominees have prudently professed respect for all of them.<sup>208</sup> Among nominees who have named names, popular choices have been Sandra Day O'Connor and Antonin Scalia,<sup>209</sup> both of whom were appointed by President Reagan, whose philosophy of picking judges was so unlike President Clinton's, but very much like that of the Republicans who controlled the Senate. Nominees who have selected these justices have generally praised them for exercising judicial restraint and for displaying other qualities admired by the Republican members of the committee.<sup>210</sup> Only very rarely did Clinton nominees

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<sup>206</sup> *Id.* at 475-76 (responses of Alan S. Gold to questions from Sen. Ashcroft); *id.* at 728 (response of Judge Katherine Sweeney Hayden to questions from Sen. Ashcroft); *1998 Hearings Part 3, supra* note 22, at 823 (response of Kermit V. Lipez to Sen. Ashcroft's follow-up questions).

<sup>207</sup> *1997 Hearings Part 1, supra* note 6, at 272 (testimony of Arthur Gajarsa); *id.* at 279 (testimony of Thomas W. Thrash, Jr.); *1998 Hearings Part 3, supra* note 22, at 241 (responses of M. Margaret McKeown to questions from Sen. Ashcroft); *id.* at 266 (responses of Judge Richard L. Young to questions from Sen. Ashcroft); *id.* at 268 (responses of Susan Oki Molloway to questions from Sen. Ashcroft).

<sup>208</sup> *1997 Hearings Part 1, supra* note 6, at 718 (response of Anthony T. Dronney to questions from Sen. Ashbrook) ("I admire all of the current Supreme Court justices for their commitment to justice and fairness."); *id.* at 722 (response of Henry H. Kennedy, Jr. to Sen. Hatch) ("While I admire each member of the Supreme Court . . . I do not admire any one Justice more than any other."); *id.* at 724 (response of Anthony W. Ishii to questions from Sen. Ashcroft) ("There is no one particular current Supreme Court Justice that I most admire.").

<sup>209</sup> *Id.* at 730 (response of Clarence J. Sundram to questions from Sen. Ashcroft, naming Justice O'Connor); *id.* at 728 (response of Judge Katherine Sweeney Hayden to questions from Sen. Ashcroft, naming O'Connor); *id.* at 1071 (responses of Judge Frank M. Hull to questions from Sen. Ashcroft, naming O'Connor); *id.* at 1073 (response of Robert C. Chambers to questions from Sen. Ashcroft, naming O'Connor); *id.* at 273 (responses of Arthur S. Gajarsa to questions from Sen. Ashcroft, naming Justice Scalia); *1998 Hearings Part 3, supra* note 22, at 241 (responses of M. Margaret McKeown to questions from Sen. Ashcroft, naming O'Connor); *id.* at 266 (responses of Judge Richard L. Young to questions from Sen. Ashcroft, naming O'Connor); *id.* at 629 (responses of Sam A. Lindsay to questions from Sen. Ashcroft, naming O'Connor); *id.* at 631 (responses of Dolissa A. Ridgway to questions from Sen. Ashcroft, naming O'Connor); *id.* at 827 (responses of Gregory M. Sleet to questions from Sen. Ashcroft, naming O'Connor); *id.* at 829 (responses of Johnnie B. Rawlinson to questions from Sen. Ashcroft, naming O'Connor); *id.* at 830 (responses of Garr M. King to questions from Sen. Ashcroft, naming O'Connor).

<sup>210</sup> For example, McKeown stated that O'Connor's "opinions are clear, to the point and written in plain English, making it easy to understand the holding and the scope of the ruling. Further, she has emphasized the importance of precedent and *stare decisis*." *1998 Hearings*



dare to express admiration for “liberal” justices.<sup>211</sup>

When asked to name which law review article or book has most influenced them, nominees have likewise played it safe. One nominee, for example, selected Oliver Wendell Holmes Jr.’s *The Common Law*.<sup>212</sup> Other nominees have named Robert Bork’s *The Tempting of America*<sup>213</sup> and Alexander M. Bickel’s *The Least Dangerous Branch*,<sup>214</sup> both of which called for greater judicial restraint. Other nominees have eschewed the mention of any publication with philosophical content and have named legal treatises.<sup>215</sup>

#### F. Judicial Management Skills

The Senate also has expressed much interest in the management skills of nominees, particularly district court nominees. Some of the most substantive exchanges between senators and nominees have concerned issues of judicial management rather than abstract issues of constitutional adjudication. Management issues have figured prominently in both oral and written questions. The answers have been predictable, as virtually all nominees who have been questioned on this subject have naturally tried to convince the Senate that they share the prevailing enthusiasm for active judicial management of cases<sup>216</sup> and for experimentation with

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*Part 3, supra* note 21, at 241 (responses of M. Margaret McKeown to questions from Sen. Ashcroft). Judge McKeown also expressed appreciation for “the down-to-earth manner” in which O’Connor approaches her work. *Id.*

<sup>211</sup> For example, Stephan P. Mickle named Thurgood Marshall. *Id.* at 1216 (responses to questions from Senator Ashcroft).

<sup>212</sup> *1997 Hearings Part 1, supra* note 6, at 471 (responses of Eric Clay to questions from Sen. Ashcroft).

<sup>213</sup> *Id.* at 476 (responses of Alan S. Gold to questions from Sen. Thurmond).

<sup>214</sup> *1998 Hearings Part 3, supra* note 22, at 824 (responses of Kermit V. Lipez to questions from Sen. Ashcroft); *id.* at 1199 (responses of William A. Fletcher to questions from Sen. Thurmond).

<sup>215</sup> *1997 Hearings Part 1, supra* note 6, at 729 (response of Judge Katherine Sweeney Hayden to questions from Sen. Ashcroft, citing FRANCIS WELLMAN, *THE ART OF CROSS EXAMINATION*); *id.* at 725 (responses of Judge Ishii to questions from Sen. Ashcroft, citing LOUISELL, HAZARD, & TAIT, *PLEADINGS AND PROCEDURE*, and WALTZ & PARK, *EVIDENCE*); *1998 Hearings Part 3, supra* note 22, at 242 (responses of M. Margaret McKeown to questions from Sen. Ashcroft, citing C.A. WRIGHT & R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL*); *id.* at 269 (responses of Susan Oki Mollway to questions from Sen. Ashcroft, citing THOMAS J. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION*); *id.* at 625 (responses of Judge Paez to questions from Sen. Ashcroft, citing B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW*).

