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The Refusal of Supreme Court Nominees to Discuss Legal, Political, and Social Issues at Senate Confirmation Hearings: Ethical Obligation or Survival Strategy?

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THE REFUSAL OF SUPREME COURT NOMINEES TO DISCUSS LEGAL, POLITICAL, AND SOCIAL ISSUES AT SENATE CONFIRMATION HEARINGS: ETHICAL OBLIGATION OR SURVIVAL STRATEGY?

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Supreme Court nominees routinely refuse to discuss their personal views on legal, political, and social issues with members of the Senate Judiciary Committee. Nominees assert that judicial ethics rules prohibit them from discussing any issue that might come before the Court. So, abortion, the death penalty, presidential powers, racial equality, gender discrimination, the right to privacy, and many other issues of interest to the Senate and to the public are off limits at confirmation hearings. Contrary to the claims of those seeking a seat on the high court, judicial ethics codes do not prevent judges from expressing their personal opinions on legal, political, and social issues. Courts, judicial disciplinary bodies, and judicial ethics advisory committees all agree that judges may announce their views on the very subjects that Court nominees claim ethics rules bar them from discussing.

No one can blame high court candidates for refusing to discuss substantive issues. The only nominee to fully and freely answer questions posed by members of the Judiciary Committee was Judge Robert Bork. The Senate thanked Bork for his cooperation and openness by rejecting his nomination. Nominees should remain free to refuse to answer questions posed by senators. But the duties of candor and probity mandate that judges and lawyers advance a new, legally defensible justification for declining to discuss hot-button issues. In the absence of a new, more convincing rationale, nominees should simply admit that silence is the societal cost of increasing their odds of confirmation.

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I. INTRODUCTION

Until two weeks before the close of the U.S. Federal Constitutional Convention in Philadelphia, the delegates anticipated that the Senate would appoint Supreme Court Justices.[1] But on September 4, 1787, New Jersey Delegate David Brearley presented the report of the Committee on Compromise proposing that the appointment power be shared between the President and Senate.[2] Brearley's proposal that the President would nominate, and with the "advice and consent of the Senate," appoint Supreme Court Justices, became the Appointments Clause of Article II, Section Two, of the United States Constitution.[3] Because neither the Constitution nor the convention debates shed light on the intended scope of the Senate's role in the confirmation process, scholars continue to debate the breadth and purpose of

1. *See* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1498 (1992).

2. Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 120 (2005). *See also* Strauss & Sunstein, *supra* note 1, at 1498–99 (explaining the convention's shift to a shared appointment power).

3. White, *supra* note 2, at 120–21.

the Senate's "advise and consent" function.[4] Some observers believe that the only legitimate function of the Senate in the confirmation process is to protect against the appointment of an incompetent, unprincipled crony of the President.[5] Supporters of this theory rely on Alexander Hamilton's view that the Senate's consent function would serve as, "[A]n excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[6]

Advocates for a broader role of the Senate find support in the assertion of delegate George Mason that the Constitution grants the Senate the "Power of interfering in every part of the Subject" and "a Right to decide upon [the nomination's] Propriety or Impropriety."[7] Such unbounded authority would permit inquiry not only into the ethics and competency of a nominee but also into the nominee's ideology, constitutional vision, and personal opinions on political, social, and legal issues.

Regardless of the Framers' intent, beginning with Justice Potter Stewart's confirmation hearing in 1975, the Senate Judiciary Committee has consistently interrogated Supreme Court nominees on their judicial philosophy and ideology. The Committee has sought the nominees' personal views on every conceivable subject: abortion, gun rights, world government, origins of crime, gender discrimination, the death penalty, the Bill of Rights, past Court decisions, and whether the Korean Conflict was a war.[8] With one notable exception, nominees generally refuse to discuss these subjects interposing their oaths of office promising impartiality, judicial ethics codes requiring impartiality, and the concern that disclosing personal opinions on an issue might result in their disqualification from cases involving that issue.[9] This article examines the validity of the nominees' boilerplate objections to discussing substantive maters at confirmation hearings.

Part I reviews the evolution of Senate confirmation hearings for Supreme Court nominees with an emphasis on the requirement that nominees appear before the Senate Judiciary Committee and field questions concerning their views on societal and legal issues. A survey of the questions put to nominees

4. Johannes W. Fedderke & Marco Ventoruzzo, *Do Conservative Justices Favor Wall Street? Ideology and the Supreme Court's Securities Regulation Decisions*, 67 FLA. L. REV. 1211, 1225 (2015) ("Scholars widely debate the precise scope of the Senate's powers under the 'Advise and Consent' clause, and the Constitution does not offer much guidance on the issue.").

5. *See, e.g.*, THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (J. Cooke ed., 1961).

6. *Id*. at 513. *But see* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 n.21 (1988) (arguing for "treating [the appointment] process as wholly political").

7. Strauss & Sunstein, *supra* note 1, at 1495.

8. *See infra* Part II.

9. *See infra* Part III.

during the last five decades demonstrates (1) the routine nature of questions seeking the personal views of nominees on legal, social, and political issues, and (2) that except for Judge Robert Bork, nominees generally refuse to answer or otherwise sidestep these questions. Part I also compares the ill-fated decision of Judge Bork to freely engage the Senators in substantive legal discussions with the tight-lipped approach of other nominees.

Part II examines Supreme Court candidates' reasons for refusing to express their personal views. Rationales include prohibitions allegedly contained in (1) judicial oaths of office, (2) codes of judicial conduct, and (3) judicial disqualification rules. The examination demonstrates that these proffered justifications lack a sound legal basis and that the real reason nominees refuse to answer substantive questions is to avoid the fate of Judge Robert Bork who, by engaging in debate on constitutional issues, forfeited his chance to serve on the United States Supreme Court. Part II argues that while free to decline to express personal views, nominees should not base their refusals on judicial oaths, codes of judicial conduct, or disqualification rules. That is because courts and authoritative administrative bodies have uniformly found that oaths, judicial codes, and disqualification rules permit judges and candidates for judicial office to express views on constitutional issues, legal ideology, judicial philosophy, past Court decisions, and other policy issues. Part II concludes by suggesting that nominees who refuse to discuss substantive legal, political, and social issues need to either advance a new, legally defensible rationale or simply admit that their decision is based on a desire to avoid alienating Senators.

II. SENATE CONFIRMATION PROCEEDINGS: THE EARLY DAYS

Article II, Section Two of the United States Constitution governs the appointment of Justices to the nation's highest court. Section Two crisply and simply states that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court."[10] In the absence of further direction, the Senate confirmation process has evolved in a somewhat haphazard fashion. Before 1868, the Senate had no rule automatically referring nominations to the Senate Judiciary Committee.[11] Until 1929, hearings on nominees were conducted behind closed doors unless two-thirds of the Senators voted to open a hearing to the public.[12] In 1916, the

10. U.S. CONST. art. II, § 2, cl. 2.

11. *See* BARRY J. MCMILLION, CONG. RSCH. SERV., RL33225, SUPREME COURT NOMINATIONS, 1789 TO 2020: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 17–18 (2021).

12. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988).

