



Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue

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Summary

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

This issue might be of particular relevance to the Senate Judiciary Committee as it prepares for the scheduled start, on June 28, 2010, of confirmation hearings for Supreme Court nominee Elena Kagan. For the nominee herself once contended, in a 1995 book review, that a Supreme Court confirmation hearing should focus not on "the objective qualifications or personal morality of the nominee" but on the nominee's "substantive views." Such aims, she wrote approvingly, were achieved by the committee in the 1987 confirmation hearings for Supreme Court nominee Robert H. Bork. The Bork hearings, she said, presented to the public "a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction." By contrast, "subsequent hearings," she wrote, "have presented to the public a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis."

Also in her 1995 article, Ms. Kagan said that what "must guide" a decision on whether to confirm a person to be a Justice is a Senator's "vision of the Court and an understanding of the way a nominee would influence its behavior." Further, she said, if questioning on "substantive positions ever were to become the norm, the nominees lacking a publication record would have no automatic advantage over a highly prolific author." She emphasized, however, that she was not arguing "that the President and the Senate may ask, and a nominee must answer, any question whatsoever." Some kinds of questions, she said "do pose a threat to the integrity of the judiciary"—for example, if a Senator "asked a nominee to commit herself to voting a certain way on a case that the court had accepted for argument."

In 2009, in testimony before the Judiciary Committee, as nominee to be Solicitor General, Ms. Kagan appeared to signal somewhat of a change in the views she expressed in 1995. In reply to a Senator's question at the 2009 hearings, Ms. Kagan stated that, while the Senate, when questioning a nominee, "has to get the information that it needs," the "nominee for any particular position, whether it is judicial or otherwise, has to be protective of certain kinds of interests."

This report also examines four recent Supreme Court confirmation hearings and provides excerpts of Senators asking, and nominees responding to, questions. It reveals a usual practice of nominees declining to respond to committee questions seeking their views about current legal or constitutional issues. Notable in this regard were the 1993 Supreme Court confirmation hearings for nominee Ruth Bader Ginsburg. In her opening statement to the Judiciary Committee, Judge Ginsburg articulated a limit on what the Senators could expect their questioning to elicit from her, stating she would be constrained, when responding to questions, from providing any "previews," "hints," or "forecasts" of how she as a Justice might cast her vote on issues coming before the Court: These limits subsequently came to be known informally as the "Ginsburg Rule," standing for the principle—invoked frequently by later Court nominees—that nominees should not, in replying to questions from Judiciary Committee members, disclose their personal views or opinions on issues if there were a possibility the issues in the future would come before the Court.

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Introduction

In recent decades a recurring Senate issue has been what kinds of questions are appropriate for Senators to pose to a Supreme Court nominee appearing at hearings before the Senate Judiciary Committee. Particularly at issue has been whether, or to what extent, questions by committee members should seek out a nominee's personal views on current legal or constitutional issues or on past Supreme Court decisions that have involved those issues. Usually, when Senators at confirmation hearings have asked Supreme Court nominees to comment on topical legal and constitutional issues, the nominees have firmly declined to do so. In those situations, the nominees typically have taken the position that answers to questions which convey their personal views would conflict with their obligation to avoid appearing to make commitments, or provide signals, as to how they would vote as a Justice on future cases.

For their part, Senators on the Judiciary Committee generally have agreed that Supreme Court nominees should not, in replying to committee questions, indicate how they would rule on a matter being litigated in the courts. More complicated questions arise, however, regarding the extent to which it is appropriate to ask nominees about issues that might come before the Court, and the circumstances under which a nominee, in replying, would be prejudging the issues.

These issues might be of particular relevance to the Senate Judiciary Committee as it prepares for the scheduled start, on June 28, 2010, of confirmation hearings for Supreme Court nominee Elena Kagan. For the nominee herself once contended that a Supreme Court confirmation hearing should focus not on "the objective qualifications or personal morality of the nominee" but on the nominee's "substantive views." The Senate, she elaborated, in a 1995 law review article,

... ought to view the hearings as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct. Like other kinds of legislative fact-finding, the inquiry serves both to educate members of the Senate and public and to enhance their ability to make reasoned choices. Open exploration of the nominee's substantive views, that is, enables senators and their constituents into engage in a focused discussion of constitutional values, to ascertain the values held by the nominee, and to evaluate whether the nominee possesses values that the Supreme Court most urgently requires. These are the issues of greatest consequence surrounding any Supreme Court nomination (not the objective qualifications or personal morality of the nominee); and the process used in the Senate to serve the intertwined aims of education and evaluation ought to reflect what most greatly matters.¹

Such aims, she wrote approvingly, were achieved by the committee in the 1987 confirmation hearings for Supreme Court nominee Robert H. Bork. Those hearings, she said, presented to the public "a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction." By contrast, she maintained,

¹ Elena Kagan, "Confirmation Messes, Old and New," *University of Chicago Law Review*, vol. 62 (1995), p. 935, accessed from Senate Judiciary Committee website, at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part10.pdf>. (Hereafter cited as Kagan, "Confirmation Messes.") As noted later in this report, Ms. Kagan in 2009 signaled that she no longer held some of the views she expressed in her 1995 law review article.

Subsequent hearings have presented to the public a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis. Such hearings serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government. Neither can such hearings contribute toward an evaluation of the Court and a determination whether the nominee would make it a better or worse institution.²

Although made a decade and a half ago, such comments, in large part because they were authored by the current Supreme Court nominee, have refocused attention on the issue of what kinds of questions are appropriate for Senate Judiciary Committee members to pose to Supreme Court nominees. To provide an overview of this issue, the following pages, in separate sections, discuss the following:

- The various purposes members of the Senate Judiciary Committees are understood to have in questioning Supreme Court nominees at their confirmation hearings, and the wide range of subject areas that historically have been posed to those nominees.
- The usual, if not invariable, practice of Supreme Court nominees, particularly since the 1993 hearings on nominee Ruth Bader Ginsburg, to decline to respond to committee questions seeking their views about current legal or constitutional issues or issues likely to come before the Court.
- Past statements by Elena Kagan concerning the kinds of questions she maintained were appropriate to pose to a nominee at Supreme Court confirmation hearing (examining first Ms. Kagan's 1995 law review article on this subject and, later, her 2009 testimony, before the Senate Judiciary Committee, as nominee to be Solicitor General of the United States, during which she signaled a change in some of the views expressed in 1995).
- Differing views expressed by Senators on whether Elena Kagan should express her views on current legal or constitutional issues at her own Supreme Court confirmation hearing.

Purposes of Committee Questioning and Range of Subjects Historically Covered

In 1955, hearings on the Supreme Court nomination of John M. Harlan marked the beginning of a practice, continuing to the present, of each Court nominee testifying before the Senate Judiciary Committee.³ The principal business of these hearings is the questioning of the nominee by committee members (with the committee thereafter also hearing the testimony of other public witnesses speaking either in favor of or in opposition to the nominee's confirmation).

A Supreme Court confirmation hearing typically begins with a statement by the chair of the Judiciary Committee welcoming the nominee and outlining how the hearing will proceed. Other

² *Ibid.*, p. 941.

³ See CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus, (under heading "Historical Background").

members of the committee follow with opening statements, and a panel of “presenters” introduces the nominee to the committee. It is then the nominee’s turn to make an opening statement, after which begins the questioning of the nominee by Senators serving on the Judiciary Committee. Typically, the chair begins the questioning, followed by the ranking minority member and then the rest of the committee in descending order of seniority, alternating between majority and minority members, with a uniform time limit for each Senator during each round. When the first round of questioning has been completed, the committee begins a second round, which may be followed by more rounds, at the discretion of the committee chair.