<sup>216</sup> *1997 Hearings Part 1, supra* note 6, at 30 (testimony of Jeffrey T. Miller); *id.* at 237 (response of Jeffrey T. Miller to written question from Sen. Thurmond); *1997 Hearings Part 2, supra* note 21, at 370 (testimony of James S. Gwin); *id.* at 371 (testimony of Algenon L. Marbley); *id.* (testimony of Charles J. Siragusa).

alternative dispute resolution.<sup>217</sup> Because judicial management is perhaps more a matter of will than of technique, nominees are unlikely to espouse any novel ideas for managing cases. Their answers nevertheless provide at least some insight into how they would approach docket control. When asked during confirmation hearings how she would attempt to keep her docket moving expeditiously, Audrey Collins replied that she would be "an active manager" who would set firm dates for completion of discovery and trial, work closely with the chief judge and magistrates, and hold frequent telephonic conferences with attorneys in order to encourage the narrowing of issues.<sup>218</sup> Judge Sands indicated he would try to "make good use of the magistrates" and explore the potential of arbitration.<sup>219</sup> Paul Borman stated that the judge should call lawyers to make sure that a case is progressing.<sup>220</sup> Other nominees have similarly expressed their willingness to use magistrates and modern technology to facilitate docket movement,<sup>221</sup> and to communicate regularly with attorneys<sup>222</sup> and court personnel.<sup>223</sup> Sometimes senators have asked nominees who are already judges about their speed in handling their caseload, although this information is generally a matter of public record.<sup>224</sup>

Other questions have involved a diverse array of topics, including: the use of cameras in courtrooms;<sup>225</sup> attendance by the press at pre-trial depositions;<sup>226</sup> Federal

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<sup>217</sup> *1997 Hearings Part 2, supra* note 21, at 370 (testimony of James S. Gwin); *1999 Hearings Part 1, supra* note 25, at 178-79 (testimony of Stewart).

<sup>218</sup> *1994 Hearings Part 3, supra* note 20, at 4-5 (testimony of Audrey Collins).

<sup>219</sup> *Id.* at 132 (testimony of Judge W. Louis Sands).

<sup>220</sup> *1994 Hearings Part 4, supra* note 28, at 5 (testimony of Paul Borman).

<sup>221</sup> *1994 Hearings Part 3, supra* note 20, at 680 (testimony of Vanessa Gilmore).

<sup>222</sup> *1994 Hearings Part 4, supra* note 28, at 11-12 (testimony of John Koeltl). Koeltl stated that he would:

[H]ave a management conference at the beginning of the case, attempt to understand whether any dispositive motions are going to be in the case, understand what the discovery plan is in the case, and set realistic deadlines in the case. I would also explore with the parties when the appropriate time to discuss the settlement or possible settlement tools that might be available to effect the settlement of the case if that is appropriate in that case.

*Id.*

<sup>223</sup> *1997 Hearings Part 2, supra* note 21, at 505 (testimony of Katherine Sweeney Hayden).

<sup>224</sup> *1997 Hearings Part 1, supra* note 6, at 29 (testimony of Jeffrey T. Miller).

<sup>225</sup> *Id.* at 238 (answer of Donald M. Middlebrooks to written question from Sen. Thurmond); *1997 Hearings Part 2, supra* note 21, at 372 (testimony of Charles J. Siragusa); *1994 Hearings Part 3, supra* note 20, at 124 (testimony of Judge Cooper); *id.* at 680-81 (testimony of Vanessa Gilmore); *1994 Hearings Part 4, supra* note 28, at 11 (testimony of Mr. Koeltl); *id.* at 14 (testimony of Judge Pooler).

<sup>226</sup> *1997 Hearings Part 1, supra* note 6, at 238 (answer of Donald M. Middlebrooks to written question from Sen. Thurmond).

Rule of Civil Procedure 11;<sup>227</sup> the usefulness of oral arguments in appellate cases;<sup>228</sup> advertising by attorneys;<sup>229</sup> the scope of federal common law;<sup>230</sup> means of avoiding judicial conflicts of interest;<sup>231</sup> the proper role of law clerks;<sup>232</sup> whether the judge would hire permanent law clerks;<sup>233</sup> the role of judges in alleviating criticism of the legal profession;<sup>234</sup> the use of court-appointed arbitrators for small cases;<sup>235</sup> methods for remedying the problem of a judge who has a high reversal rate;<sup>236</sup> ways that judges can help prevent discovery conflicts;<sup>237</sup> means of reducing the cost and complexity of class actions;<sup>238</sup> procedures for expediting international litigation;<sup>239</sup> prevention of financial conflicts of interest;<sup>240</sup> special issues that a judge should consider in order to ensure fairness to Native Americans;<sup>241</sup> and special considerations for intellectual property cases that a judge should consider in trying a case and drafting an opinion.<sup>242</sup>

Senators have also asked nominees about their commitment to *pro bono* work. It is hardly surprising that virtually all nominees have emphasized the importance of *pro bono* work and the need to encourage it. Much more revealing are answers to questions about whether it should be mandatory or voluntary. Even nominees who laud the importance of *pro bono* have opposed making mandatory standards.<sup>243</sup>

Judicial management issues have often produced more fruitful dialogues between senators and nominees than have questions about judicial philosophy. Eric L. Clay told Senator Sessions in response to his query about the appropriateness of oral argument that “it is very valuable to have oral arguments in as many cases as possible to give the attorneys an opportunity to plead their cases not only in their

<sup>227</sup> *Id.* at 243 (answer of Margaret M. Morrow to written question from Sen. Thurmond).

<sup>228</sup> *Id.* at 269 (exchange between Sen. Sessions and Eric L. Clay).

<sup>229</sup> *Id.* at 281 (exchange between Sen. Sessions and Thomas W. Thrash, Jr.).

<sup>230</sup> *Id.* at 470-71 (responses of Eric Clay to written questions of Sen. Ashcroft); *id.* at 476 (responses of Eric S. Gold to questions from Senator Ashcroft).

<sup>231</sup> *Id.* at 471-72 (responses of Arthur Joseph Gajarsa to questions from Sen. Thurmond).

<sup>232</sup> *Id.* at 474-75 (responses of Alan S. Gold to questions from Sen. Thurmond); *id.* at 726 (response of Judge Ishii to questions from Sen. Ashcroft).

<sup>233</sup> *Id.* at 475 (responses of Alan S. Gold to question from Sen. Thurmond).

<sup>234</sup> *Id.* at 776-77 (exchange between Sen. Feingold and Janet C. Hall).

<sup>235</sup> 1994 *Hearings Part 3*, *supra* note 20, at 128.

<sup>236</sup> 1999 *Hearings Part 1*, *supra* note 25, at 138 (response of Charles Wilson to questions from Sen. Ashcroft).

<sup>237</sup> *Id.* at 177 (testimony of Judge Buchwald).

<sup>238</sup> *Id.* at 177-78 (testimony of Mr. Lorenz).