Senate held its first public confirmation hearing on the nomination of Louis D. Brandeis to the U.S. Supreme Court.[13] Over nineteen days of testimony, the Committee heard many witnesses but not Justice Brandeis.[14] The Committee did not request the nominee to appear at the hearing.[15]

In 1925, Harlan Fiske Stone became the first nominee to appear before the Senate Judiciary Committee.[16] The Senate did not summon Stone to the hearing.[17] Rather Stone appeared at his own request to explain why, as Attorney General, he did not dismiss an indictment against a powerful U.S. Senator.[18] In 1939, the chair of the Judiciary Committee invited Felix Frankfurter to "be present, at [his] pleasure, either in person or by counsel" during the Committee's confirmation hearing.[19] Frankfurter appeared and read a curt, 217 word statement instructing the Committee that his record spoke for itself.[20] The appearances of Stone and Frankfurter did not trigger any expectation that future nominees would attend their confirmation hearings.[21] In fact, it was not until 1949 that the Senate again asked a nominee, Judge Sherman Minton, to testify.[22] Judge Minton politely but firmly declined the invitation explaining that his attendance might create an appearance of impropriety if Senators asked questions about his views on controversial issues pending before the Court.[23] Most senators did not take Minton's refusal personally and confirmed the new Justice by a vote of 48–16.[24]

John Marshall Harlan's nomination in 1955 catalyzed the requirement that nominees appear and testify before the Senate Judiciary Committee.[25] It also foreshadowed the Senate's interest in interrogating nominees on legal and

13. MCMILLION, *supra* note 11, at 6.
14. *Id.*
15. *Id.*
16. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 194–95 (1956).
17. *See id.*
18. *See id.*
19. Freund, *supra* note 12, at 1158.
20. *Id.* at 1159.
21. *See* BARRY J. MCMILLION, CONG. RSCH. SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY 10 n.39 (2021) (explaining that in the 30 years following Stone's appearance, the Senate Judiciary Committee "usually declined to invite Supreme Court nominees to testify if a confirmation hearing were held").
22. Freund, *supra* note 12, at 1161.
23. 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*, 62 TUL. L. REV. 109, 118 (1987).
24. James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. L. 371, 384 (1969).
25. Ross, *supra* note 23, at 119.

political issues.[26] Harlan mostly answered questions posed to him by isolationist Senators concerning his view of world government.[27] As the first nominee after the Court's desegregation decision in *Brown v. Board of Education*, Harlan also faced some indirect questioning from Senator James Eastland about his views on segregation.[28] Senator Eastland asked the nominee, "Do you believe the Supreme Court should change established interpretations of the Constitution to accord with the economic, political, and sociological views—that is the personal views—of the judges who from time to time constitute the membership of the Court?"[29] Harlan challenged Senator Eastland by asking whether the Senator's question was a poorly disguised attempt to obtain the nominee's view on the *Brown* decision.[30] Because of the Senate's tradition of not asking Supreme Court nominees for their views on legal issues or Court decisions, Senator Eastland backed off the question.[31]

The Senate has requested the testimony of every Supreme Court nominee since John Marshall Harlan.[32] Potter Stewart would become the first nominee to suffer a wholesale interrogation about his legal, social, and political views.[33]

Because the consequences of *Brown v. Board of Education* became more apparent in the four years following Justice Harlan's confirmation, the Senate Judiciary Committee's questions to the next nominee, Potter Stewart, focused on desegregation in general and the *Brown* decision specifically.[34] Senators asked Judge Stewart whether the Supreme Court had appropriated congressional and state authority in *Brown*, whether the Court was a policy making body, and whether *Brown*, in effect, amended the Constitution.[35] But

26. *See id.*

27. *Id. See also* Thorpe, *supra* note 24, at 384 (explaining that Southern Democratic Senators desired to interrogate Harlan on his views concerning world government).

28. Professor Stephen Carter suggests that it was the desire of Southern Senators to question Harlan about *Brown v. Board of Education* that caused the Senate to depart from past practice and request a nominee's appearance before the Committee. STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 66–68 (1994). *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

29. Brad Synder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 402–03 (2000).

30. *Id.* at 403.

31. *See id.*; *see also* Rebecca Wilhelm, Note, *Giving Public Opinion the Process that is Due: What the Supreme Court Can Learn from Its Eighth Amendment Jurisprudence*, 38 HOFTSTRA L. REV. 367, 373 n.41 (2009) ("Southern senators did not question Harlan specifically about desegregation but instead focused on political opinions that would reveal his social philosophy.").

32. Ross, *supra* note 23, at 119.

33. *Id.*

34. *See* Daniel M. Berman, *Mr. Justice Stewart: A Preliminary Appraisal*, 28 U. CIN. L. REV. 401, 410 (1959).

35. *Id.*

Senator John L. McClellan cut to the heart of the matter by asking whether the nominee agreed with the premise, reasoning, logic, philosophy, and outcome of the *Brown* decision.[36] Resisting Senator McClellan's request for a "yes" or "no" answer,[37] Stewart was the first nominee to interpose "judicial ethics" as a reason for declining to answer a Senator's question. Judge Stewart responded in part:

> If I give a simple "yes" or "no" answer to your conscientiously phrased question, therefore, it would not only disqualify my participation in pending cases and heaven only knows how many future cases, but it seems to me it would involve a serious problem of simple judicial ethics. It would or might be construed in a case as prejudice on my part, one way or the other, about cases that are before the court and now pending.[38]

Undeterred by Judge Potter's invocation of judicial ethics, members of the Senate Judiciary Committee continued to question future nominees on social, political, and legal topics. This trend hit full gear with the devastating blow dealt by the Watergate Scandal to public confidence in all three branches of government.[39] Thus, in 1975, senators asked nominee John Stevens "about his views on a long list of issues, including capital punishment, wiretapping, gender discrimination, the exclusionary rule, the origins of crime, the problem of delay and backlogs in the courts, the amendment of the Constitution, factors to be considered in granting a petition for certiorari, statutory interpretation, and the power of Congress to restrict the Court's jurisdiction."[40] Intensive questioning became the norm even for nominees confirmed unanimously like Justice Sandra Day O'Connor or those confirmed in a "lovefest" like Justices Ruth Bader Ginsburg and Stephen Breyer.[41] A brief review of the testimony of seven representative Supreme Court nominees demonstrates the routine

36. *Id.* at 411.

37. *Nomination of Potter Stewart to Be Associate Justice of the Supreme Court of the United States: Hearing Before the* S. *Comm. on the Judiciary*, 86th Cong. 62 (1959).

38. *Id.* at 63.

39. Raymond J. McKoski, *Disqualifying Judges when Their Impartiality Might Reasonable Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 414 (2014) [hereinafter *Disqualifying Judges*] (noting the "Watergate scandal's devastating effect on public confidence in elected and appointed government officials").

40. Ross, *supra* note 23, at 121.

41. *See generally Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 60–173 (1981) [hereinafter *O'Connor Hearings*]. *See also* Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920 (1995) (reviewing CARTER, *supra* note 28) (describing the nomination hearings for Justices Ginsburg and Breyer as "lovefests").

nature of questions concerning legal, social, and political issues and the nominees' approaches to either addressing or dodging those questions.