For members of the Judiciary Committee, questioning of the nominee may serve various purposes. For some Senators who are undecided about how they should vote on confirmation, the purpose of questions may be to shed light on the nominee's professional qualifications, temperament, and character, or on his or her understanding of the Constitution, the role of the judiciary, and the extent of the judiciary’s powers under the Constitution. Other Senators who are undecided may seek to glean from the nominee's responses signs of how the nominee, if confirmed as a Justice, might be expected to rule on particular issues or affect the ideological balance of the Court.⁴

Some Senators, as the hearings begin, may already be “reasonably certain about voting to confirm the nominee,” yet “also remain reasonably open to counter-evidence,” and thus use the hearings “to pursue a line of questioning designed to probe the validity of this initial favorable predisposition.”⁵ Still others, however, may come to the hearings “having already decided how they will vote on the nomination” and, accordingly, use their questioning of the nominee to try “to secure or defeat the nomination.”□ For some Senators, the hearings may be a vehicle through which to impress certain values or concerns upon the nominee, in the hope of influencing how he or she might approach issues later as a Justice.⁶ The hearings also may represent to some Senators an opportunity, through their questioning of the nominee, to draw the public's attention to certain issues, to advocate their policy preferences, or to associate themselves with concern about certain problems. Senators, it has been noted, “may play multiple roles in any given hearings.”□

For his or her part, however, a nominee might sometimes be reluctant to answer certain questions that are posed at confirmation hearings. As already noted, a nominee might decline to answer for fear of appearing to make commitments on issues that later could come before the Court.⁷ A

⁴ At the very least, one scholar maintains, the questioning process “can be useful to Senators if they recognize its limitations and attempt to frame questions that are reasonably calculated to elicit meaningful responses. The questioning process can and has provided useful insights into the general thinking of nominees on important constitutional issues such as the scope of various provisions of the Bill of Rights. The process has helped to measure the mental acuity of nominees, and to clarify their approach to the process of adjudication.” William G. Ross, “The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees,” *Tulane Law Review*, vol. 62, November 1987, pp. 109. (Hereafter cited as Ross, “Questioning of Supreme Court Nominees.”)

⁵ George L. Watson and John A. Stookey, *Shaping America; the Politics of Supreme Court Appointments* (New York: HarperCollins College Publishers, 1995), p. 150. (Hereafter cited as Watson and Stookey, *Shaping America*.)

⁶ See Stephen J. Wermiel, “Confirming the Constitution: The Role of the Senate Judiciary Committee,” *Law and Contemporary Problems*, vol. 56, Autumn 1993, p. 141, in which author maintains that, since the 1987 hearings on Supreme Court nominee Robert H. Bork, a purpose of Senators on the Judiciary Committee has been “to identify points of constitutional concern and pursue those concerns with nominees, with the hope that, once confirmed, the new Justices will remember the importance of the core values urged on them by the senators or at least feel bound by the assurance they gave during their hearings.”

⁷ Illustrative of such a concern was the following statement by nominee David H. Souter, at a September 14, 1990, hearing, explaining his refusal to answer a question concerning the issue of a woman's right, under the Constitution, to (continued...)

nominee also might be concerned that the substance of candid responses, or the wrong choice of words in response, to certain questions could displease some Senators and thus put the nominee's chances for confirmation in jeopardy.⁸ "Nominees," a former chairman of the Judiciary Committee once reportedly remarked, "tend to answer just as many questions as they have to in order to be confirmed." □

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

- the nominee's knowledge of the law, the Constitution and past Supreme Court rulings, and the major issues addressed in those rulings;
- the nominee's "judicial philosophy," insofar as that expression concerns his or her overriding objectives as a judge and general approach to judicial decision making;⁹
- the nominee's past writings or public statements (including judicial opinions as a lower court judge)¹⁰ on social, economic, political, legal, or constitutional issues; and

(...continued)

have an abortion: "Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off-limits to a judge. Why this kind of discussion would take me down a road which I think it would be unethical for me to follow is something that perhaps I can suggest, and I will close with this question.

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

⁸ In this vein, one journalist has written, the perspective of Supreme Court nominee John G. Roberts Jr., as he prepared for his 2005 confirmation hearings, was that he "knew he could afford no mistakes. He worried that one answer, one ten-second response to one question over the course of fifteen hours of questioning, could doom his chances." Jan Crawford Greenburg, *Supreme Conflict* (New York: Penguin Press, 2007), p. 234.

⁹ See for example, the willingness of Judge Ruth Bader Ginsburg, at her 1993 Supreme Court confirmation hearings, to "state in a nutshell how I view the work of judging," while cautioning, moments later in her testimony, that it would be "injudicious" to "rehearse here what I would say and how I would reason" on questions that the Supreme Court might be called on to decide. U.S. Congress, Senate Committee on the Judiciary, *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States*, hearings, 103rd Cong., 1st sess., July 20-23, 1993 (Washington: GPO, 1994), pp. 51-52.

¹⁰ For instance, at her confirmation hearings in July 2009, Supreme Court nominee Sonia Sotomayor was asked questions about public statements she had made prior to her nomination (and which opponents of her nomination had criticized) of appellate judges making policy and of the experiences of a "wise Latina woman" versus those of a white male judge. Senators on the Judiciary Committee also asked her about her participation in a three-judge appellate panel ruling in a case involving reverse discrimination allegations by a group of white firefighters against city officials in New Haven, Connecticut (a ruling reversed by the Supreme Court in June 2009, after Judge Sotomayor's nomination to the Court but prior to the start of her confirmation hearings). See Tony Mauro, "During Senate Questioning, Sotomayor (continued...)"

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

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

- the soundness of particular Supreme Court rulings, including whether they should be overruled;
- legal or constitutional issues not immediately pending but which might someday come before the Court; and
- the relative weight to give to competing constitutional values in hypothetical cases.

All Senators, one news analysis generalized, “agree that nominees should not signal how they might rule on a case that could come before them on the Court.”¹¹ Such agreement, it can be assumed, is grounded in the notion that a judicial nominee should not prejudge a case or controversy. In contrast with political branch officials, judges are expected not to have any particular platform of ideas; rather they are required to apply the rule of law in an impartial manner to each new Article III “case or controversy.” This rationale is reflected in judicial ethics canons, most notably Canon 5A(3)(d)(ii) of the American Bar Association's Model Code of Judicial Conduct. This canon provides that a judge or judicial candidate “shall not ... with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”¹² Further, Senators on the Judiciary Committee, as well as the nominee, would be aware that a comment by the latter about a pending case at the confirmation hearings, would, under federal law as well as judicial ethical canons, “raise a serious question of bias that might compel recusal.”¹³

For their part, committee members may differ in their assessments of a nominee's stated reasons for refusing to answer certain questions. Some may be sympathetic and consider a nominee's refusal to discuss certain matters as of no relevance to his or her fitness for appointment. Others, however, may consider the nominee's views on certain subjects as important to assessing the nominee's fitness and hence regard unresponsiveness to questions on these subjects as sufficient reason to vote against confirmation.¹⁴ Protracted questioning, occurring over several days of hearings, is likely especially if the nominee is relatively controversial or is perceived by committee members to be evasive or insincere

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Explains Controversial Statements, Defends Rulings,” *The National Law Journal*, July 15, 2009, at <http://www.law.com>., Peter Baker and Neil A. Lewis, “Republicans Press Judge About Bias and Activism,” *The New York Times*, July 15, 2009, pp. A1, A15; and Tom LoBianco, “Nominee Hit with Hot-Button Issues; Sotomayor Explains ‘Wise Latina’ Again,” *The Washington Times*, July 16, 2009, p. A9.

See also Margaret Williams and Lawrence Baum, “Questioning Judges About Their Decisions; Supreme Court Nominees Before the Senate Judiciary Committee,” *Judicature*, vol. 90, September-October 2006, pp. 73-80, which examines the number, and tone, of confirmation hearing questions posed to Supreme Court nominees, from Harlan (1955) to Breyer (1994), about prior judicial decisions.

¹¹ In this vein, one Senator has written that, in his judgment, “the Senate should resist, if not refuse, to confirm Supreme Court nominees who refuse to answer questions on fundamental issues. In voting on whether to confirm a nominee, senators should not have to gamble or guess about a candidate's philosophy but should be able to judge on the basis of the candidate's expressed views.” Arlen Specter with Charles Robbins, *Passion for Truth*, 1st Perennial ed. (New York: Perennial, 2001), p. 342.

Nominee Reticence Becomes the Norm

The following paragraphs examine the usual, if not invariable, practice of recent Supreme Court nominees, at their confirmation hearings, to decline to respond to committee questions seeking their views about current legal or constitutional issues or issues likely to come before the Court. Selected examples of this practice were identified in an examination of the published transcripts of four recent Supreme Court confirmation hearings, and they are provided below as excerpts from the hearings—showing Senators asking, and the nominees responding to, questions.

The examination begins first with the Supreme Court nomination hearings of Ruth Bader Ginsburg in 1993. The Ginsburg hearings might be considered of particular interest because the nominee, at her hearings, articulated grounds for declining to respond to certain types of questions posed to her, which subsequently came to be known informally, but widely, as the “Ginsburg Rule.” While media commentators are not in agreement as to the exact formulation of this “rule,”¹² there appears general agreement that it stands for the principle—invoked frequently by later Supreme Court nominees—that nominees should not, in replying to questions from Judiciary Committee members, disclose their personal views or opinions on issues if there is a possibility that the issues in the future will come before the Court.