<sup>239</sup> *Id.* at 178 (testimony of Mr. Marrero).

<sup>240</sup> *Id.* at 229-30 (testimony of Ronald M. Gould).

<sup>241</sup> *Id.* at 68 (response of Karen Schreier to a question from Sen. Hatch).

<sup>242</sup> *Id.* at 70 (response of Stefan R. Underhill to a question from Sen. Hatch).

<sup>243</sup> *E.g.*, 1997 *Hearings Part 1*, *supra* note 6, at 40 (exchange between Sen. Thurmond and Margaret M. Morrow); 1994 *Hearings Part 3*, *supra* note 20, at 118 (Stewart opposed mandatory *pro bono* work); 1994 *Hearings Part 4*, *supra* note 28, 8 (Cote opposed mandatory *pro bono* work).

written papers . . . realizing that for most people who come before the court of appeals . . . this is their very last chance.”<sup>244</sup> Senator Sessions replied that he believed that many cases did not warrant the time and expense that oral arguments imposed upon litigants and the courts.<sup>245</sup> In response to Mr. Clay’s agreement that not every case requires an oral argument, Senator Sessions expressed satisfaction that the nominee did not share the belief of some judges that every case needs an oral argument.<sup>246</sup> This exchange helped to demonstrate Mr. Clay’s willingness to give litigants a full opportunity to present their cases, and allowed Senator Sessions an opportunity to remind Mr. Clay about the importance of containing legal fees and conserving judicial resources.

## II. PROBING A NOMINEE’S RECORD

### A. *Positions as an Advocate*

Although it is unlikely that judges would permit positions that they advocated as attorneys to directly bias their judicial decisions, senators often may be able to discern a nominee’s political predilections from the types of clients and cases that a nominee has had as an attorney. Although most lawyers advocate positions about which they hold indifferent or conflicting opinions, a nominee who consistently has acted as an advocate for particular positions or causes is likely to have personal sympathy for such positions or causes, or at least is likely to have absorbed, perhaps unconsciously, the attitudes of his clients. Accordingly, it is appropriate for senators to inquire about a nominee’s commitment to issues that he or she has advocated as an attorney.

At numerous hearings, senators have asked nominees whether the positions they advocated as attorneys reflect any philosophical commitment to such positions. Nominees have regularly denied that positions they advocated as attorneys would influence their decisions on the bench. When asked whether her experience in representing labor unions in disputes with their members would interfere with her ability to fairly adjudicate the rights of employees, Marsha S. Berzon assured Senator Leahy that she was “keenly aware of the difference between an advocacy position and the position of a judge” and that she would “leave behind all positions of all my clients and look with an open mind” on all legal issues.<sup>247</sup>

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<sup>244</sup> 1997 Hearings Part 1, *supra* note 6, at 269 (testimony of Mr. Clay in response to Sen. Sessions).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> 1999 Hearings Part 1, *supra* note 25, at 27 (testimony of Ms. Berzon).

## B. *Judicial Decisions of Nominees who are Judges*

The record of a nominee who already is a jurist provides a particularly useful means of assessing competence and political predilections. One recent nominee had the perfect answer to a question about whether she had "any personal, moral, or religious qualms about enforcing the death penalty," because she was able to point out that she had imposed capital punishment in all four trials in which a jury had recommended it.<sup>248</sup>

The Committee has meticulously questioned highly controversial nominees about their judicial decisions. For example, the Committee questioned Rosemary Barkett in depth about her decisions as a justice of the Supreme Court of Florida<sup>249</sup> after many conservatives alleged that she had been too lenient toward criminals.<sup>250</sup> Barkett's testimony may have helped assuage senatorial concerns since she was confirmed, albeit by an unusually close vote of 61 to 37.<sup>251</sup> Similarly, Senate liberals questioned U.S. District Judge Kenneth E. Ryskamp in detail about his judicial opinions in civil rights cases.<sup>252</sup> Possible dissatisfaction over his answers may have been a factor in the withdrawal of his nomination to the U.S. Court of Appeals. The questions asked on these occasions have been far more sophisticated and technical than questions that Committee members have asked about judicial philosophy. Because judicial decisions can reveal so much about a nominee, the Committee is wise to invest substantial effort in these inquiries if serious doubts exist about a nominee.

The Senate has sometimes questioned non-controversial nominees about their judicial decisions. For example, Senator Simpson questioned the wisdom of a decision in which Diana G. Motz had invalidated a curfew ordinance. When Motz explained that she did not believe that all curfew ordinances were necessarily unconstitutional, Simpson expressed satisfaction that Motz would adjudicate "on

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<sup>248</sup> *Id.* at 242 (responses of Florence Marie Cooper to questions from Sen. Smith).

<sup>249</sup> *Confirmation Hearing on Federal Appointments: 1994 Hearings before the Senate Comm. on the Judiciary, Part 2*, 103rd Cong. 375-416, 484-509 (1995) [hereinafter *1994 Hearings Part 2*].

<sup>250</sup> *The Wall Street Journal*, for example, alleged that "Barkett's brand of liberal jurisprudence is much to blame for America's crime problem." Editorial, *Barkett v. Bill*, WALL ST. J., Jan. 10, 1994, at A12. See also Editorial, *What Kind of Federal Judges?*, ROCKY MTN. NEWS, Oct. 20, 1993, at 40A. Mailings by the Free Congress Foundation alleged that Barkett "blames everyone but the killer" and she was "breathtakingly radical." Bill Rankin, *An Immigrant, a Nun, a Judge - And Now a Nominee in Uproar*, ATLANTA CONST., Dec. 26, 1993, at A1. The endorsement of Barkett's nomination by the National Association of Police Organizations helped to deflate these allegations. Jeanne Cummings, *Nominee Takes Heat in Hearings*, TIMES-PICAYUNE, Feb. 4, 1994, at A2; *1994 Hearings Part 2*, *supra* note 249 at 375-76.

<sup>251</sup> *Clinton's Judicial Picks Confirmed*, 1994 CONG. Q. ALMANAC 300 (1994).