A. Sandra Day O'Connor

During her 1981 confirmation hearing, Arizona state court judge Sandra Day O'Connor was pummeled with questions on more than fifty different legal, social, and political topics. Although Judge O'Connor expressed her personal opposition to abortion and to women in the military serving in combat,[42] she sidestepped most questions concerning controversial or contested issues of law and policy.[43] Judge O'Connor was willing to acknowledge well-established constitutional doctrine. For example, she accepted the *Brown* desegregation decision and exceptions to the First Amendment including commercial speech, obscenity, fraudulent statements, and statements that incite a riot.[44] She also accepted the prohibition against gender-based discrimination.[45] Otherwise, she "stonewall[ed]" the senators on matters of constitutional law.[46]

Judge O'Connor explained that she could not state whether she believed "the unborn child is a human being" or whether she agreed with the Court's decision in *Roe v. Wade*,[47] because such statements would necessitate her disqualification from cases. O'Connor stated:

> I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Suprem[e] Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter.[48]

42. *O'Connor Hearings*, *supra* note 41, at 125, 127 ("[F]or myself [abortion] is simply offensive to me. It is something that is repugnant to me and something in which I would not engage. . . . I have never felt and do not now feel that it is appropriate for women to engage in combat if that term is restricted in its meaning to a battlefield situation, as opposed to pushing a button someplace in a missile silo.").

43. *See* Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 919 (1983).

44. *O'Connor Hearings*, *supra* note 41, at 102, 143.

45. Rees, *supra* note 43, at 920 n.25.

46. *Id.* at 922.

47. *O'Connor Hearings*, *supra* note 41, at 218–19.

48. *Id.* at 57–58.

In support of her position, Justice O'Connor cited the Canon 3C of Code of Conduct for United States Judges and the federal judicial disqualification statute, both of which require disqualification from cases in which a judge's "impartiality might reasonably be questioned."[49] Justice O'Connor further explained that answering questions concerning *Roe v. Wade* would create an appearance of impropriety because it would appear that the nominee was pledging to take a particular legal position to gain favor with a senator.[50]

B. Robert H. Bork

Five years later, in July 1987, President Ronald Reagan nominated U.S. Court of Appeals Judge Robert Bork for a seat on the Supreme Court.[51] As a conservative legal scholar, constitutional theorist, professor, and jurist, Bork took a unique approach to answering the questions posed by the Senate Judiciary Committee.[52] Prior to Judge Bork's appearance, the accepted practice was for nominees to avoid providing specific answers to questions regarding their judicial philosophy, constitutional issues and interpretations, validity of prior Court decisions, hypothetical case scenarios, and hot-button issues of the day.[53] Declining to follow the time-proven strategy of Justice John Paul Stevens, Justice O'Connor, and others, Judge Bork spoke freely—and often in excruciating detail—about matters previously considered off limits.[54] The type of questions the Senators asked Judge Bork did not

49. *O'Connor Hearings*, *supra* note 41, at 218; 28 U.S.C. § 455; *see also* CODE OF CONDUCT FOR U.S. JUDGES Canon 2 (JUD. CONF. 2019) (prohibiting conduct that creates "the appearance of impropriety").

50. *O'Connor Hearings*, *supra* note 41, at 218–19. Other nominees have suggested that answering questions about Court decisions and legal issues would make it appear that they were taking a position to secure a Senator's vote for confirmation. *See, e.g.*, *Confirmation Hearing on the Nomination of the Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 124 (2018) [hereinafter *Kavanaugh Hearings*] (stating that he would avoid "get[ting] into some kind of process that appears to be a bargaining process where I say well, I will agree with this decision in exchange for your vote").

51. Gerald M. Boyd, *Bork Picked for High Court; Reagan Cites His 'Restraint'; Confirmation Fight Looms*, N.Y. TIMES, July 2, 1987, at A1.

52. Ross, *supra* note 23, at 110 n.3 ("Bork's testimony was unique. Queried in unprecedented detail about his judicial philosophy, his massive volume of writings, and his own judicial decisions during his five years on the Court of Appeals, Judge Bork vouchsafed answers to all but the most patently improper questions.").

53. *See* THE BORK HEARINGS: HIGHLIGHTS FROM THE MOST CONTROVERSIAL JUDICIAL CONFIRMATION BATTLE IN U.S. HISTORY, at xiii (Ralph E. Shaffer ed., 2005) (stating that Bork departed from the custom of previous nominees to "routinely refuse to answer questions about judicial philosophy or the nature of the Constitution.").

54. *See* Ross, *supra* note 23, at 110 n.3.

significantly differ from those asked to other nominees.[55] Rather, it was Bork's approach to answering the questions that broke the mold and derailed any chance of his confirmation.[56] Judge Bork was willing—and almost anxious—to opine on hypothetical case scenarios,[57] speculate on the intention of the Framers of the Constitution,[58] declare Court decisions erroneous,[59] and encourage extended debate with senators on complex issues of constitutional interpretation.[60] Unlike other nominees, Judge Bork did not invoke the judicial oath, canons of judicial ethics, or disqualification rules to avoid questions touching on constitutional interpretation or case analysis.[61] Even on the rare occasion when he declined to opine on issues likely to come before the Court, Judge Bork found it difficult to completely abstain from the discussion. For example, when asked about racial quotas, Bork responded, "as a Constitutional matter or a statutory matter, I do not think I should express an opinion because I assume that kind of thing may be litigated in any court I happen to be on in the future."[62] But as a "policy matter" rather than a constitutional or statutory matter, Judge Bork offered that "any long-run institution of quotas worries me very much."[63]

Senators applauded Judge Bork's unprecedented candid responses. Senator Chuck Grassley embraced Bork's "openness to answering questions" as "a breath of fresh air" and expressed special appreciation for the "depth" into which the nominee was willing to go in discussing the issues.[64] Senator Alan Simon agreed that Bork discussed prior Court decisions in greater detail than any other nominee appearing before the Committee.[65] As it became apparent to Senator Simpson that Bork's truthful yet freewheeling answers

55. Frank Guliuzza III et al., *Character, Competency, and Constitutionalism: Did the Bork Nomination Represent a Fundamental Shift in Confirmation Criteria?*, 75 MARQ. L. REV. 409, 427–29 (1992) (comparing the subject matter of questions asked to Bork with questions asked to other nominees).

56. *See id.* at 417–18, 432–33.

57. *See, e.g.*, *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 251, 272 (1989) [hereinafter *Bork Hearings*].

58. *See, e.g.*, *id.* at 249–50 (speculating as to what the Framers "had in mind" as to enumerated rights); *id.* at 260 (speculating as to the Framers' intent in in drafting Article II, § 3 of the Constitution).

59. *Id.* at 249–50, 260 (speculating as to what the Framers "had in mind" as to enumerated rights and the Framers' intent in drafting Article II, § 3 of the Constitution).

60. *See id.* at 268–83 (discussing the First Amendment).

61. *But see id.* at 1–1262 (lacking evidence that Judge Bork ever invoked the judicial oath, canons of judicial ethics, or disqualification rules).

62. *Id.* at 261.

63. *Id.*

64. *Id*. at 259.

65. *Id.* at 313.

severely crippled his chances at confirmation, the Senator accurately predicited the approach of future nominees:

> We will never see it again. This will never happen again. Doesn't matter whether you are confirmed or rejected. Because the next time we have a Supreme Court nominee he or she will say: . . . "I do not believe as a nominee I can tell you how I might vote on a particular issue which may well come before the Court or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again"; or "How I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter . . . ."[66]

Although Judge Bork's sweeping answers did not transcend restrictions placed on judges by the canons of judicial ethics, the judicial oaths of office, or disqualification rules, they did result in his rejection by the Senate.[67]

C. Ruth Bader Ginsburg

Like Justice O'Connor and Judge Bork, Ruth Bader Ginsburg fielded questions from senators on a wide variety of contested legal, political, and social topics including the right to bear arms,[68] judicial activism,[69] the death penalty,[70] abortion,[71] the separation of powers,[72] gender discrimination,[73] antitrust legislation,[74] the separation of church and state,[75] federal funding of the arts,[76] and race and sex based employment quotas.[77] Learning from the recent confirmation defeat of Judge Bork, nominee Ginsburg refused to

66. *Id.* at 851–52; *see also* Christine Kexel Chabot, *A Long View of the Senate's Influence over Supreme Court Appointments*, 64 HASTINGS L.J. 1229, 1265 (2013) ("Future nominees had tremendous incentives to avoid being as forthcoming as Bork at confirmation hearings.").