Also examined below, after the Ginsburg hearings, are relevant excerpts from the three most recent Supreme Court confirmation hearings—those for nominees John G. Roberts Jr., Samuel A. Alito Jr., and Sonia Sotomayor.

The Ginsburg Hearings, 1993

At her 1993 Supreme Court confirmation hearings, nominee Ruth Bader Ginsburg in her opening statement urged the Judiciary Committee to judge her fitness to be a Justice principally on the written record of her past 34 years of legal experience—as a law teacher, practicing attorney, and federal appellate court judge.¹³ She then articulated a limit on what the Senators could expect

¹² See, for example, Marcia Coyle, “Sotomayor Hearing Revives Old Battle: Why Do Senators Allow High Court Nominees to Dodge Questions on Hot-Button Issues?”, *The National Law Journal*, vol. 31, July 13, 2009, which refers to “the so-called Ginsburg Rule—[that the nominee provide to the Judiciary Committee] ‘no hints, no forecasts, no previews’” of how he or she might vote on an issue coming before the Court. Another observer provides a more value-laden description, recalling that in 1993 then-Judge Ginsburg “invoked what became known as the ‘Ginsburg Rule’ to decline pretty much any question she wanted on the grounds that the issue might come before her on the Court, so an answer could jeopardize her judicial impartiality.” Dan Froomkin, “Kagan Under Obligation to Open Up,” June 17, 2010, accessed at <http://www.huffingtonpost.com>.

¹³ She told the Judiciary Committee’s members,

You have been supplied, in the 5 weeks since the President announced my nomination, with hundreds of pages about me and thousands of pages I have penned—my writings as a law teacher, mainly about procedure; 10 years of briefs filed when I was a courtroom advocate of the equal stature of men and women before the law; numerous speeches and articles on that same theme; 13 years of opinions—counting the unpublished together with the published opinions, well over 700 of them—all decisions I made as a member of the U.S. Court of Appeals for the District of Columbia Circuit; several comments on the roles of judge and lawyers in our legal system. That body of material, I know, has been examined by the committee with care. It is the most tangible, reliable indicator of my attitude, outlook, approach, and style. I hope you will judge my qualifications principally on that written record, a record spanning 34 years.

U.S. Congress, Senate committee on the Judiciary, *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States*, 103rd Cong., 1st sess., July 20-23, 1993 (Washington: GPO, 1994), p. 52, accessed, (continued...)

their questioning to elicit from her. For, she said, she would be constrained, when responding to Senators' questions, from providing any "previews," "hints," or "forecasts" of how she as a Justice might cast her vote on issues that might come before the Court:

Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.

Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.¹⁴

In her subsequent testimony, Judge Ginsburg sometimes declined to address or discuss in any way an issue raised by a Senator's question, in each instance referring to her earlier proclaimed intention not to provide any "hints or forecasts" on how she might vote on an issue once on the Court. In such a manner, for instance, she foreclosed any discussion of her views on issues raised in the following two questions posed to her by Senator Larry Pressler of South Dakota:

Senator PRESSLER. The ninth circuit, in *Washington Department of Ecology v. U.S. Environmental Protection Agency*, held that States could not regulate the activities of an Indian tribe in operating a solid waste project, only the Federal Government can regulate the operation of such facilities on Indian reservations. Do you have any thoughts on whether an Indian tribe can be made to comply with environmental regulations of a State, whose regulations are more stringent than those of the Federal Government?

Judge GINSBURG. This is a matter that might come before me, if this nomination is confirmed. I would have to decide it in the context of a specific case, and I can't preview or forecast my decision.

Senator PRESSLER. The Indian Gaming Act mandates that the States negotiate in good faith with the tribes in establishing compacts regulating reservation gambling. The statute does not define good faith nor set out much direction for what is required by either party. As you know, Indian gaming has become a controversial issue in many States. What are your views with respect to the ability of Congress to mandate that these two sovereigns negotiate in good faith, without providing significant direction to either?

Judge GINSBURG. The Indian Gaming Act is a new and much litigated law. Cases concerning that legislation may well come before me, so at this time I am not in a position to comment on it.¹⁵

Likewise, Judge Ginsburg invoked her commitment to provide the Judiciary Committee with no "hints or forecasts" when asked the following question by Senator Arlen Specter of Pennsylvania:

(...continued)

on CRS home page, at http://crs.gov/Supreme%20Court%20PDFs/documents/hrg_ginsburg.pdf

¹⁴ Ibid.

¹⁵ Ibid., pp. 236-237.

Senator SPECTER. Judge Ginsburg, you responded to a question by Senator Kennedy quoting your opposition to discrimination against gays, saying that you were against discrimination as to all people. And I don't know to what extent you will comment about this based on the answers you have given so far, but I want to ask the question.

In considering the discrimination in our society to a variety of categories of individuals—disabled, gays, mentally ill—to what extent do you think it appropriate for the Court to use the standard which you articulated as an advocate in favor of women's rights under the equal protection clause, looking to the rights of various groups discriminated against as I have particularized them? Would you think it appropriate for the Court to employ in general terms the boldly dynamic interpretation, radically departing from the original understanding of the 14th amendment, which you wrote about in the *Washington University Law Quarterly* as interpretation as to women's rights?

Judge GINSBURG. I have no comment on that, Senator Specter. I have said that these issues will be coming before the Court. I will not say anything in this legislative chamber that will hint or forecast how I will vote in cases involving those particular classifications.¹⁶

Earlier in the hearing, Judge Ginsburg was asked questions about the issue of a woman's right to have an abortion, a subject on which she had written as a law professor. To an initial question, from Senator Howard Metzenbaum of Ohio, Judge Ginsburg largely confined herself to reciting text from a Supreme Court opinion concerning abortion rights, while also stating it would be inappropriate to comment on the ruling.

Senator METZENBAUM. After the *Casey* decision, some have questioned whether the right to choose is still a fundamental constitutional right. In your view, does the *Casey* decision stand for the proposition that the right to choose is a fundamental constitutional right?

Judge GINSBURG. The Court itself has said after *Casey* (1992)—I don't want to misrepresent the Supreme Court, so I will read its own words. This is the statement of a majority of the Supreme Court, including the dissenters in *Casey*. “The right to abortion is one element of a more general right of privacy ... or of Fourteenth Amendment liberty.” That is the Court's most recent statement. It includes a citation to *Roe v. Wade*. The Court has once again said that abortion is part of the concept of privacy or liberty under the 14th amendment. What regulations will be permitted is certainly a matter likely to be before the Court. Answers depend, in part, Senator, on the kind of record presented to the Court. It would not be appropriate for me to go beyond the Court's recent reaffirmation that abortion is a woman's right guaranteed by the 14th amendment; it is part of the liberty guaranteed by the 14th amendment.¹⁷

Shortly thereafter, however, in response to questions from Senator Hank Brown of Colorado, Judge Ginsburg spoke more directly about her views on abortion rights. She did so, when asked to explain a view she had expressed, in past writings, that the equal protection clause in the Fourteenth Amendment of the Constitution provides support for abortion rights.

Senator BROWN. I can see how the equal protection argument would apply to a policy that interfered with her plan to bear the child. Could that argument be applied for someone who wished to have the option of an abortion as well? Does it apply both to the decision to not have an abortion, as well as the decision to have an abortion, to terminate the pregnancy?

¹⁶ *Ibid.*, pp. 359-360.

¹⁷ *Ibid.*, pp. 149-150.

Judge GINSBURG. ... you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.¹⁸

A few moments later, the dialog with Senator Brown continued as follows:

Judge GINSBURG. I will rest my answer on the *Casey* decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child.

Senator BROWN. So the rights are not equal in this regard, because the interests are not equal?

Judge GINSBURG. It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.¹⁹

During the next day of hearings, Judge Ginsburg was much more circumspect—and unwilling to share her views—regarding the constitutionality of the death penalty. In response to a question from Senator Orrin G. Hatch of Utah, Judge Ginsburg indicated that her reluctance to comment on the issue was based largely on the fact that two death penalty cases were about to come before the Court.

Senator HATCH. Do you believe, as Justices Brennan and Marshall did, that the death penalty under all circumstances, even for whatever you would consider to be the most heinous of crimes, is incompatible with the eighth amendment's prohibition against cruel and unusual punishment?

Judge GINSBURG. Senator Hatch, let me say first that I appreciate your sensitivity to my position and the line that I have tried to draw.

Senator HATCH. Sure.

Judge GINSBURG. Let me try to answer your question this way.

Senator HATCH. All right.