<sup>252</sup> *Confirmation Hearing on Federal Appointments: 1991 Hearings before the Senate Comm. on the Judiciary, Part 3*, 102nd Cong. 97-117 (1992).

a case-by-case basis with common sense."<sup>253</sup> In another recent hearing, a district court judge offered a detailed explanation of a decision in which he invalidated an Illinois statute prohibiting fetal experimentation unless it was beneficial to the fetus.<sup>254</sup>

### C. *Public Speeches and Writing*

As questions about a nominee's judicial philosophy often yield so few insights, the Senate probably can learn more about a nominee by questioning her about public statements made over the years in her speeches and writings. Because lower court nominees generally are less likely than Supreme Court nominees to have had high profile careers in public service or academia prior to their nomination, they are less apt to have left a "paper trail" of writings and speeches that might embarrass them at confirmation hearings. Nevertheless, some nominees have made statements that haunt them at the hearings. On a number of occasions, senators have called nominees to account for various statements or writings which suggested that they favored "liberal" positions on various public issues. For example, Senator Thurmond expressed understandable curiosity about a speech in which Carr had complained that Congress' growing emphasis on incapacitating rather than rehabilitating criminals had resulted in a "gulag syndrome."<sup>255</sup> Although Carr refused to recant his criticism of Congress' lack of interest in rehabilitation and its institution of mandatory minimum sentences, he emphasized that he would feel bound to faithfully apply the sentencing guidelines and mandatory minimum sentences.<sup>256</sup> Carr also assured Thurmond that his use of the word "gulag" was not intended to suggest that any American was held in any prison for political reasons.<sup>257</sup>

Similarly, when senators inquired about Richard A. Paez's remark in a public speech that California's Proposition 187 was "anti-civil rights," Paez explained that he was merely stating that the Latino community in California was not enthused about the initiative, that the initiative was controversial, and that he doubted if he had commented on the same initiative that eventually appeared on the ballot.<sup>258</sup> He also emphasized that initiatives are entitled a high level of judicial deference and that he respected the Ninth Circuit's decision to uphold the constitutionality of the initiative.<sup>259</sup> When Senator Sessions pointed out that the phrase "anti-civil rights"

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<sup>253</sup> 1994 *Hearings Part 3*, *supra* note 20, at 939-40 (testimony of Judge Motz).

<sup>254</sup> 1999 *Hearings Part 1*, *supra* note 25, at 382 (testimony of Judge Anne Claire Williams).

<sup>255</sup> 1994 *Hearings Part 3*, *supra* note 20, at 122 (exchange between Judge Carr and Sen. Thurmond).

<sup>256</sup> *Id.* at 122-23.

<sup>257</sup> *Id.* at 123.

<sup>258</sup> 1998 *Hearings Part 3*, *supra* note 22, at 324, 332, 334 (testimony of Judge Paez).

<sup>259</sup> *Id.* at 335.

seemed to suggest more than merely an expression of Paez's belief that the initiative was controversial, Paez expressed "regret" that he had used that phrase and explained that he believed that the initiative was "not anti-civil rights because it sought to ensure equal opportunity and to make that clear and to basically eliminate government-sponsored . . . affirmative action programs."<sup>260</sup>

In inquiring about a nominee's public statements, senators all too often fail to consider the implications of such statements or push the nominees to explain their meaning. Asked about a speech that could have been interpreted as criticizing the Supreme Court's recent sovereign immunity decisions, a nominee briefly summarized existing law and assured the committee that she accepted as binding precedent "the Court's construction of the powers of Congress with respect to the waiver of sovereign immunity of the states."<sup>261</sup> Rather than trying to determine whether she intended her remarks as a criticism of the Court's decisions, Senator Hatch replied, "Well, I think we've asked enough questions here. There are a lot of other questions, naturally we could ask."<sup>262</sup> Indeed. But he did not ask them.

In a few instances, nominees' writings have troubled senators. Conservative members of the committee were troubled by a *Buffalo Law Review* note that Clarence J. Sundram wrote as a student more than a quarter of a century before his nomination in which Sundram defended affirmative action.<sup>263</sup> Guido Calabresi was questioned about a newspaper column in which he had harshly attacked the activism of the Rehnquist Court.<sup>264</sup> Calabresi replied that he would "not think that words of that sort would be appropriate in a judicial opinion, or even in a work of scholarship" but that they were not inappropriate in an op-ed piece.<sup>265</sup> Calabresi also assured the Committee that he would apply even those Supreme Court decisions with which he disagreed.<sup>266</sup> Similarly, Senator Kyl expressed concern about Lynn S. Adelman's authorship of a state bar journal article arguing on policy grounds against the reinstatement of capital punishment in Wisconsin.<sup>267</sup> Adelman assured Kyl that nothing in his personal beliefs would prevent him from abiding by U.S. Supreme Court precedent sustaining the constitutionality of the death

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<sup>260</sup> *Id.* at 334 and 626.

<sup>261</sup> *May 25, 2000 Hearings, supra* note 85 (testimony of Judge Taylor Swain). Judge Taylor Swain had stated in her speech that the "Supreme Court's recent states' rights decisions, particularly in the sovereign immunity area, change radically settled assumptions regarding private civil litigation as means of enforcing federally recognized rights, including in the discrimination area." *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *1997 Hearings Part 1, supra* note 6, at 499 (testimony of Sundram in reference to *Buffalo Law Review* article.)

<sup>264</sup> *1994 Hearings Part 4, supra* note 28, at 230 (testimony of Calabresi).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *1997 Hearings Part 2, supra* note 21, at 1015 (testimony of Adelman).

penalty.<sup>268</sup>

In some instances, questions about publications can stimulate dialogue with the nominee on significant constitutional issues. For example, one recent nominee provided a long and thoughtful written response to an inquiry about a law review article concerning Congress' power to limit the jurisdiction of the federal courts.<sup>269</sup>

#### D. Memberships

Senators also have examined the organizations to which nominees belong in order to obtain clues to the political predilections of the nominee. In their zeal to sniff out "judicial activism," some senators during recent years have seemed almost to regard American Bar Association membership as subversive. Some senators have asked nominees if they ever have been ABA members almost as if they were asking them if they had ever been members of the Communist Party.<sup>270</sup> Accordingly, senators at numerous confirmation hearings have asked nominees who have been ABA members whether they believe that it is appropriate for the ABA to make controversial pronouncements about subjects such as abortion, capital punishment, affirmative action, and gun control. Not surprisingly, nominees have uniformly expressed misgivings about the both the ABA's practice of taking positions on controversial issues and the substance of those positions.<sup>271</sup> Pressed hard by senators for an explanation of why she had signed a 1992 report calling for the ABA to take a position on abortion, McKeown renounced this action, stating that she had learned during the subsequent six years that ABA pronouncements on controversial issues are unduly divisive and that the ABA should stick to focusing

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<sup>268</sup> *Id.*

<sup>269</sup> *1999 Hearings Part 1, supra* note 25, at 71 (responses of Stefan R. Underhill to questions from Sen. Sessions).

<sup>270</sup> *1997 Hearings Part 2, supra* note 21, at 11 (exchange between Sen. Specter and Marjorie O. Rendell).