67. *See* Dion Farganis & Justin Wedeking, *"No Hints, No Forecasts, No Previews": An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan*, 45 LAW & SOC'Y REV. 525, 525–26 (2011) ("Observers argue that Bork's lengthy and candid answers doomed his nomination . . . .").

68. *See Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States*: *Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 128 (1993) [hereinafter *Ginsburg Hearings*].

69. *Id.* at 169.

70. *Id.* at 263–65.

71. *Id.* at 148–50.

72. *Id.* at 176–78.

73. *Id.* at 164–67.

74. *Id.* at 150–52.

75. *Id.* at 154–55.

76. *Id.* at 160.

77. *Id.* at 129–30.

comment on these hot-button issues for the same reason as Justice O'Connor: she believed "it would be wrong" to preview how she would vote on questions "the Supreme Court may be called upon to decide."[78] A judge's sworn oath of impartiality required Ginsburg to "offer no forecasts, no hints" on how she might decide a case.[79] Ginsburg freely commented on constitutional issues that she considered settled law by expressing approval of the decisions in *Brown v. Board of Education*, *Griswald v. Connecticut*, and even *Roe v. Wade*.[80] Just as readily she renounced the Court's decisions in *Dred Scott v. Sandford* and *United States v. Korematsu.*[81] If confirmed, she agreed to follow the disqualification requirements of the Code of Conduct for United States Judges even though the Code only applies to lower court judges.[82] Seemingly inconsistent with her refusal to express personal opinions on legal issues, Justice Ginsburg admitted that this federal code of judicial conduct did not require recusal "on the basis of a jurist's views on legal principles or expressions concerning the law itself as distinguished from application of the law to a particular case."[83]

D. Stephen G. Breyer

Even though Judge Stephen Breyer's 1994 confirmation hearing, like that of Justice Ginsburg, was a "lovefest,"[84] he was asked about his views on many controversial issues including the separation of church and state,[85] the First Amendment's application to juvenile curfews;[86] corporate First Amendment rights;[87] public housing searches;[88] the death penalty;[89] federal sentencing guidelines;[90] school prayer;[91] and the right to privacy.[92] The nominee refused

78. *Id.* at 52.
79. *Id.*
80. *See* Lori A. Ringhand & Paul M. Collins, Jr., *Neil Gorsuch and the Ginsburg Rules*, 93 CHI.-KENT L. REV. 475, 493 (2018).
81. *Id.*
82. *Ginsburg Hearings*, *supra* note 68, at 94–95.
83. *Id.* at 95.
84. Kagan, *supra* note 41, at 920.
85. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 378 (1994) [hereinafter *Breyer Hearings*] (declining to answer specific questions about the separation of church and state because the issue could come before the Court).
86. *Id.* at 367 (testifying that children need greater protection than adults but declining to discuss the topic further because the subject was likely to come before the Court).
87. *Id.* at 383–84.
88. *Id.* at 386.
89. *Id.* at 191–93.
90. *Id.* at 181–83.
91. *Id.* at 123–24.
92. *Id.* at 166.

to express an opinion on the desirability of term limits for elected officials[93] but agreed that *Brown v. Board of Education* was "beyond challenge today"[94] and that the Korean conflict was, in fact, a war.[95]

Viewing the ethical restrictions on a judge's discussion of legal issues narrowly, Breyer answered more questions than other recent nominees.[96] Early in the Senate hearings, Judge Breyer stated that he would not "predict or commit" himself to issues likely to come before the Court because nothing was more important to him "than to have an open mind and to listen carefully to the arguments."[97] Thus, Breyer testified concerning his views on the death penalty but without "actually predicting or expressing a view on a particular case that might come up."[98] Justice Breyer's view on ethical rules is more consistent with the long-standing interpretation of judicial codes and disqualification rules than the view of most Court nominees: that the rules prohibit *any* expression of personal opinion on issues that might come before the Court.[99]

E. Elena Kagan

Although Elena Kagan was not a judge in 2010 when nominated by President Obama, the Senate Judiciary Committee assumed that she would abide by the canons of judicial ethics in answering questions.[100] Occasionally, Kagan directly answered inquiries concerning past cases and her personal view of social and legal issues. For example, she stated that the Court's decision in the *District of Columbia v. Heller*, finding that the Constitution secures a fundamental right to gun ownership, was "binding precedent" and "settled law."[101] She also expressed personal opposition to the military's "Don't Ask, Don't Tell" policy and her support for cameras in the courtroom.[102] But for the most part Solicitor General Kagan declined to answer or dodged questions on past Court decisions and current social,

93. *Id.* at 386–87.
94. *Id.* at 380.
95. *Id*. at 379.
96. *Id.* at 562.
97. *Id.* at 114.
98. *Id.*
99. *See Breyer Hearings*, *supra* note 85, at 562.
100. *See Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. 35 (2010) [hereinafter *Kagan Hearings*] (Senator Tom Coburn advised nominee Kagan "[w]e are not asking you to violate judicial canons"). At the time of her nomination, Elena Kagan was the Solicitor General of the United States. *Id.* at 1.
101. *Id.* at 65.
102. *Id*. at 71 ("I do oppose the 'Don't ask, don't tell' policy."); *id.* at 83 ("I think it would be a terrific thing to have cameras in the courtroom.").

political, and legal issues.[103] Kagan agreed with Justice Breyer that judicial codes require nominees to avoid pledges, promises, and commitments.[104] However, she went further than the dictates of codes of judicial conduct by saying that she would make no statement that might forecast how she would rule as a Supreme Court Justice.[105]

F. Neil M. Gorsuch

During his confirmation hearing in May 2017, Judge Neil Gorsuch entertained many questions on current issues similar to those posed to his predecessors.[106] But as President Trump's first nominee, many questions focused on whether Judge Gorsuch agreed with the activities and decisions of the President. Thus, Judiciary Committee members asked Judge Gorsuch's opinion on the Emoluments Clause of the Constitution,[107] what constituted "high crimes and misdemeanors" for impeachment purposes,[108] whether a President can ignore a statute passed by Congress,[109] whether President Trump showed the proper respect for the judicial branch when he referred to a "Mexican judge" and to a "so-called judge."[110] Senator Patrick Leahy asked Judge Gorsuch if the Senate Judiciary Committee treated President Obama's Court nominee Merrick Garland fairly.[111] In declining to answer these

103. *See, e.g.*, *id*. at 84 (declining to comment on *Bush v. Gore*); *id*. at 85–88 (declining to express an opinion on the relationship between campaign finance and free speech); *id.* at 97–99 (declining to express an opinion on the President's authority to detain American citizens who aid terrorists without a criminal trial). *See also id.* at 95–96 (questioning concerning guns); *id.* at 113–14 (questioning concerning the limits of presidential power); *id.* at 103 (questioning concerning the role of empathy in a judge's decision-making process); *id.* at 100–01 (questioning concerning environmental issues); *id.* at 121 (questioning concerning president's ability to direct and control actions by administrative agencies).