Judge GINSBURG. At least since 1972 and, if you date it from *Furman*, even earlier, the Supreme Court, by large majorities, has rejected the position that the death penalty under any and all circumstances is unconstitutional. I recognize that no judge on the Court currently takes the position that the death penalty is unconstitutional under any and all circumstances. All of the Justices on the Court have rejected that view. Many questions [are] left unresolved. They are coming constantly before the Court. At least two are before the Court next year. I can tell you that I do not have a closed mind on this subject. I don't think it would be consistent with the line I have tried to hold to tell you that I will definitely accept

¹⁸ *Ibid.*, p. 207.

¹⁹ *Ibid.*

or definitely reject any position. I can tell you that I am well aware of the precedent, and I have already expressed my views on the value of precedent.²⁰

At the end of questioning by Senator Hatch, Judge Ginsburg contrasted her firmness in refusing to discuss her views in this instance, with her willingness to speak more frankly the day before about abortion issues.

Judge GINSBURG. Senator Hatch, I have tried to be totally candid with this committee.

Senator HATCH. You have. You have.

Judge GINSBURG. You asked a question. I was asked a lot about abortion yesterday. I can't—

Senator HATCH. You were very forthright in talking about that.

Judge GINSBURG. I have written about it, I have spoken about it as a teacher since the middle seventies. You know that teaching and appellate judging are more alike than any two ways of working at the law.²¹

The Roberts Hearings, 2005

At the 2005 confirmation hearings for John G. Roberts Jr., on his nomination to be Chief Justice, various questions were posed to the nominee concerning past Supreme Court rulings on women's abortion rights or his views on whether statutory limitations on abortion would be constitutional. The nominee, in response, declined to discuss these cases, maintaining they involved issues likely to come before the Court again.

Early in the hearings, for instance, the then-chairman of the Judiciary Committee, Senator Specter, asked the nominee, "But there is no doctrinal basis erosion in *Roe*, is there, Judge Roberts?" The following exchange occurred:

Judge ROBERTS. Well, I feel the need to stay away from a discussion of particular cases. I'm happy to discuss the principles of *stare decisis*, and the Court has developed a series of precedents on precedent, if you will. They have a number of cases talking about how this principle should be applied. And as you emphasized, in *Casey* they focused on settled expectations. They also looked at the workability and the erosion of precedents. The erosion of precedent I think figured more prominently in the Court's discussion in the *Lawrence* case, for example, but it is one of the factors that is looked at on the other side of the balance.

Chairman SPECTER. Well, do you see any erosion of precedent as to *Roe*?

Judge ROBERTS. Again, I think I should stay away from discussions of particular issues that are likely to come before the Court again. And in the area of abortion, there are cases on the Court's docket, of course. It is an issue that does come before the Court. So while I'm

²⁰ Ibid., p. 263.

²¹ Ibid., pp. 264-265.

happy to talk about *stare decisis* and the importance of precedent, I don't think I should get into the application of those principles in a particular area.²²

In a few other instances, Senators in their questions noted Justice Ginsburg's willingness, when she was before the Judiciary Committee, to divulge her views concerning the Constitution and abortion. In one instance, a Senator asked Judge Roberts why he was not willing to do the same. The questioning in the first of these instances, by Senator Dianne Feinstein of California, and the nominee's responses distinguishing his situation from Justice Ginsburg's at her hearing, proceeded as follows:

Senator FEINSTEIN. Thank you. One other reading from Justice Ginsburg's testimony. "Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men. That was the idea I tried to express in the lecture to which you referred. The two strands, equality and autonomy, both figure in the full portrayal." Do you agree or disagree?

Judge ROBERTS. Well, I think Justice—then Judge Ginsburg felt at greater liberty to discuss that precisely for the reason you noted, that she'd given a lecture on the subject. Those are issues that come up again and again before the Court. Consistent with what I understand the approach to have been of other nominees, I don't think I should express a view on that.²³

A subsequent instance in which Justice Ginsburg was mentioned came during the following questioning of the nominee by Senator Joseph R. Biden Jr. of Delaware:

Senator BIDEN. Now, I assumed you would answer it that way. Let me suggest to you also that I asked—I asked Justice—or I am not sure whether I asked or one of our colleagues asked Justice Ginsburg the question of whether or not it would be a ball or a strike if in fact a State passed a law prohibiting abortion. And she said that's a foul ball. They can't do that. And let me quote her. She said, quote: "Abortion prohibition by the State controls women and denies them full autonomy and full equality with men." It would be unconstitutional. What is your view, according to the Ginsburg rule?

Judge ROBERTS. Well, that is in an area where I think I should not respond.

Senator BIDEN. Why?

Judge ROBERTS. Because—

²² U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of John G. Roberts Jr. To Be Chief Justice of the United States*, 109th Cong., 1st sess., September 12-15, 2005 (Washington: GPO, 2005), p. 142, accessed on CRS home page, at <http://crs.gov/Supreme%20Court%20PDFs/documents/robertsnomation.pdf>.

²³ *Ibid.*, p. 224. Shortly thereafter, Senator Feinstein, continuing her line of questioning, asked Judge Roberts, "But do you believe then that the Federal Court should become involved in end-of-life decisions?" The nominee replied:

Well, Senator, that is exactly one of the questions that's before the Court, and I can't answer that in the abstract. I have to answer that on the basis of the parties' arguments, on the basis of the record in the case, on the basis of the precedents. An abstract opinion that would prejudice that case would be inappropriate for a nominee to express.

Ibid., p. 228.

Senator BIDEN. You said you would abide by the Ginsburg rule.

Judge ROBERTS. Then-Judge Ginsburg and now Justice Ginsburg explained that she thought she was at greater liberty to discuss her writings. She'd written extensively on that area and I think that's why she felt at greater liberty to talk about those cases. In other areas, where she had not written, her response was that it was inappropriate to comment. In particular, I remember her response in the *Mayer* and the *Harris* cases. She said those are the Court's precedents; I have no agenda to overrule them, and I will leave it at that. And I think that's important to adhere to that. Let me explain very briefly why. It's because if these questions come before me, either on the court on which I now sit or, if I am confirmed, on the Supreme Court, I need to decide those questions with an open mind on the basis of the arguments presented, on the basis of the record presented in the case, and on the basis of the rule of law, including the precedents of the Court, and not on the basis of any commitments during the confirmation process. The litigants have a right to expect that of the judges or Justices before whom they appear.²⁴

The Alito Hearings, 2006

At the 2006 confirmation hearings for Supreme Court nominee Samuel A. Alito, various questions posed to the nominee sought out his views on current legal or constitutional issues. Such questions, among other things, asked if he agreed with particular Supreme Court rulings, continued to subscribe to views expressed in past writings which were critical of certain Court decisions, or considered certain rulings of the Court "settled law." The nominee typically declined to comment on these cases. However, at the outset of some responses, he did not state why he could not address the questions raised, but instead began by discussing the legal or constitutional framework for the issues and then the kind of information he would need or factors he would have to consider, before being able to arrive at a conclusion.²⁵ He sometimes offered another reason not to comment on an issue (much the same as that offered by nominees Ginsburg and Roberts), namely that the issue was in litigation or could reach the Court in a future case.

Judge Alito, for instance, responded with a detailed framing of the issue in the following question and answer with the then-ranking member of the Judiciary Committee, Senator Patrick J. Leahy of Vermont.

Senator LEAHY. Do you believe the President can circumvent the FISA law, and bypass the FISA court to conduct warrantless spying on Americans?

Judge ALITO. The President has to comply with the Fourth Amendment and the President has to comply with the statutes that are passed. This is an issue I was speaking about with Chairman Specter that I think is very likely to result in litigation in the Federal courts. It could be in my court. It certainly could get to the Supreme Court and there may be statutory issues involved—the meaning of the provision of FISA that you mentioned, the meaning certainly of the authorization for the use of military force—and those would have to be resolved. And in order to resolve them, I would have to know the arguments that are made

²⁴ *Ibid.*, pp. 186-187.

²⁵ One news report on the Alito confirmation hearings observed noted, "Unlike the testimony of John G. Roberts Jr. , who had often declined to answer questions on various grounds, among them that certain issues might come before him as chief justice or that his older writings did not necessarily reflect his current views, Judge Alito's default impulse frequently seemed to be to try to give a direct response." Adam Liptak and Adam Nagourney, "Judge Alito the Witness Proves a Powerful Match for Senate Questioners," *The New York Times*, January 11, 2006, p. 27.

by the contending parties. On what basis is it claimed that there is a violation? On what basis would the President claim that what occurred fell within the authorization of the authorization for the use of military force? And then if you got beyond that, there could be constitutional questions about the Fourth Amendment, whether it was a violation of the Fourth Amendment, whether it was the valid exercise of Executive power.²⁶

To a question from Senator Russell D. Feingold of Wisconsin, Judge Alito again framed in detail the issues that he believed were raised. He then signaled, however, that he would not state his views on those issues, which he said might “well result in litigation.”