<sup>271</sup> In a typical answer, Robert W. Pratt stated in response to a question from Senator Hatch that he did not believe that controversial ABA pronouncements were appropriate because "[w]e have got enough problems in the ABA about delivering legal services without getting into issues that reasonable people can and do disagree that become divisive and do not accomplish what the bar association ought to be about." *1997 Hearings Part 1, supra* note 6, at 24. He acknowledged in response to further questioning from Senator Leahy that the ABA has the right to speak out on such issues. *Id.* at 25. One of the bolder answers was given by Donald W. Middlebrooks, who acknowledged that "it is important for the association to speak out for lawyers and to engage in the debate." *Id.* at 24. Middlebrooks therefore stated that he was not certain that the ABA should not speak out on controversial issues even though he disagreed with some of the ABA's positions. *Id.* See also *id.* at 472 (responses to questions for Arthur Joseph Gajarsa from Sen. Thurmond) ("the ABA should exercise extreme caution in taking positions on which there is significant splits of opinion among its members.").



“on administration of justice and lawyers and the practice of law.”<sup>272</sup>

Although senators have little reason to fear that ABA membership is necessarily an expression of belief in judicial activism, senators have more understandably expressed concern that the ABA during its screening interviews has asked nominees about their positions on controversial issues on which the ABA has taken a stand. Nominees have uniformly assured senators that the ABA has not inquired about such subjects and that the ABA interviews were limited to questions about non-political issues such as experience, judicial temperament, and case management.<sup>273</sup>

Some senators also have taken a dim view of membership in the American Civil Liberties Union and nominees have sometimes taken pains to disassociate themselves from the ACLU's more controversial pronouncements. Margaret M. Morrow, who had served as chair of the ACLU of Washington Legal Committee, assured Senator Hatch that she had not provided any legal opinions to the ACLU and had played no role in determining those issues upon which the ACLU would take a position or litigate.<sup>274</sup> She also stated in reply to a question from Senator Hatch that she was unfamiliar with the details of the many positions adopted by the ACLU.<sup>275</sup> Similarly, Susan Oki Mollway, who served as a member of the board of directors of the Hawaii ACLU, assured senators that she had no role in the Hawaii ACLU's support for state legislation to legalize same-sex marriages.<sup>276</sup>

After T. John Ward refused in a response to a written question from Senator Sessions to reveal whether he personally agreed with various specific positions of the ACLU on the grounds that his personal views would not influence his judicial decisions,<sup>277</sup> Sessions reiterated the question, explaining that a judge “will be required to hear cases involving illegal drugs, and, as a result, I think it is appropriate to ask a prospective nominee about their personal opinion on such an issue, if only to assess to my satisfaction that a nominee contains no inner biases that would prevent them from properly applying applicable law.”<sup>278</sup> In an amended response, Ward expressed disagreement with various ACLU positions on the grounds that they were contrary to settled Supreme Court precedent.<sup>279</sup>

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<sup>272</sup> 1998 *Hearings Part 3*, *supra* note 22, at 252 (response of M. Margaret McKeown to question from Sen. Thurmond).

<sup>273</sup> 1997 *Hearings Part 1*, *supra* note 6, at 32 (testimony of Jeffrey T. Miller, Donald W. Middlebrooks, & Robert W. Pratt).

<sup>274</sup> 1998 *Hearings Part 3*, *supra* note 22, at 246.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 275-76 (answers of Susan Oki Mollway to follow-up questions from Sen. Sessions).

<sup>277</sup> 1999 *Hearings Part 1*, *supra* note 25, at 73 (responses of T. John Ward to questions from Sen. Sessions)

<sup>278</sup> *Id.* at 76.

<sup>279</sup> *Id.* at 76-77.

## III. "ADVICE" TO NOMINEES

Confirmation hearings provide an excellent forum for senators to discharge their constitutional obligation to offer "advice" on nominations on providing advice to nominees about a wide range of issues. During the Clinton Administration, senators used the hearings as a forum for admonishing the nominees to exercise judicial restraint. Indeed, many of the seemingly perfunctory or pointless questions about judicial restraint have perhaps been designed more to provide senators with an opportunity to emphasize the importance of judicial restraint than to elicit any response from the nominee.<sup>280</sup> For example, Hatch reminded one group of recent nominees at the close of their testimony that "it is very important that you understand the roles you have, which is not to make the laws," except in cases of first impression.<sup>281</sup> Hatch admonished the nominees that "you really need to follow the precedent of the upper courts or we lose control of the system. If judges start usurping the role of the legislative branch or the executive branch, this country will not survive in its present form. It has been the judiciary that has kept the Constitution viable and active."<sup>282</sup>

The hearings also provide an opportunity for senators to admonish nominees to maintain a balanced judicial temperament. Senator Thurmond, for example, regularly has urged nominees to remain humble and display courtesy toward litigants, witnesses, and attorneys.<sup>283</sup> Senator Specter advised a nominee to be courteous to litigants and attorneys, explaining that he feared that "judges, especially judges with life tenure, tend to forget that very fast."<sup>284</sup> Senator Biden has urged nominees to "remember where you came from,"<sup>285</sup> and Senator Sessions has reminded a nominee that "judges are appointed, not anointed."<sup>286</sup> Although such admonitions may sound perfunctory, they may serve a useful purpose, for the nominees are unlikely to receive any lecture on humility once they are confirmed.<sup>287</sup>

Senators sometimes have offered advice on more technical issues. For example, Senators Ashcroft and Torricelli advised one group of nominees to be

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<sup>280</sup> *1998 Hearings Part 3, supra* note 22, at 1033 (remarks of Sen. DeWine).

<sup>281</sup> *1999 Hearings Part 1, supra* note 25, at 181.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 119.

<sup>284</sup> *1998 Hearings Part 3, supra* note 22, at 19.

<sup>285</sup> *Id.* at 667.

<sup>286</sup> *1997 Hearings Part 1, supra* note 6, at 281.