104. *Id.* at 57 ("I will make no pledges this week other than this one . . . I will listen hard to every party before the court and to each of my colleagues. I will work hard and I will do my best to consider every case impartially, modestly, with commitment to principle and in accordance with law."); *id.* at 231 (refusing to promise certain rulings in cases).

105. *Id.* at 439 (agreeing with Justice Ginsburg's opinion on nominees forcasting case rulings).

106. *See, e.g.*, *Confirmation Hearing on the Nomination of the Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 115th Cong. 288–92 (2017) [hereinafter *Gorsuch Hearings*] (questioning regarding campaign finance regulations); *id*. at 83–84 (questioning concerning the right to bear arms); *id.* at 111–12 (questioning on abortion); *id.* at 122–24 (questioning about the Religious Freedom Restoration Act).

107. *Id.* at 268.

108. *Id.* at 270.

109. *Id.* at 266–67.

110. *Id.* at 203–04.

111. *Id.* at 96.

questions concerning past Court decisions[112] and the Constitution in general,[113] Judge Gorsuch did not hesitate to invoke purported restrictions imposed on judicial speech by the Code of Conduct for United States Judges.[114] Judge Gorsuch's answers, or more accurately lack of answers, to the Committee's inquiries led Senator Diane Feinstein to conclude that the nominee was "very much able to avoid any specificity like no one I have ever seen before."[115] Senator Dick Durbin agreed, stating he had "reached the point where [he] could finish [Gorsuch's] sentences and complete [Gorusch's] answers before [Gorsuch]."[116]

G. Brett Kavanaugh

Like Justice Gorsuch, Judge Brett Kavanaugh fielded questions concerning the activities of President Trump.[117] The Senators also attempted to extract the nominee's opinions on past Court decisions,[118] race discrimination,[119] gun violence,[120] abortion,[121] executive privilege,[122] insurance coverage for pre-existing medical conditions,[123] school prayer,[124] sexual harassment,[125] voter suppression,[126] and a host of other legal and social

112. *See id.* at 76 ("I am not in a position to tell you whether I personally like or dislike any precedent."); *see also* Ringhand & Collins, *supra* note 80, at 481 (documenting Judge Gorsuch's refusal to discuss Court precedent).

113. *Gorsuch Hearings*, *supra* note 106*,* at 268 ("Well, I am hesitant to discuss any part of the Constitution to the extent we are talking about a case that is likely to come before a court, pending or impending.").

114. *See, e.g.*, *id.* at 171 (declining to comment on the Merrick Garland nomination because "I have a canon of ethics that precludes me from getting involved in any way, shape, or form in politics."); *id.* at 298 (invoking the judicial canon prohibiting comment on pending and impending cases).

115. *Id.* at 259.

116. *Id.* at 276.

117. For example, after referring to a tweet by the President, Senator Jeff Flake asked Judge Kavanaugh, "Should a President be able to use his authority to pressure executive or independence agencies to carry out directives for purely political purposes?" *Kavanaugh Hearings*, *supra* note 50, at 253.

118. *Id.* at 126–28.

119. *Id.* at 120.

120. *See id.* at 126–27, 248–49.

121. *Id.* at 127–28, 157, 167–68.

122. *Id.* at 181–83.

123. *Id.* at 180–81.

124. *Id.* at 171–72, 389–90.

125. *Id*. at 137–38, 258–60.

126. *Id.* at 310–13.

issues routinely targeted by Senators during confirmation hearings.[127] Judge Kavanaugh declined to express opinions on most of these subjects; rather, he cited Justice Ginsburg and offered "no hints, no forecarests, no previews."[128] Following the playbook of other nominees, Judge Kavanaugh emphasized that judges must keep an open mind and refrain from making decisional commitments during the confirmation process.[129] Similar to Chief Justice John Roberts, Judge Kavanaugh premised the need to remain tight-lipped on his personal belief that commenting on legal issues would be "inconsistent with judicial independence, rooted in Article III" of the Constitution.[130]

III. THE NOMINEES' REASONS FOR REFUSING TO DISCUSS LEGAL, SOCIAL, AND POLITICAL ISSUES

With varying degrees of specificity, nominees offer several rationales for their refusal to engage in discussions concerning judicial philosophy; constitutional interpretation; prior Court decisions; and personal views on legal, social, and political issues. First, nominees interpose their oaths of office as a bar to discussing these topics.[131] Second, nominees claim that the duty of impartiality precludes them from answering some questions.[132] Third, the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges are offered as limits on what nominees may discuss.[133] Fourth, nominees suggest that they must be extremely circumspect in statements before the Senate Judiciary Committee to avoid disqualification from future cases before the Court.[134]

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127. *See* Adam Liptak, *What Kavanaugh's Hearings Reveal About His Beliefs on Abortion, Guns and Presidential Power*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/us/politics/kavanaugh-abortion-guns-presidential-power.html [https://perma.cc/BZW3-S2RZ] (summarizing Judge Kavanaugh's responses to Senators' questions on abortion, guns, and presidential power).

128. *Kavanaugh Hearings*, *supra* note 50, at 123, 181, 343.

129. *Id.* at 123 ("[T]he litigants who come before us have to know we have an open mind, that we do not have a closed mind, that we have not committed something in this process . . . .").

130. *Id.* at 181. Chief Justice Roberts also invoked judicial independence as the rationale for declining to comment on Court decisions and legal issues. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 381–82 (2005) [hereinafter *Roberts Hearings*]. As used by Chief Justice Roberts and Justice Kavanaugh, "judicial independence" is the same core concept as "judicial impartiality"—approaching a case with an open mind and deciding issues solely on the law and facts disregarding personal beliefs and opinions.

131. *See infra* Part III.A.

132. *See infra* Part III.B.

133. *See infra* Part III.C. *See also Kavanaugh Hearings*, *supra* note 50, at 76 (statement of Senator Blumenthal) (observing that nominees have offered the "canons of [judicial] ethics" as a reason for not expressing opinions on the correctness of Court decisions).

134. *See infra* Part III.C.3.

A. The Judicial Oaths

Federal judges, including Supreme Court Justices, take two oaths of office.[135] Article VI of the U.S. Constitution provides that legislators, executives, and judicial officers, "both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."[136] Until 1868, the statutory oath enacted to comply with this constitutional mandate simply stated, "I, A. B.[,] do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States."[137] In 1868, Congress expanded the oath to include promises to "defend the Constitution against all enemies," "bear true faith and allegiance" to the Constitution, and "well and faithfully discharge the duties of the office."[138]

Unsurprisingly, no nominee has specifically invoked the Article VI oath as a reason for declining to answer questions posed by the Senate Judiciary Committee since the oath does "not actually impose affirmative duties on oath-takers."[139] It merely acknowledges "a willingness to abide by 'constitutional processes of government'" without imposing an obligation to undertake specific actions.[140] Short of inciting others to violate the law, this oath does not restrict an oath-taker's speech before a Senate committee or any

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135. State judges usually take one oath that, in substance, is a combination of the two oaths required of federal judges. For example, the oath administered to Ohio state court judges provides:

> I, (name), do solemnly swear that I will support the Constitution of the United States and the Constitution of Ohio, will administer justice without respect to persons, and will faithfully and impartially discharge and perform all of the duties incumbent upon me as (name of office) according to the best of my ability and understanding. [This I do as I shall answer unto God.]

OHIO REV. CODE § 3.23 (2007).

136. U.S. CONST. art. VI, cl. 3.

137. Act to Regulate the Time and Manner of Administering Certain Oaths, ch. 1, § 1, 1 Stat. 23 (1789).

138. Act Prescribing an Oath of Office To Be Taken by Persons from Whom Legal Disabilities Shall Have Been Removed, ch. 139, 15 Stat. 85 (1868). The oath states:

> I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331.