Senator FEINGOLD. Then let us take a more concrete example. Does the President, in your opinion, have the authority, acting as Commander in Chief, to authorize warrantless searches of Americans’ homes and wiretaps of their conversations in violation of the criminal and Foreign Intelligence Surveillance statutes of this country?

Judge ALITO. That’s the issue that’s been framed by the developments that have been in the news over the past few weeks, and as I understand the situation, it can involve statutory questions, the interpretation of FISA, and the provision of FISA that says that no wiretapping may be done except as authorized by FISA or otherwise authorized by law, and the meaning of the authorization for the use of military force, and then constitutional questions. And those would be—those are issues, as I said this morning, that may well result in litigation. They could come before me on the Court of Appeals for the Third Circuit. They certainly could come before the Supreme Court. And before—those are weighty issues involving two of the most important considerations that can arise in constitutional law, the protection of a country and the protection of people’s fundamental rights, and I would have to know the specifics and the arguments that were made.²⁷

Later, Senator Charles E. Schumer of New York asked Judge Alito if he still subscribed to a controversial view that he had expressed more than 20 years earlier. Judge Alito explained that he no longer did. He then framed certain fundamental steps he would have to take in addressing the issue if it came before him as a judge.

Senator SCHUMER. Judge Alito, in 1985 you wrote that the Constitution—these are your words—does not protect a right to an abortion. And you said to Senator Specter ... that those words accurately reflected your view at the time. Now let me ask you, do they accurately reflect your view today? Do you stand by that statement? Do you disavow it? Do you embrace it? It is OK if you distance yourself from it and it is fine if you embrace it. We just want to know your view.

Judge ALITO. Senator, it was an accurate statement of my views at the time. That was in 1985, and I made it from my vantage point as an attorney in the Solicitor General’s Office, but it was an expression of what I thought at that time. If the issue were to come before me as a judge, if I am confirmed and if this issue were to come up, the first question that would have to be addressed is the question of *stare decisis*, which I have discussed earlier, and it’s a very important doctrine and that was the starting point and the ending point of the joint opinion in *Casey*. And then if I were to get beyond that, if a court were to get beyond the

²⁶ U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Samuel A. Alito Jr. To Be an Associate Justice of the Supreme Court of the United States*, 109th Cong., 2nd sess., January 9-13, 2006 (Washington: GPO, 2006), p. 329, accessed on CRS home page, at <http://www.access.gpo.gov/congress/senate/pdf/109hr/25429.pdf>.

²⁷ *Ibid.*, p. 412.

issue of *stare decisis*, then I would have to go through the whole judicial decision-making process before reaching a conclusion.²⁸

Shortly thereafter, Senator Schumer asked Judge Alito why he was unwilling to share his views concerning abortion rights under the Constitution as forthrightly as he was to answer a question about free speech under the First Amendment.

Senator SCHUMER. Does the Constitution protect the right to free speech?

Judge ALITO. Certainly, it does. That is in the First Amendment.

Senator SCHUMER. So why can't you answer the question of does the Constitution protect the right to an abortion the same way, without talking about *stare decisis*, without talking about cases, et cetera?

Judge ALITO. Because answering the question of whether the Constitution provides a right to free speech is simply responding to whether there is language in the First Amendment that says that the freedom of speech and freedom of the press can't be abridged. Asking about the issue of abortion has to do with the interpretation of certain provisions of the Constitution.²⁹

The possibility of an issue coming before the Supreme Court was cited again by Judge Alito in declining, in response to a question from Senator Richard J. Durbin of Illinois, to discuss his views about the issue. "Why," Senator Durbin asked, can you say unequivocally that you find constitutional support for *Griswold*, unequivocally you find constitutional support for *Brown*, but cannot bring yourself to say that you find constitutional support for a woman's right to choose?"

Judge Alito prefaced his reply to Senator Durbin with short narratives summarizing the historical context and constitutional bases for the Supreme Court rulings in *Griswold* and *Brown v. Board of Education*. He then distinguished *Griswold* (and presumably, if asked, would also have distinguished *Brown*) from the abortion rights issues addressed in *Roe v. Wade*:

Griswold concerned the marital right to privacy, and when the decision was handed down, it was written by Justice Douglas, and he based that on his theories of—his theory of emanations and penumbras from various constitutional provisions, the Ninth Amendment and the Fourth Amendment, and a variety of others, but it has been understood in later cases as based on the Due Process Clause of the 14th Amendment, which says that no person shall be denied due process—shall be denied liberty without due process of law. And that's my understanding of it. And the issue that was involved in *Griswold*, the possession of contraceptives by married people, is not an issue that is likely to come before the courts again. It's not likely to come before the Third Circuit, it's not likely to come before the Supreme Court, so I feel an ability to comment, a greater ability to comment on that than I do on an issue that is involved in litigation.

Senator DURBIN. But let me just ask you this. John Roberts said that *Roe v. Wade* is the settled law of the land. Do you believe it is the settled law of the land?

Judge ALITO. *Roe v. Wade* is an important precedent of the Supreme Court. It was decided in 1973, so it has been on the books for a long time. It has been challenged on a number of occasions, and I discussed those yesterday, and the Supreme Court has reaffirmed the

²⁸ Ibid., p. 432.

²⁹ Ibid., p. 434.

decision, sometimes on the merits, sometimes in *Casey* based on *stare decisis*, and I think that when a decision is challenged and it is reaffirmed that strengthens its value as *stare decisis* for at least two reasons. First of all, the more often a decision is reaffirmed, the more people tend to rely on it, and second, I think *stare decisis* reflects the view that there is wisdom embedded in decisions that have been made by prior Justices who take the same oath and are scholars and are conscientious, and when they examine a question and they reach a conclusion, I think that's entitled to considerable respect, and of course, the more times that happens, the more respect the decision is entitled to, and that's my view of that. So it is a very important precedent that—

Senator DURBIN. Is it the settled law of the land?

Judge ALITO. It is a—if settled means that it can't be re-examined, then that's one thing. If settled means that it is a precedent that is entitled to respect as *stare decisis*, and all of the factors that I've mentioned come into play, including the reaffirmation and all of that, then it is a precedent that is protected, entitled to respect under the doctrine of *stare decisis* in that way.

Senator DURBIN. How do you see it?

Judge ALITO. I have explained, Senator, as best I can how I see it. It is a precedent that has now been on the books for several decades. It has been challenged. It has been reaffirmed, but it is an issue that is involved in litigation now at all levels. There is an abortion case before the Supreme Court this term. There are abortion cases in the lower courts. I've sat on three of them on the Court of Appeals for the Third Circuit. I'm sure there are others in other courts of appeals, or working their way toward the courts of appeals right now, so it's an issue that is involved in a considerable amount of litigation that is going on.³⁰

The Sotomayor Hearings, 2009

At the 2009 confirmation hearings for Supreme Court nominee Sonia Sotomayor, Senators in some instances directly asked her for her views on current legal or constitutional controversies. More of the questions, however, appeared to ask the nominee about opinions she had written or concurred with as a U.S. appellate court judge or to explain some of the more controversial remarks she had made over the years in published articles, speeches, or seminars. Like those of the previous Supreme Court nominee, Samuel A. Alito Jr., the responses of Judge Sotomayor about legal or constitutional issues typically did not, at the outset, decline to address the issues raised. Instead, her responses usually discussed relevant Court precedents, without, however, offering her personal views on the issues involved. Sometimes her replies also emphasized her need, before being able to form an opinion about a case, to see the legal briefs and hear the oral arguments that litigants in the case would present to the Court, as well as her personal commitment to “apply the law” to each case impartially and with an open mind.³¹

³⁰ Ibid., pp. 454-455.

³¹ One news analysis described Judge Sotomayor, at her confirmation hearings, as having “expressed little of her thought process about interpreting the Constitution and statutes, and avoided saying what she really thought about the most pressing issues likely to come before the Supreme Court. Instead, she parried questions by describing precedents while declining to weigh in on unsettled legal questions, by saying she had to keep an open mind about potential future cases, and by almost mechanically reciting basic propositions with a controlled and deliberate delivery.” Charles Savage, “A Nominee on Display, but Not Her Views,” *The New York Times*, July 17, 2009, p. A11.