<sup>287</sup> Senator Specter remarked at a recent hearing that he has come to appreciate the wisdom of Senator Thurmond's traditional queries about courtesy during Thurmond's service on the Judiciary Committee. Although Specter explained that he originally had thought, "What kind of question is that? What is the witness going to say but yes?," he was impressed by the profundity of Thurmond's reminder of the need for courtesy among persons who exercise great power. *1998 Hearings Part 3, supra* note 22, at 320.

wary of the accuracy of statements in congressional committee reports.<sup>288</sup>

In some instances, senators appear to have sought advice from nominees, particularly with respect to the experience of sitting judges in administering various aspects of criminal procedure. For example, Senator Thurmond asked two nominees whether they believed that the Prisoner Litigation Reform Act had helped to reduce frivolous actions by prisoners or whether it had placed too many restrictions on the ability of judges to remedy constitutional violations of prisoner rights.<sup>289</sup> Although neither nominee offered a detailed critique of the statute, they assured the senator that the statute was operating in a useful and fair manner.<sup>290</sup>

The hearings also sometimes provide an opportunity for senators to elicit the thoughts of nominees about issues on which Congress might legislate. For example, Senator Sessions asked Anthony Droney, a former United States attorney, for his opinion about restrictions on allowing defendants to speak with prosecutors.<sup>291</sup>

As Robert A. Katzmann has pointed out, the hearings "also provide senators with opportunities to communicate with, and appeal to their constituencies."<sup>292</sup> Indeed, the desire of senators to use the hearings as a way of communicating with constituents may explain much of the superficiality of the questions and the failure of the senators to ask useful questions following up responses by nominees. Senators may be more interested in what they themselves have to say than in what the nominees have to say. Their questions are designed more as statements to reassure constituencies of the soundness of their own views about such subjects as abortion and capital punishment than to elicit the opinions of the nominees. Moreover, the mere act of asking questions about these subjects helps to assure constituents that senators have been vigilant in trying to prevent the appointment of judges who hold other views; accordingly, the response of the nominee is irrelevant unless the nominee actually opposes the senator's opinion.

#### IV. CONCLUSION

Because federal judges exercise such substantial power and enjoy lifetime tenure, the Senate has a duty to thoroughly examine every judicial nomination in order to make certain that the nominee meets the high standards of professional competence, experience, and integrity that a federal judgeship requires. Insofar as even lower federal judges are instrumental in shaping the law, it also is appropriate

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<sup>288</sup> 1997 *Hearings Part 1*, *supra* note 6, at 508-09 (remarks of Sen. Ashcroft and Sen. Torricelli).

<sup>289</sup> 1999 *Hearings Part 1*, *supra* note 25, at 383-84 (testimony of Frank H. McCarthy and Virginia A. Phillips).

<sup>290</sup> *Id.*

<sup>291</sup> 1997 *Hearings Part 1*, *supra* note 6, at 511-12 (remarks of Sen. Sessions); *id.* at 511 (testimony of Anthony Droney).

<sup>292</sup> 1999 *Hearings Part 1*, *supra* note 25, at 36 (citing South Dakota Senator Larry L. Pressler's questioning of Judge Ruth Bader Ginsburg about Indian jurisdiction).

for senators to inquire into the ideological predilections of judicial nominees. Although the written and oral questions with which the Senate Judiciary Committee probe the background and opinions of the nominees go far in helping to assess the intellectual, professional, ethical, and political character of nominees, the written questions could benefit from some minor changes and the process of oral questioning needs more substantial reform.

The written questionnaire that is available to the public provides a comprehensive portrait of the nominee's professional credentials, offers useful insights the process through which the nominee was selected, and provides information, including a financial statement, that helps to identify potential conflicts of interest. Efforts to ensure that judges have high personal integrity are further enhanced by the confidential questionnaire, which asks about tax problems, bankruptcy, and proceedings involving ethical violations.

The written questionnaires would have more effectively helped to assess the integrity of nominees if the Judiciary Committee, under pressure from its Republican members, had not during the late autumn of 2001 withdrawn several revisions that the Committee promulgated in September 2001. In particular, the public questionnaire ought to have continued to ask nominees about criminal convictions within a twenty year period rather than reducing the time period to ten years. Indeed, the questionnaire ideally should ask whether a nominee *ever* has been convicted of a crime other than a traffic offense. Because the Senate — and the nation — has the right to expect that judges have always led lives that are beyond reproach, the Senate should know about *any* criminal conviction, since even an offense in the distant past casts a pall over the nominee's present integrity. Moreover, such an extension presumably would not unduly protract the confirmation process because one surely hope that such an extension of the question would affect only a small proportion of nominees.

Similarly, the confidential questionnaire ought to have retained questions about the use, possession, or distribution of illegal substances. Because so many lower federal judges preside over drug offense prosecutions, prior drug use by a judge is relevant in several respects. For example, one could argue that a judge who himself has broken drug laws is morally unfit to pass judgment on others who have broken similar laws. Prior drug use by a judge might make the judge more lenient in enforcing the laws than many senators might prefer. A history of drug abuse also might indicate the nominee continues to have a drug problem that could adversely affect the performance of his judicial duties.

Although much of this information may be available in FBI reports, the confidential questionnaire might have produced information about drug offenses that even the FBI was unable to uncover. Moreover, FBI reports are available only to the nineteen members of the Judiciary Committee and are not available to the remaining eight-one senators who will vote on the nomination if it is reported out

of committee, except through the filter of Judiciary Committee staff. While critics of the questions expressed fear that the confidential information would be leaked by Judiciary Committee staff members and could unduly embarrass nominees, a nominee who has a history of significant lawbreaking warrants public scrutiny.

It is also unfortunate that the Judiciary Committee withdrew from the confidential questionnaire the query about campaign contributions. While the questionnaire continues to ask nominees to describe their role in political campaigns, a nominee could easily argue that campaign contributions are beyond the scope of this question. Likewise, specific disclosure of campaign contributions is needed even though much of this information is available from other sources because reference to such sources would waste the precious resources of an already overworked committee. Explicit questions about contributions are needed because the Senate and the public have a right to know the extent to which federal judgeships may be rewards for political activity.<sup>293</sup> Indeed, Alexander Hamilton indicated in *The Federalist* that amelioration of personal favoritism of presidents would be one of the Senate's principal roles in the confirmation process.<sup>294</sup> Although critics of this question contended that campaign contributions are irrelevant if a candidate is otherwise qualified for a judgeship, this argument overlooks the fact that there are degrees of qualification and that political contributions may result in the nomination of a well qualified candidate rather than an even better qualified candidate. Although it is unrealistic to expect to banish all political favoritism from the appointments process, and there even may be sound reasons why partisan loyalty is a legitimate factor in this process, the degree to which favoritism may be a factor should at least be apparent for all to see.

While much information about campaign contributions is available from other sources, the confirmation process would be slowed if the Judiciary Committee had to take the considerable time necessary to compile the data from such sources. Moreover, the inclusion of this information on the questionnaire itself is likely to enhance public awareness of the role that contributions may play in the judicial selection process. Candidates remain free to inform the Judiciary Committee about

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<sup>293</sup> One early survey has found that nearly half of Bush's nominees to federal judgeships have donated money to the Republican party, although none gave more than twenty thousand dollars — a mere mite in today's political world. Alexander Bolton, *Bush Judicial Nominees Gave Money to GOP Candidates*, THE HILL, July 25, 2001, at 1.