139. *See* Cole v. Richardson, 405 U.S. 676, 684 (1972) ("[T]he purpose leading legislatures to enact such [state loyalty] oaths, just as the purpose leading the Framers of our Constitution to include the two explicit constitutional oaths, was not to create specific responsibilities but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system . . . .").

140. *Id*. at 682 (quoting Bond v. Floyd, 385 U.S. 116, 135 (1966)).

other body.[141] The relevance of the oath to a nominee's testimony before the Senate only lies in the nominee's commitment to "faithfully discharge the duties of the [judicial] office." But those "duties," left to be defined in the Constitution, statutes, and codes of judicial conduct, bind a judge with or without the Article VI oath.[142]

The second oath taken by federal judges differs from the first oath "in that it is tailored to ensure that the oath-taker understands his or her primary directive—to decide cases impartially without regard to personal predilections or the social, economic, religious, financial, or political status" or other irrelevant personal characteristics of a litigant.[143] This oath, unique to federal officials who hold judicial office, provides:

> I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ____ under the Constitution and laws of the United States. So help me God.[144]

Although the oath requires that a judicial nominee publicly accept the solemn obligation of impartiality, the oath does not create that duty.[145] Nor does the judicial oath define impartiality.[146] Courts define the concept of impartiality in the context of constitutional provisions, statutes, and rules of judicial conduct that prohibit judicial partiality.[147] Similarly, the views that a judge or judicial candidate may express to Senate members without harming judicial impartiality or independence is determined by the courts and not the oath.[148]

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141. *See* Dalack v. Vill. of Tequesta, 434 F. Supp. 2d 1336, 1342 (S.D. Fla. 2006) ("While the State has 'an interest in requiring its legislators to swear a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy.'" (quoting *Bond*, 385 U.S. at 135)).

142. Steve Sheppard, *What Oaths Meant to the Framers' Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273, 277–78 ("In every instance, the acceptance of an office and the nature of the office imply a set of obligations, not the least being to perform that office according to its purpose and for the benefit of those whom the office is created to serve. That an oath requires such a function be performed is a bit superfluous.").

143. Raymond J. McKoski, *Judicial Disqualification After* Caperton v. A.T. Massey Coal Company*: What's Due Process Got to Do with It?*, 63 BAYLOR L. REV. 368, 381 (2011).

144. 28 U.S.C. § 453 (1990).

145. *See id.*

146. *See id.*

147. *See infra* Part III.B.

148. *See infra* Part III.C.2.a.

B. The Duty of Impartiality

The United States Constitution[149] and every jurisdiction's code of judicial conduct[150] requires an impartial judge. Most nominees base their objections to Senators' questions concerning legal issues or prior Court decisions on the claimed need to maintain judicial impartiality. For example, in his reply to Senator John Kennedy's question about abortion, Judge David Souter responded that answering the question "would go far to dispel the promise of impartiality in approaching this issue, if it [came] before [him]."[151] Similarly, Judge Antonin Scalia declined to opine on the correctness of Supreme Court decisions because to do so might impair his ability to be "impartial in future cases before the Court."[152]

The position taken by Justices Souter and Scalia implies that judicial impartiality includes neutrality regarding competing legal positions. But is that true? Can a judge be impartial, as that term is used in the Constitution, statutes, and ethics codes, while simultaneously holding personal views as to the proper interpretation of constitutional provisions, the validity of prior Court decisions, and the advisability of social and political policies? And does the duty of impartiality bar a judge from publicly expressing such personal opinions? The Court unequivocally answered these questions in *Republican Party of Minnesota v. White*.[153]

In *White*, the Court reviewed the constitutionality of a provision of the Minnesota Code of Judicial Conduct providing that "a 'candidate for a judicial office, including an incumbent judge,' shall not 'announce his or her views on

149. Weiss v. United States, 510 U.S. 163, 178 (1994) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)) ("It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.'").

150. *See, e.g.*, CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (JUD. CONF. 2019) ("A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently."); MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR. ASS'N 2007) ("A judge shall perform the duties of judicial office impartially, competently, and diligently."); Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1152 (2004) ("The Code of Conduct for United States Judges like all codes of judicial conduct, focuses on maintaining judicial impartiality . . . .").

151. *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 211–12 (1990).

152. *Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 58 (1986) [hereinafter *Scalia Hearings*]; *see also Ginsburg Hearings*, *supra* note 68, at 52 (invoking a judge's sworn duty of impartiality as a reason for declining to give any "forecasts" or "hints" on how Justice Ginsburg would decide cases); *Roberts Hearings*, *supra* note 130, at 20–21 (statement of Senator Jon Kyl) (stating that the interests of impartiality and neutrality require nominees to decline to answer questions regarding issues that may come before them).

153. 536 U.S. 765 (2002).

disputed legal or political issues.'"[154] Minnesota asserted that this intrusion on the First Amendment was justified by the state's compelling interest in protecting judicial impartiality and the appearance of impartiality.[155] According to the state's argument, how could the public trust the impartiality of a judge hearing a capital murder case if the judge, as a candidate, expressed her personal support for, or opposition to, the death penalty?

The Court quickly disposed of the state's contention by narrowly defining the concept of judicial impartiality.[156] According to the Court, the "root meaning" of judicial impartiality "is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law."[157] The Court flatly rejected the notion that the concept of impartiality includes a "lack of preconception in favor of or against a particular *legal view*."[158] The Court recognized that a judge's lack of predisposition regarding the legal issues in a case has never been thought of as a necessary component of equal justice because every judge has preconceptions about the law.[159] Once the Court acknowledged that selecting judges without "preconceptions on legal issues is neither possible nor desirable," it had to decide if requiring judges to conceal their views from the public would advance a compelling state interest.[160] The majority found that "pretending" that a judge held no views on legal issues could not advance any interest in impartiality and that hiding opinions from the public did not advance the appearance of justice.[161] It was especially important to the Court that the Minnesota speech restriction limited the topics that judicial candidates could discuss with the individuals responsible for selecting judges:[162]

> "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." We have never allowed the

154. *Id.* at 768 (citing Republican Party v. White, 247 F.3d 854, 867 (2002), *rev'd*, 536 U.S. 765 (2002)).

155. *Id.* at 775.

156. *Id.* at 775–76.

157. *Id.*

158. *Id.* at 777 (emphasis added).

159. *Id.*

160. *Id.* at 778.

161. *Id. See also* Erwin Chemerinsky, *Ideology, Judicial Selection and Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 643, 661 (1989) ("Assuring impartiality does not require that the judge pretend to lack views on important topics of constitutional law.").

162. *See White*, 536 U.S. at 787–88.

> government to prohibit candidates from communicating relevant information to voters during an election.[163]

The *White* Court also considered "openmindedness" as a possible component of impartiality.[164] If included in the concept of due process, open-mindedness would require that a judge be open to considering views contrary to her preconceptions on legal issues.[165] Impartiality, in this sense, would "guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so."[166] The Court did not decide whether open-mindedness is a necessary trait of an impartial judge.[167] But assuming that it is, the open-minded aspect of impartiality has little impact on whether nominees may discuss their preconceptions or policy preferences with Senators. This is because nominees uniformly promise the Senate to set aside personal views, keep an open mind, and consider the briefs and arguments of every litigant in every case.[168] Even Judge Bork, after years of declaring that the Constitution includes no right of privacy, testified that he was open to finding a constitutional basis for it if presented with a persuasive, new argument.[169]

Thus, in *White*, the Court defined the due process right to impartiality in terms of the neutral treatment of litigants and not the neutral treatment of constitutional or other legal issues.[170] The Court accepted that judges "often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches," and could do so in campaigns for judicial office.[171] The constitutional right to an impartial tribunal does not include a judge without views on the law or a judge who hides those views from the public.