In the following instance, for example, Judge Sotomayor declined, when invited to do so by Senator Chuck Grassley of Iowa, to comment on a recent controversial Supreme Court decision. She acknowledged that the ruling was controversial (as she noted it had prompted negative reactions in various state legislatures), but also said it was a precedent, on which she could not comment and which she indicated she would be in a position to evaluate only if the Court revisited the issue.

Senator GRASSLEY. Do you believe that the Supreme Court overstepped their constitutional authorities when they went beyond the words of the Constitution, in other words, to the word purpose, and thus expanded the ability of government to take an individual's private property? Because I think everybody believes that *Kelo* was an expansion of previous precedent there.

Judge SOTOMAYOR. I know that there are many litigants who have expressed that view. And, in fact, there have been many state legislators that have passed state legislation not permitting state governments to take in the situation that the Supreme Court approved of in *Kelo*. The question of whether the Supreme Court overstepped the Constitution, as I've indicated, the Court, at least my understanding of the majority's opinion, believed and explained why it thought not.

I have to accept because it is precedent that as precedent. And so, I can't comment further than to say that I understand the questions and I understand what state legislatures have done and would have to await another situation, or the Court would, to apply the holding in that case.³²

The next day, again in response to a question from Senator Grassley, Judge Sotomayor cited judicial ethics rules as preventing her from commenting on an issue that could come before the Court.

Senator GRASSLEY. Do you agree with federal courts, which have held that the Defense of Marriage Act does not violate the full faith and credit clause and is an appropriate exercise of Congress's power to regulate conflicts between laws of different states?

Judge SOTOMAYOR. ... the ABA rules would not permit me to comment on the merits of a case that's pending or impending before the Supreme Court. The Supreme Court has not addressed the constitutionality of that statute. And to the extent that lower courts have addressed it and made holdings, it is an impending case that could come before the Supreme Court, so I can't comment on the merits of that case.³³

At recent Supreme Court hearings, Senators sometimes have asked nominees whether they believed a particular Supreme Court ruling was "settled law" (with the basic holding in the ruling likely never to be reconsidered by the Court). In response to such an inquiry from Senator Herb Kohl of Wisconsin, Judge Sotomayor noted that the ruling in question had been reaffirmed by the Court in a later ruling, which she said, without further comment, was the Court's "settled interpretation of what the core holding is."

³² "Senate Judiciary Committee Holds Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court," *CQ Congressional Transcripts*, July 14, 2009, at <http://www.CQ.com>. (no page numbering supplied). (Hereafter cited as July 14, 2009 Sotomayor Transcripts.)

³³ "Senate Judiciary Committee Holds Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court," *CQ Congressional Transcripts*, July 15, 2009, at <http://www.CQ.com>, (no page numbering supplied).

Senator KOHL: All right. Judge, the court's ruling about the right to privacy in *Griswold* laid the foundation for *Roe v. Wade*. In your opinion, is *Roe* settled law?

Judge SOTOMAYOR: The court's decision in *Planned Parenthood v. Casey* reaffirmed the court holding of *Roe*. That is the precedent of the court and settled, in terms of the holding of the court.

Senator KOHL: Do you agree with Justices Souter, O'Connor, and Kennedy in their opinion in *Casey*, which reaffirmed the core holding in *Roe*?

Judge SOTOMAYOR: As I said, I—*Casey* reaffirmed the holding in *Roe*. That is the Supreme Court's settled interpretation of what the core holding is and its reaffirmance of it.³⁴

Another possible means of ascertaining a nominee's views on legal and constitutional issues are questions asking which particular jurists or legal scholars the nominee most admires. Judge Sotomayor declined to respond to the following question of this nature from Senator Kohl:

Senator KOHL: Judge, which current one or two Supreme Court justices do you most identify with and which ones might we expect you to be agreeing with most of the time in the event that you are confirmed?

Judge SOTOMAYOR: Senator, to suggest that I admire one of the sitting Supreme Court justices would suggest that I think of myself as a clone of one of the justices. I don't.

Each one of them bring integrity, their sense of respect for the law, and their sense of their best efforts and hard work to come to the decisions they think the law requires.

Going further than that would put me in the position of suggesting that by picking one justice, I was disagreeing or criticizing another. And I don't wish to do that. I wish to describe just myself.

I'm a judge who believes that the facts drive the law and the conclusion that the law will apply to that case. And when I say "drives the law," I mean determines how the law will apply in that individual case.³⁵

In some instances during the Sotomayor hearings, a line of questioning started with an inquiry about the soundness of a particular judicial decision rendered by the nominee, followed by questions into the nominee's views about current issues related to that decision. This, for instance, was the thrust of the following series of questions by Senator Hatch concerning the Second Amendment. In reply, the nominee explained her decision, but declined to comment on the current issue.

Senator HATCH. Now, in the 2004 case entitled *United States v. Sanchez Villar*, you handled the Second Amendment issue in a short footnote. You cited the second circuit's decision in *United States v. Toner* for the proposition that the right to possess a gun is not a fundamental right.

Toner, in turn, relied on the Supreme Court's decision in *United States v. Miller*. Last year, in *District of Columbia v. Heller*, the Supreme Court examined *Miller* and concluded that,

³⁴ July 14, 2009, Sotomayor Transcripts.

³⁵ *Ibid.*

quote, “The case did not even purport to be a thorough examination of the Second Amendment,” unquote, and that *Miller* provided, quote, “no explanation of the content of the right,” unquote.

You're familiar with that.

Judge SOTOMAYOR. I am, sir.

Senator HATCH: OK. So let me ask you, doesn't the Supreme Court's treatment of *Miller* at least cast doubts on whether relying on *Miller*, as the second circuit has done, for this proposition is proper?

Judge SOTOMAYOR. The issue...

Senator HATCH. Remember, I'm saying at least cast doubts.

Judge SOTOMAYOR. Well, that is what I believe Justice Scalia implied in his footnote 23, but he acknowledged that the issue of whether the right, as understood in Supreme Court jurisprudence, was fundamental.

It's not that I considered it un-fundamental, but that the Supreme Court didn't consider it fundamental so as to be incorporated against the state.

Senator HATCH. Well, it didn't decide that point.

Judge SOTOMAYOR. Well, it not only didn't decide it, but I understood Justice Scalia to be recognizing that the court's precedent had held it was not.

His opinion with respect to the application of the Second Amendment to government regulation was a different inquiry and a different inquiry as to the meaning of *U.S. v. Miller* with respect to that issue.

Senator HATCH. Well, if *Heller* had already been decided, would you have addressed that issue differently than *Heller* or would you take the position that it—that the doctrine of incorporation is inevitable with regard to state—state issues?

Judge SOTOMAYOR. That's the very question that the Supreme Court is more than likely to be...

Senator HATCH. To decide.

Judge SOTOMAYOR. ... considering. There are three cases addressing this issue, at least, I should say, three cases...

Senator HATCH. Right.

Judge SOTOMAYOR. ... addressing this issue in the circuit courts. And so it's not a question that I can address. As I said, I bring an open mind to every case.³⁶

³⁶ Ibid.

Elena Kagan's Position on Questioning Supreme Court Nominees

Comments Expressed in 1995 Law Review Article

In 1995, while a University of Chicago law professor, Elena Kagan wrote a book review that in large part was an essay critical of the manner in which the Senate Judiciary Committee questioned Supreme Court nominees at their confirmation hearings.³⁷ Her essay reviewed, and took general issue with themes in, a book by Yale law professor Stephen L. Carter entitled *The Confirmation Mess*.³⁸ Carter's book was, among other things, highly critical of the 1987 confirmation hearings for Supreme Court nominee Robert H. Bork, especially of Senators' questions at the hearings that sought to elicit the nominee's views on controversial issues and how he might vote on controversial cases if confirmed.

Summarized Themes of Carter's Book

According to *The Confirmation Mess*, Ms. Kagan wrote, examination of a nominee's views on constitutional issues "gives the public too great a chance to influence how the judiciary will decide these issues, precisely by enabling the public to reject a nominee on grounds of substance."³⁹ Such an inquiry, noted Kagan in further summarizing Carter's arguments, "undermines the eventual Justice's ability (and the public's belief in the Justice's ability) to decide cases impartially, based on the facts at issue and the argument presented, rather than on the Justice's prior views or commitments." Carter, she also wrote, "advocates a return to confirmation proceedings that focus on a nominee's technical qualifications—in other words, his legal aptitude, skills, and experience." As for the possible nominee, "otherwise qualified, who wished to overturn a case like *Brown v. Board*," she noted, "Carter urges, as a safeguard against extremism of this kind, an inquiry into whether a nominee subscribes to the 'firm moral consensus' of society."⁴⁰

Praised the Bork Hearings, Criticized Others That Followed

Ms. Kagan, however, disagreed with Carter's view that that the Judiciary Committee's questioning of Robert Bork was too probing. Further, she was critical of subsequent Supreme Court confirmation hearings for generally failing, through committee questioning, to elicit a nominee's views on constitutional issues. The Bork hearings, she wrote approvingly,

... presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction. Subsequent hearings have presented to the public a vapid and hollow charade, in which repetition of platitudes has replace discussion of viewpoints and personal anecdotes have

³⁷ Kagan, "Confirmation Messes."