<sup>294</sup> THE FEDERALIST, NO. 76, at 513 (A. Hamilton) (Jacob E. Cooke ed., 1961). Hamilton explained that the participation of the Senate in the appointment process:

[W]ould have a powerful, though in general a silent operation. It would be an excellent check upon the spirit of favoritism in the president, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."

drug offenses, campaign contributions, and criminal convictions that are more than ten years old in response to an invitation at the end of the confidential questionnaire to “advise the Committee of any unfavorable information that may affect your nomination.” This general language, however, does not explicitly require information about otherwise undisclosed drug convictions, criminal offenses, and campaign contributions. It could place conscientious nominees at a disadvantage since they might disclose innocent offenses that could impede their nomination, while other nominees fail to disclose far more damaging information. Even though the omission of questions about campaign contributions and drug offenses and the erosion of questions about the question about criminal convictions seriously diminishes the rigor of the written questionnaire, the written questions probably need less reform than the oral questions asked at Senate confirmation hearings.

In contrast to the generally satisfactory nature of the Judiciary Committee’s written questionnaires, the quality and depth of oral questioning varies widely. Provocative issues are regularly raised at confirmation hearings, but often are abruptly terminated. Senators frequently ask elaborate questions to which nominees proffer safely minimalist responses, which are stillborn because senators typically fail to ask follow-up questions, moving instead onto an unrelated topic.

When asking questions about judicial philosophy, senators often seemed to be prodding Clinton nominees to provide orthodox renunciations of judicial restraint rather than engaging in genuine dialogue, perhaps because the senators were primarily interested in admonishing the nominees to exercise restraint. Questions about substantive issues are often stymied because nominees properly refuse to provide answers that might create the appearance that they have pre-judged an issue that could come before them on the bench. Even so, many nominees who have testified before the committee could have provided at least general insights into their views about issues that may come before them on the bench without violating the Canons of Judicial Conduct by creating an appearance of prejudice or impropriety.

Since nearly all nominees are confirmed — the Senate voted down only one of Clinton’s nominees — nominees may have an incentive to provide opaque replies to questions insofar as reticence will almost never harm a nomination while a controversial remark could perhaps jeopardize confirmation.<sup>295</sup> The transcripts of many hearings suggest, however, that senators would have little interest in addressing substantive questions in greater depth even if the nominees were less reticent.

The dialogue between senators and nominees often has been most fruitful when

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<sup>295</sup> Expressing understandable frustration over this problem, Senator Smith observed with some exaggeration in 1999 that nominees who refuse to answer questions about controversial issues “get confirmed and the ones who do don’t.” *1999 Hearings Part 1, supra* note 25, at 167.

it involves mundane issues of judicial management rather than politically controversial subjects. The hearings also often perform the useful function of enabling senators to give advice to the nominees, and the personal appearance of the nominees helps senators to assess their temperament. Technical legal issues usually are explored with sophistication only when the committee probes the judicial decisions of highly controversial nominees who have served as judges.

The questioning of lower federal nominees is certainly less thorough than the questioning of Supreme Court nominees. The superficial dialogues between senators and lower federal nominees contrast sharply with the rich constitutional law seminars that hearings on Supreme Court nominees have become during the past several decades. Senators, however, have a least as much licence to explore the backgrounds and opinions of lower federal court nominees as to scrutinize Supreme Court nominees. Indeed the Senate's role in confirming lower federal judges may be even more expansive than is its role in confirming Supreme Court nominees insofar as Congress created the lower federal courts and may have the power to eliminate these courts or at least to significantly constrict their jurisdiction.<sup>296</sup>

It is unrealistic, however, to expect the Senate to examine lower federal nominees with the same intensity that it devotes to Supreme Court nominees. Although the Judiciary Committee's questioning of many nominees may be perfunctory, it is difficult to see how the Committee could conduct more detailed inquiries since the Committee must review so many judicial confirmations. During the 106th Congress, President Clinton made eighty-three district court nominations and thirty-two Court of Appeals nominees, of whom the Senate confirmed fifty-seven of the former and thirteen of the latter.<sup>297</sup> With an average of at least thirty confirmations per year, the Committee obviously lacks time to devote days on hearings for each nominee. If the Committee conducted hearings on each nominee that were as time-consuming and elaborate as its hearings on Supreme Court nominees, the Committee would have time for little or no other business.

To the extent that senators lack time for more elaborate confirmation hearings, they might be able to delegate some of their work to staff. The transcripts of hearings already leave the impression that senators often are reading questions prepared by staff and that they are unable or unwilling to prod the nominees for more specific responses. Dissatisfaction with the superficiality of questioning Supreme Court nominees has inspired various proposals to have Senate staff members conduct at least part of the questioning of nominees. The sheer volume of lower federal nominations may make questioning by staff more justifiable for

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<sup>296</sup> As Professor Yackle has explained, "[t]he very existence of the lower federal courts may depend upon congressional will, and, certainly, the jurisdiction of those courts is open to congressional adjustment of at least some sort. It follows . . . that Congress can specify qualifications for federal judgeships." Yackle, *supra* note 76, at 321-22.

<sup>297</sup> Sheldon Goldman, et. al, *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 231 (Mar.-Apr. 2001).

lower federal nominees than it is for Supreme Court nominees. Perhaps the proper balance could be maintained through Professor Katzmann's suggestion that senators might "use special counsels in particular circumstances for instance, with regard to highly technical and abstruse points of law." Under this proposal, these special counsels, with the guidance of senators, "could engage nominees in detailed but appropriate discussions, in much the same way that other committees make use of staff."<sup>298</sup> Time constraints may make questioning by staff more justifiable in lower federal confirmation proceedings than in Supreme Court nominations.<sup>299</sup>

In addition to lack of time and resources, senators also may refrain from rigorous questioning of all but the most controversial nominees because they assume that the confirmation is inevitable. Senators from the party that does not control the White House may feel resigned to the appointment of nominees who generally do not share their views and may prefer to concentrate their efforts on influencing the nomination process itself<sup>300</sup> and opposing the confirmation only of the most extreme nominees. As Senator Hatch told a news reporter in 1996, "[o]nly if nominees are off-the-wall should you reject them. But if they are in the mainstream then you have no reason to block them."<sup>301</sup> Senators also may fear that they will lose credibility if they oppose nominations except in the rarest cases. As Senator Metzenbaum has explained, "[y]ou don't just always want to stand in a negative position. And if you're going to be effective on the controversial ones, you have to let some go by that you don't think are so good."<sup>302</sup>

Moreover, a senator generally has more to lose than to gain from opposing a nomination. The reasons for opposing a nomination are abstractions, but the nominee herself is a person. The nominee and her principal supporters generally have far more of a stake in the nomination's success than its opponents have in its failure. Hostility toward a dissident senator among supporters of a nomination is

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<sup>298</sup> 1999 Hearings Part 1, *supra* note 25, at 42.