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163. *Id.* at 781–82 (first quoting Wood v. Georgia, 370 U.S. 375, 395 (1962); then quoting Brown v. Hartlage, 456 U.S. 45, 60 (1982)) (citations omitted).

164. *Id.* at 778.

165. *Id.*

166. *Id.*

167. *Id.*

168. *See, e.g.*, *Breyer Hearings*, *supra* note 85, at 114 ("[T]here is nothing more important to a judge than to have an open mind and to listen carefully to the arguments."); *Kagan Hearings*, *supra* note 100, at 56 (promising to listen to each party with an open mind); *Gorsuch Hearings*, *supra* note 106, at 71; *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 322 (2006).

169. *See Bork Hearings*, *supra* note 57, at 754 ("[I]t is not a right of privacy I am opposed to. It is a generalized undefined right of privacy that is not drawn from any constitutional provision. Maybe it can be, but I have not seen it done yet.").

170. *See White*, 536 U.S. at 775–77 (suggesting that impartiality would guarantee litigants an equal chance to persuade the court).

171. *Id.* at 779, 781.

The question remains, however: Is the nature of judicial impartiality demanded by ethics codes a broader concept than the impartiality requirement of the Due Process Clause? And if it is, does the judicial code model of impartiality mandate restrictions on judges expressing personal views on contested issues? The ABA Model Code of Judicial Conduct (ABA Model Code) defines impartiality as embracing two concepts. First, the ABA Model Code parrots the language found in *White* by defining impartiality as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties."[172] Second, the ABA Model Code embraces the alternate definition of impartiality discussed in *White* and adopted by every nominee that requires judges to "maintain[] an open mind in considering issues that may come before a judge."[173] As a result, provisions of ethics codes requiring impartiality are no more a bar to nominees discussing constitutional, legal, or political issues than the impartiality requirement of the Due Process Clause.

C. Codes of Judicial Conduct

At the confirmation hearings for Judge Neil Gorsuch, Senator John Kennedy laid out the provisions of both the Code of Conduct for United States Judges and the ABA Model Code of Judicial Conduct that would limit the Senator's questions.[174] First, the Senator identified Canon 3(A)(6) of the federal judicial code, which provides: "A judge should not make public comment on the merits of a matter pending or impending in any court."[175] Second, Senator Kennedy assured the nominee that his questions were not designed to violate Rule 2.10(A) of the ABA Model Code, which states: "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in a court."[176] Finally, Senator Kennedy promised that his questions would not seek pledges, promises, or commitments "in connection with cases, controversies, or issues that are likely to come before the court" in violation of Rule 2.10(B) of the ABA Model Code.[177]

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172. MODEL CODE OF JUD. CONDUCT Terminology (AM. BAR ASS'N 2007).

173. *Id. See also Charts Comparing Individual Jurisdictional Judicial Conduct Rules to ABA Model Code of Judicial Conduct*, *Terminology* (June 23, 2020), https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/aba_model_code_comparison, [https://perma.cc/GS8Y-WVA7].

174. *Gorsuch Hearings*, *supra* note 106, at 56.

175. *Id.*

176. *Id*. MODEL CODE OF JUD. CONDUCT r. 2.10(A) (AM. BAR ASS'N 2007).

177. *Id*. Rule 2.10(B) of the 2007 ABA Model Code of Judicial Conduct provides: "A judge shall not, in connection with 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 his judicial office." *Id.*

Senator Kennedy accurately identified the judicial ethics code provisions most often relied on by nominees to justify their decisions in declining to answer questions.[178] But do any of these rules actually support a nominee's refusal to discuss legal, social, and political issues?

1. Comments on Pending and Impending Cases

Judicial codes severely restrict a judge's extrajudicial comments on cases pending in the judge's court.[179] This restriction is justified by the common-sense proposition that litigants should learn about a judge's decisions and reasoning in court and not in the newspaper or in the judge's blog.[180] Equally important, almost any out-of-court remark by a judge about a case—no matter how innocently intended—can give the impression that the judge favors one party over another.[181] But the no-comment rule is not limited to cases in the judge's court.[182] The rule also applies to comments concerning cases pending in other courts and in other jurisdictions.[183] Prohibiting a judge from evaluating a colleague's work avoids the perception that the judge is attempting to influence another judge's decision.[184] It also alleviates the threat to public trust in the courts posed "by a judge from one court or jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction."[185] This last rationale is especially germane if a nominee for the country's highest court were to offer an assessment of a case pending in state or federal court. If a nominee made such a case specific comment, the lower court judge might feel compelled to adopt the nominee's view.

178. *See, e.g.*, *Roberts Hearings*, *supra* note 130, at 243 ("Under the Judicial Canons of Ethics, Canon 3-A(6), I'm not supposed to comment publicly in any way about a case that is still pending."); *Kavanaugh Hearings*, *supra* note 50, at 76 (observing that nominees have offered the "canons of [judicial] ethics" as a reason for not expressing opinions on the correctness of Court decisions).

179. *See generally* MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2007).

180. *See id.* r. 2.10 cmt. 1.

181. *See In re* Boston's Child. First, 244 F.3d 164, 170 (1st Cir. 2001) (finding that a reasonable person might interpret ambiguous extrajudicial statements of a judge as evidence of bias). *See generally* RAYMOND J. MCKOSKI, JUDGES IN STREET CLOTHES: ACTING ETHICALLY OFF-THE-BENCH 113–15 (2017) [hereinafter JUDGES IN STREET CLOTHES] (examining the prohibition against commenting on pending and impending cases).

182. United States v. Microsoft Corp., 253 F.3d 34, 112 (D.C. Cir. 2001) (per curium); *In re* Inquiry of Broadbelt, 683 A.2d 543, 546 (N.J. 1996) (per curium).

183. *Microsoft Corp.*, 253 F.3d at 112 (interpreting the term "any court" to include all state and federal trial and appellate courts); *Broadbelt*, 683 A.2d at 546 ("The phrase 'any court' has been interpreted to refer to any court in any jurisdiction.").

184. State *ex rel.* Comm'n on Jud. Qualifications v. White, 651 N.W.2d 551, 564 (Neb. 2002).

185. *Id.*

The rules barring comments on pending cases also forbid comments on "impending" matters.[186] In this context, an impending matter is a case or other court proceeding "that is imminent or expected to occur in the near future."[187] Thus, judges must not comment on arrests, grand jury proceedings, or law enforcement investigations because those matters are likely to wind-up in court.[188] For example, Ohio disciplined a judge for issuing a press release describing the results of a polygraph examination taken by a court employee who was subsequently indicted by a grand jury.[189] The important point here is that the no-comment rule on impending matters governs impending cases and proceedings, not impending issues.[190] Speech on issues is limited only when a judge's remarks rise to a pledge, promise, or commitment to rule in a certain way.[191] Senator Patrick Leahy correctly highlighted this difference during Ruth Bader Ginsburg's hearings:

> Judge Ginsburg, during these hearings, you will be pressed on many important issues. That is our responsibility. While it is inappropriate for you to be asked about specific cases that may be pending before the Court, the Committee cannot satisfy its constitutional obligation unless it can learn what your constitutional vision is— how you think about the great issues of the day.[192]

The precise nature of the no-comment rule varies among jurisdictions.[193] As previously discussed, Canon 3A(6) of the Code of Conduct for United States Judges prohibits public comment only if the comment concerns "the merits of a matter."[194] The 2007 ABA Model Code and the vast majority of state codes do not limit the prohibition to comments involving a case's

186. MODEL CODE OF JUD. CONDUCT r. 2.10(A) (AM. BAR ASS'N 2007).

187. *Id.* at Terminology.