³⁸ Stephen L. Carter, *The Confirmation Mess* (New York: Basic Books, 1994), 252 pp.

³⁹ Kagan, "Confirmation Messes," p. 922.

⁴⁰ *Ibid.*

supplanted legal analysis. Such hearings serve little educative functions, except perhaps to reinforce lessons of cynicism that citizens often glean from government. Neither can such hearings contribute toward an evaluation of the Court and in a determination whether the nominee would make it a better or worse institution.⁴¹

Said Concern Should Be with How Nominee Would Influence Court

Ms. Kagan said that that what “must guide” a decision on whether to confirm a person to be a Justice is a Senator’s “vision of the Court and an understanding of the way a nominee would influence its behavior.” This vision, she continued, “largely consists of a view as to the kinds of decisions the Court should issue. The critical inquiry as to any individual similarly concerns the votes she would cast, the perspective she would add (or argument), and the direction in which she would move the institution.”⁴²

Advocated Exploration of Nominee’s ‘Substantive Views’

The Senate’s confirmation hearings, Ms. Kagan wrote,

... ought to focus on substantive issues; the Senate ought to view the hearings an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct.... Open exploration of the nominee’s substantive views, that is, enables senators and their constituents to engage in a focused discussion of constitutional values to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires.

The kind of inquiry that would contribute most to understanding and evaluating a nominee is the kind Carter would forbid: discussion first, of the nominee’s broad judicial philosophy and, second, of her views on particular constitutional issues. By ‘judicial philosophy’ ... , I mean such things as the judge’s understanding of the role of courts in our society, of the nature of and values embodied in our Constitution, and of the proper tools and techniques of interpretation, both constitutional and statutory.⁴³

A second aspect of her preferred approach to inquiry, Kagan continued, would be “the insistence on seeing how theory works in practice by evoking a nominee’s comments on particular issues— involving privacy rights, free speech, race and gender discrimination, and so forth—that the Court regularly faces.”⁴⁴

Said Nominees with Little Publication Record Would No Longer Have Advantage

“If questioning on substantive positions ever were to become the norm,” Ms. Kagan wrote, “the nominees lacking a publication record would have no automatic advantage over a highly prolific

⁴¹ Ibid., p. 941.

⁴² Ibid., p. 934.

⁴³ Ibid., p. 935.

⁴⁴ Ibid., p. 936.

author. The success of a nomination in each case would depend on the nominee's views, whether or not previously expressed in a law review or federal reporter."⁴⁵

Made Distinction Between Expressing Views on Issues and Making Commitments

Ms. Kagan emphasized she did “not mean to argue here that the President and the Senate may ask, and a nominee (or potential nominee) must answer, any question whatsoever.” Some kinds of questions, she said, “do pose a threat to the integrity of the judiciary”—for example, if a Senator “asked a nominee to commit herself to voting a certain way on a case that the court had accepted for argument. We would object ... to this question, on the ground that any commitment of this kind, even though unenforceable, would place pressure on the judge (independent of the merits of the case) to rule in a certain manner.”⁴⁶ She then distinguished a commitment of this sort from a nominee's expressing a viewpoint:

There is a difference between a prohibition on making a commitment (whether explicitly or implicitly) and a prohibition on stating a current view as to a disputed legal question. The most recent drafters of the Model Code of Judicial Conduct acknowledged just this distinction when they adopted the former prohibition in place of the latter for candidates for judicial office. Of course, there will be hard cases—cases in which reasonable people may disagree as to whether a nominee's statement of opinion manifests a settled intent to decide in a particular manner a particular case likely to come before the court. But many cases precede the hard ones: a nominee can say a great, great deal before making a statement that, under this standard, nears the improper. A nominee, as I have indicated before, usually can comment on judicial methodology, on prior caselaw, on hypothetical cases, on general issues like affirmative action or abortion. To make this more concrete, a nominee can do ... well, what Robert Bork did.⁴⁷

Statements Made in 2009 as Solicitor General Nominee

In February 2009, Kagan testified before the Senate Judiciary Committee on her nomination to be Solicitor General of the United States.⁴⁸ At the hearing, a committee member, Senator Hatch, referred to Ms. Kagan's 1995 article that reviewed Stephen Carter's book, *The Confirmation Mess*. Addressing Ms. Kagan, Senator Hatch stated, “you wrote that the Senate should ask judicial nominees about their views on constitutional issues, the direction they would take the Court, and even about votes that they would cast.” How, he then asked, “do you square this with the principle that judges must be impartial and with the oath that they take to provide justice without respect to persons?”⁴⁹ The nominee replied, “I am not sure that sitting here today I would agree with that statement.” She added:

⁴⁵ Ibid., p. 937.

⁴⁶ Ibid., p. 939.

⁴⁷ Ibid., p. 939-940.

⁴⁸ See U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee To Be Associate Attorney General of the United States and Elena Kagan Nominee To Be Solicitor General of the United States*, 111th Cong., 1st sess., February 10, 2009 (Washington: GPO, 2009), 295 pp.

⁴⁹ Ibid., p. 118.

I wrote that when I was in the position of sitting where the staff is now sitting and feeling a little bit frustrated that I really was not understanding completely what the judicial nominee in front of me meant and what she thought. But I think that you are exactly right, of course, that there are other—that this has to be a balance. The Senate has to get the information that it needs, but as well, the nominee for any particular position, whether it is judicial or otherwise, has to be protective of certain kinds of interests. And you named the countervailing ones.⁵⁰

After the hearings, Senator Specter provided Ms. Kagan with some 50 written questions. In an introduction to his questions, Senator Specter recalled Ms. Kagan's reply to Senator Hatch, at the confirmation hearings, when the latter asked the nominee about her past writing in which she had favored a Senate inquiry into a Supreme Court nominee's views on particular constitutional issues. Senator Specter noted that, in reply to Senator Hatch, she stated that although she was "not sure that, sitting here today, I would agree with" her earlier statement, she had agreed that there "has to be a balance" and that the "Senate has to get the information that it needs ... [from] the nominee, for any particular position—whether it's judicial or otherwise."⁵¹ In light of that acknowledgement, Senator Specter said, he requested Ms. Kagan's views on the constitutional issues he had provided her.

To Senator Specter's introductory note, Ms. Kagan wrote, at the start of her responses to the Senator's questions, "I appreciate this comment and stand by what I said at my hearing. I would note only that the information the Senate needs is related to the position that the nominee hopes to perform."⁵² Subsequently, the nominee, in response to some of the written questions, demurred when asked for her views on certain issues. For instance, to questions asking if she supported the death penalty, or if she believed that penalty is constitutional, Ms. Kagan stated she had "refrained from providing my personal opinions (except where I previously have disclosed them), both because these opinions will play no part in my official decisions and because such statement of opinion might be used to undermine the interests of the United States in litigation."⁵³

Similarly, in response to a question asking whether she agreed with a particular Supreme Court decision involving the death penalty, she replied "I do not think it comports with the responsibilities and role of the Solicitor General for me to say whether I view particular decisions as wrongly decided or whether I agree with criticisms of those decision."⁵⁴ Likewise, she expressly declined to state her views in response to four additional questions, each asking if she thought that a particular Supreme Court decision had been correctly decided. She explained:

For questions 10 through 13, my answer is the same. As noted earlier, the Solicitor General owes important responsibilities to the Court, one of which is respect for its precedents and for the general principle of *stare decisis*. I do not think it would comport with this responsibility to state my own views of whether particular Supreme court decision were rightly decided. All of these cases are now settled law, and as such, are entitled to my respect as the nominee for Solicitor General. In that position, I would not frequently or lightly ask

⁵⁰ Ibid.

⁵¹ Ibid., p. 165.

⁵² "So, for example," she added, "information that is relevant to one executive branch position may not be relevant to another, and information that is relevant to a judicial position may not be relevant to either (or vice versa)." Ibid.

⁵³ Ibid.