<sup>299</sup> For an argument that the questioning of Supreme Court nominees is too important to delegate to staff members, see William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 1011-13 (1994).

<sup>300</sup> Senator Hatch contended in 1996 that one of the reasons why he had opposed so few of Clinton's nominees is because he prevented at least thirty nominations by calling the president to express reservations about prospective nominees. Jamie Dettmer & Lisa Leitner, *Judicial Choices Raise Objections*, INSIGHT MAGAZINE, Apr. 29, 1996, at 8.

<sup>301</sup> *Id.* Some Republican members of the Judiciary Committee, however, were reported during the Clinton Administration to believe that the committee should take a more active role in scrutinizing judicial nominees. *Id.* Similarly, many Republicans and conservatives outside Congress criticized the Judiciary Committee during the 1990s for what they perceived as excessive deference to the president. Thomas L. Jipping, director of the judicial-selection monitoring project at the Free Congress Foundation, complained that "[s]enatorial courtesy is the single most perverse factor in the selection process. It has been the reason for the code of silence." *Id.*

<sup>302</sup> Joan Biskupic, *Bush Treads Well-Worn Path in Building Federal Bench*, 50 CONG. Q. WEEKLY REP. 111, 113 (Jan. 18, 1992).



likely to persist long after gratitude toward the senator has faded away among opponents of the nomination.<sup>303</sup>

If members of either party wish to maximize their influence on the appointments process, however, they need to ask more probing questions of lower federal nominees. The tepidity of questions at most confirmation hearings suggests that senators of both parties are unduly embarrassed about asking probing questions. Unlike religious confirmations in churches and synagogues, judicial confirmations in the Senate should not necessarily be sedate ceremonies, devoid of embarrassing criticism of the confirmands, in which the outcome is pre-ordained. If the Senate is going to defer to judicial nominees at confirmation proceedings the way that one would honor a youth at a bar or bat mitzvah, a bride and groom at a wedding, or a corpse at a funeral, then the Senate might as well relinquish any pretense to offering 'advice and consent' and simply routinely approve judicial nominees the way it approves nominees for countless thousands of military, postal, and sundry other civil service jobs.

Accordingly, senators ordinarily should not fear that questions at confirmation hearings will embarrass nominees, for such embarrassment is a small price to pay for providing more useful information to the Senate and more information to the public at large. As Professor Tobias points out, however, sometimes "[t]he possibilities of embarrassment, wasting scarce resources, or creating citizen disrespect for the process may suggest that public treatment is less beneficial or even desirable."<sup>304</sup> Accordingly, there is merit in Tobias's suggestion that the Senate should conduct inquiries about judicial philosophy in private in rare instances if the nominee prefers to have the hearing conducted behind closed

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<sup>303</sup> Similarly, Nina Totenberg, in commenting on Supreme Court appointments, has written that:

[M]ost senators would rather not spend their time and political capital on an arduous confirmation process. It is a politically risky business. Controversial issues are likely to be stirred up. A confirmation battle can only create new enemies back home. And what does the politician get for his trouble? Nothing concrete. No legislation. No campaign money. Maybe he'll satisfy some of his supporters. But he'll infuriate others. At rock bottom, all a senator gets out of the confirmation process, if it turns controversial, is one's personal satisfaction that comes from doing what he thinks is right.

Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213-14 (1988).

<sup>304</sup> Carl Tobias, *Filling the Federal Appellate Openings on the 9th Circuit*, 19 REV. LITIG. 233, 255 (2000). Tobias acknowledges that the Senate generally should examine nominees "freely and openly in a public forum" and that the circumstances under which closed hearings would be conducted "will probably be unusual, and should be handled through private negotiations involving specific candidates," the Committee chair, and the president or their designees. *Id.*

doors.<sup>305</sup>

The common practice in which nominees bring family members and friends to the hearings<sup>306</sup> also may discourage serious questioning of nominees, although it is difficult to determine whether nominees bring their families because they do not expect harsh questioning or whether senators refrain from tough questioning because they do not wish to embarrass nominees in front of their spouses, children, and friends. In order to reduce senatorial inhibitions about asking bold questions, the Judiciary Committee should discourage or even prohibit nominees from bringing anyone with them to the hearing other than their counsel. For a festive occasion, families and assorted well-wishers should await the swearing-in ceremony.

Fears that a more rigorous review process will scare off desirable nominees are largely bogus. One could better argue that a process which lacks rigor will attract rogues. A nominee or potential nominee who has led a life of probity and who has compiled an honorable record of service in the legal profession should have no reason to fear anything more than annoyance from even the most feral senator. Only an unduly thin-skinned nominee could take personal umbrage at harsh criticism from senators, news media, or public interest groups who oppose his nomination on ideological grounds, since such criticism is not personal but rather political. If the Senate criticizes or investigates the personal conduct of the nominee, such conduct probably deserves scrutiny, although such scrutiny is rare.

Even if the process were much more rambunctious, it is likely that the large majority of nominees would still be confirmed. There is no evidence that nominees who have been maligned during the confirmation process suffer diminished credibility on the bench. Indeed, some of the most controversial Supreme Court nominees have gone on to rank among the esteemed Justices — Louis D. Brandeis is an example. Criticism of lower court nominees is less likely to blight the careers of such nominees since criticism of those nominees is likely to receive much less media attention, and thereby make much less of an impression upon attorneys, litigants, court personnel, and others whose respect the judge needs. Moreover, to the extent that the criticism is political rather than personal, the criticism is not likely to harm the judge's reputation at all, and may even enhance it among persons who love the judge for the enemies she has made. It would be absurd to argue, for example, that Thurgood Marshall's reputation suffered from the opposition of a hard core of segregationist senators who grilled him harshly and voted in opposition to him when he was nominated to the U.S. Court of Appeals and the U.S. Supreme Court. Marshall's fortitude in the face of such insults is one reason why we honor

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<sup>305</sup> *Id.*

<sup>306</sup> One recent nominee, for example, was accompanied at the hearings by his wife, his parents, a son, a daughter, a nephew, several of the nephew's friends, and a friend and his wife and her brother. *1998 Hearings Part 3, supra* note 22, at 1031 (testimony of Stephan P. Mickle).

his memory.

A person who is under consideration for a lifetime post of the highest trust should expect, and even welcome, careful scrutiny by the Senate. Most women and men who have survived so much of the rough and tumble of life that they are candidates for a federal judgeship are sturdy creatures who are not likely to sacrifice the rich prize of a federal judgeship because they fear the evanescent sting of a few senatorial tongues. The Senate should therefore not hesitate to question lower federal court nominees more aggressively during the confirmation process.