⁵⁴ Ibid., p. 166.

the Court to reverse one of its precedents, and I certainly would not do so because I thought the case wrongly decided.⁵⁵

Ms. Kagan's responses prompted a follow-up letter from Senator Specter, in which he expressed "dissatisfaction with many of the answers you provided to the Committee in response to my written questions." Senator Specter commented in his letter that Ms. Kagan, in her book review of *The Confirmation Mess*, had made "a compelling case for senatorial inquiry into a nominee's judicial philosophy and her views on specific issues." She further had asserted, Senator Specter continued, that the Senate's inquiry into the views of executive nominees, as compared with Supreme Court nominees, should be even more thorough. He quoted Ms. Kagan, from the article, as stating that "the Senate ought to inquire into the views and policies of nominees to the executive branch, for whom 'independence' is no virtue." Senator Specter said that he agreed with "the foregoing assessment, and, therefore am puzzled by your responses, which do not provide clear answers concerning important constitutional and legal issues."⁵⁶

Ms. Kagan, in turn, sent to Senator Specter a letter of response, in which she expressed regret that the Senator believed some of her answers to be inadequate. She stated "how much I respect the Senate and its institutional role in the nominations process." Senators, she said, as members "of a co-equal branch of government charged with the 'advice and consent' function ... have a right and, indeed, a duty to seek necessary information about how a nominee will perform in her office. By the same token," she continued, "each nominee has a responsibility to address senatorial inquiries as fully and candidly as possible."⁵⁷

With that said, however, Ms. Kagan asserted that

... some questions—and these will be different for different positions—cannot be answered consistently with the responsible performance of the job the nominee hopes to undertake. For that reason, some balance is appropriate, as I remarked to Senator Hatch at my nomination hearing and as you quoted approvingly in the introduction to your written questions.⁵⁸

Ms. Kagan continued that she had "endeavored to strike that proper balance" in responding to the written questions from Senator Specter and from other Senators. She maintained she had answered in full every question relating to the Solicitor General's role and responsibilities, including how she would approach specific statutes and areas of law:

I also answered in detail every question relating to my own professional career, including my relatively extensive writings and speeches. Finally, I answered many questions relating to general legal issues. In short, I did my best to provide you and the rest of the Committee with a good sense of who I am and of how I would approach the role of Solicitor General. The only matters I did not address substantively were my personal views (if any) regarding specific Supreme Court cases and constitutional doctrines. These personal views would play no role in my performance of the job, which is to represent the interests of the United States; and expressing them (whether as a nominee or, if I am confirmed, as Solicitor General) might undermine my and the Office's effectiveness in a variety of ways.⁵⁹

⁵⁵ *Ibid.*, p. 171.

⁵⁶ *Ibid.*, p. 177.

⁵⁷ *Ibid.*, p. 179.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Observations on Whether Kagan Will, or Should, Express Views on Current Issues at Her Own Supreme Court Confirmation Hearing

President Barack Obama's announcement on May 10, 2010, that he had selected Solicitor Elena Kagan as his nominee to succeed retiring Justice John Paul Stevens almost immediately raised the question of how responsive she would, or should, be to questions posed to her at her confirmation hearings before the Senate Judiciary Committee. Upon learning of Ms. Kagan's selection, a member of the Judiciary Committee, Senator Kohl, issued the following statement:

In light of her critique of Supreme Court confirmation hearings as often times a "vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis," we certainly do hope that she will provide us with substantive and meaningful insight into the kind of Supreme Court Justice she would be.⁶⁰

For its part, however, the Obama Administration immediately projected a different picture of how Elena Kagan now viewed the dynamics of a Supreme Court confirmation hearing. A news blog, on the day of the Kagan selection announcement, reported that an Administration official had told reporters that Ms. Kagan no longer held the opinion, as she had written in 1995, that the confirmation process had become a "charade" because nominees were not answering direct questions. Of Ms. Kagan's earlier-held opinion, the report quoted Ronald A. Klain, chief of staff to the Vice President, as telling reporters the following:

She was asked about it and said that both the passage of time and her perspective as a nominee had given her a new appreciation and respect for the difficulty of being a nominee, and the need to answer questions carefully.

You will see before the committee that she walks that line in a very appropriate way. She will be forthcoming with the committee. It will be a robust and engaging conversation about the law, but she will obviously also respect the conventions about how far a nominee should or shouldn't go in answering about specific legal questions.⁶¹

As to whether Ms. Kagan should be responsive to hearings questions concerning her views on controversial questions, Senators have expressed different opinions. One member of the Judiciary Committee, Senator Specter, has already informed Ms. Kagan, in a letter, of his intention to ask her at the hearings about certain court opinions and whether she agrees with them.⁶² Another

⁶⁰ "Statement of U.S. Senator Herb Kohl on the Nomination of Solicitor General Elena Kagan to the Supreme Court," News Release, May 10, 2010, accessed at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=3680

⁶¹ John Ward, "Elena Kagan No Longer Thinks Supreme Court Nominees Should Have to Answer Direct Questions," *The Daily Caller*, May 10, 2010, accessed at <http://dailycaller.com>.

⁶² Senator Specter's letter, a news release stated, addressed "several important cases in the federal courts that Senator Specter previously discussed with Solicitor General Kagan." Questions posed to her in the letter included "whether you agree with Justice Ginsburg's dissenting opinion in *Garamendi* (joined by Justices Stevens, Scalia and Thomas) that an Executive-branch foreign policy not formalized in a treaty or an executive agreement cannot preempt state law; what considerations you would bring to bear in deciding whether to vote to grant certiorari in this case, if confirmed ... [and] whether you would have voted to grant certiorari in the 9/11 Litigation had you been sitting on the Court "Specter Outlines Questions for Elena Kagan," News Release, May 26, 2010, accessed at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=d577394f-93d3-f06e-1ab8-b33b56f70a6c&Region_id=&Issue_id=

Senator, not on the committee, Senator John Thune, of South Dakota, reportedly has said, “Given that Ms. Kagan does not have a judicial record, it will be especially important for Senators to inquire as to her views on the Constitution and the role of the Court.”⁶³ A similar view was also reportedly expressed by another Senator, who is on the Judiciary Committee, Senator John Cornyn of Texas. He has said that Ms. Kagan “failed to answer many questions posed by Senators prior to her confirmation as Solicitor General. This failure led many Members to oppose her nomination. I hope that she will now more willingly respond to reasonable and relevant questions.”⁶⁴

A different opinion, more supportive of Ms. Kagan taking a guarded approach in responding to committee questions, has reportedly been expressed by another committee member, Senator Dianne Feinstein of California. A news story reported that, during Ms. Kagan’s private visit in the Senator’s office, the Senator said she raised Ms. Kagan’s criticisms of the testimony of previous Supreme Court nominees. “What I said is,” the story quoted the Senator, “I trust you are going to be a paragon of exactly the opposite of what you wrote about.”⁶⁵ Similarly, Justice John Paul Stevens, whom Ms. Kagan has been nominated to succeed, has reportedly expressed the opinion that Supreme Court nominees, at confirmation hearings, should keep their personal opinions about controversial issues to themselves as much as possible. While speaking at a recent judicial conference, Justice Stevens, it was reported, said, “It’s quite unfortunate to be trying to pin down judges on particular issues. What they’ve said in published opinions is one thing, but speculating about issues is another.”⁶⁶

Apart from, in all likelihood, facing questions about controversial legal and controversial issues, Ms. Kagan, Senators have indicated, probably can also expect questions at her confirmation hearings about her 1995 essay itself—specifically about its criticisms of how Senators question Supreme Court nominees and, in turn, how nominees respond to those questions. “I talked to her about that essay,” a news account has reported Senator Leahy, chairman of the Judiciary Committee, as saying—with the Senator adding: “She said, ‘I think I’m probably going to hear that quoted back to me a few times during the hearing.’ “I said, ‘Starting with me.’”⁶⁷

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⁶³ Jesse J. Holland (Associated Press), “Don’t Expect Kagan To Speak Her Mind Before Panel,” *Lowell* (Massachusetts) *Sun*, May 12, 2010, accessed at <http://www.nexis.com>. (Hereafter cited as Holland, “Don’t Expect Kagan.”)

⁶⁴ *Ibid.*

⁶⁵ Jesse J. Holland, “In Old Article, Kagan Invites Tough Questioning,” *The Associated Press*, June 3, 2010, accessed at <http://www.nexis.com>. (Hereafter cited as Holland, “In Old Article.”)

⁶⁶ Holland, “Don’t Expect Kagan.”

⁶⁷ Holland, “In Old Article.”