188. Marla N. Greenstein, *Commenting on Pending or Impending Matters*, 46 JUDGES J. 41, 41 (2007).

189. Disciplinary Couns. v. Hoskins, 891 N.E.2d 324, 333–34 (Ohio 2008) ("Canon 3(B)(9) prohibits a judge from commenting publicly on a pending or impending proceeding in any way that might 'reasonably be expected to affect its outcome or impair its fairness.'").

190. *See* Greenstein, *supra* note 188, at 41 ("'Impending' is not meant to include every possible social or community issue that could come before the courts. Rather, impending matters are those that if they continue on their regular course will end up in a court.").

191. *See* MODEL CODE OF JUD. CONDUCT r. 2.10(B) (AM. BAR ASS'N 2007); *see also* Section III.C.3.

192. *Ginsburg Hearings*, *supra* note 68, at 29.

193. *Compare* CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(6) (JUD. CONF. 2019), *with* MODEL CODE OF JUD. CONDUCT r. 2.10 (AM. BAR ASS'N 2007).

194. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(6) (JUD. CONF. 2019).

merits.[195] Most codes prohibit any comment that might affect the fairness or outcome of a case regardless of whether the remark concerns the merits, procedures, or any other aspect of a proceeding.[196] Some states prohibit all comments about pending and impending cases even if the comment can in no way affect the outcome or impair the fairness of a proceeding.[197] Nominees wisely adopt the broadest view of the rule and consistently refuse to discuss any aspect of a case pending or impending in any jurisdiction.[198] Cases, not issues, are governed by the no-comment rule.[199] Different rules govern the ethical propriety of discussing legal issues.[200]

2. Expressing Views on Political, Social, and Legal Issues

A decade before the Court's decision in *Republican Party of Minnesota v. White*, which struck down the prohibition against judges announcing their legal and political views, the ABA already knew that the restriction was unlikely to survive a constitutional challenge. Thus, the ABA's 1990 Model Code abandoned the "announce" clause in favor of a more limited prohibition barring candidates for judicial office from making statements "that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[201] The subsequent decision in *White* kindled concern that the speech restriction of the 1990 Model Code still violated the First Amendment, so the ABA further cabined the limitation. In 2003, the ABA amended Canon 5(A)(d)(i) by eliminating the prohibition against a judicial candidate *appearing* to commit to a predetermined case outcome.[202] Revised Canon 5 only barred candidates from actual "pledges,

195. *See* MODEL CODE OF JUD. CONDUCT r. 2.10(A) (AM. BAR ASS'N 2007) (prohibiting more broadly "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter").

196. *Id.*

197. *E.g.*, N.Y. CODE OF JUD. CONDUCT § 100.3(B)(8) (2019) ("A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories.").

198. *See, e.g.*, *Gorsuch Hearings*, *supra* note 106, at 268 (declining to comment on the Emoluments Clause of the Constitution because of "impending" cases); *Roberts Hearings*, *supra* note 130, at 243 (declining to comment on a pending case because "[u]nder the Judicial Canons of Ethics, Canon 3-A(6), I'm not supposed to comment publicly in any way about a case that is still pending.").

199. *See, e.g.*, MODEL CODE OF JUD. CONDUCT r. 2.10(A) (AM. BAR ASS'N 2007) (limiting comments that may "impair the fairness of a matter pending or impending in any *court*" (emphasis added)).

200. *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A) (JUD. CONF. 2019).

201. MODEL CODE OF JUD. CONDUCT Canon 5A(3)(d)(ii) (AM. BAR ASS'N 1990). *See* Raymond J. McKoski, *The Political Activities of Judges: Historical, Constitutional, and Self-Preservation Perspectives*, 80 PITT. L. REV. 245, 270–71 (2018).

202. MODEL CODE OF JUD. CONDUCT Canon 5A(3) note (AM. BAR ASS'N 2003).

promises, or commitments" made "with respect to cases, controversies or issues that are likely to come before the court."[203] The 2007 version of the ABA Model Code carries this same prohibition.[204] Inexplicably, before the adoption of the 2007 ABA Model Code, the restriction on pledges, promises, and commitments applied only to candidates for judicial office.[205] Previous ABA model codes did not expressly bar judges from committing to preordained outcomes on issues, controversies, and potentially impending cases unless they were running for office.[206] The ABA corrected the glaring oversight in the 2007 Model Code. The 2007 Model Code continued the prohibition against pledges, promises, and commitments by candidates for judicial office[207] and added Rule 2.10(B) to apply the same prohibition to all judges at all times regardless of whether the judge is a candidate for judicial office.[208]

Reading *White* and the 2007 ABA Model Code together establishes that judges, including nominees appearing before the Senate Judiciary Committee, may announce positions on legal issues but may not promise to rule in a certain way in advance of hearing and considering the arguments of the litigants in a case.[209] Applying this rule in practice requires a judge to determine when announcing a legal view crosses the ethical line and becomes an impermissible pledge, promise, or commitment to rule in a certain way in a pending or future case. *Duwe v. Alexander* offers help in differentiating permissible announcements from prohibited commitments:

> There is a very real distinction between a judge committing to an outcome before the case begins, which renders the proceeding an exercise in futility for all involved, and a judge disclosing an opinion and predisposition before the case. A disclosure of a predisposition on an issue is nothing more than acknowledgment of the inescapable truth that thoughtful judicial minds are likely to have considered many issues and formed opinions on them prior to addressing the issue in the context of a case.[210]

In other words, a commitment "requires affirmative assurance of a particular action. It is a predetermination of the resolution of a case or issue.

203. *Id.* at 5A(3)(d)(i).
204. MODEL CODE OF JUD. CONDUCT r. 4.1(A)(13) (AM. BAR ASS'N 2007).
205. *See* MODEL CODE OF JUD. CONDUCT Canon 5A(3)(d) cmt. (AM. BAR ASS'N 1990).
206. *Id.*
207. MODEL CODE OF JUD. CONDUCT r. 2.10(B) (AM. BAR ASS'N 2007).
208. *Id.*
209. *See infra* notes 229–49 and accompanying text.
210. Duwe v. Alexander, 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007) (citing Republican Party v. White, 536 U.S. 765, 779 (2002)).

It is not a statement of belief or opinion."[211] Commitments usually include precatory phrases like "I will" or "I will not."[212] Conversely, introductory phrases like "I believe" or "It is my opinion" do not signal a predetermination or guaranty of a particular result.[213] The difference between announcing a position and making a commitment is especially important in campaigns for both elected and appointed judicial offices because:

> One presumes that a person is likely to decide in accordance with an opinion or belief, but will only rely upon an actual commitment. As a result, reaction to breaking a commitment or promise is far stronger than to a decision that contradicts an opinion or belief. A genuine commitment creates a different expectation and poses a far greater threat to the impartiality and appearance of impartiality of the judiciary.[214]

As recognized by the Seventh Circuit Court of Appeals, typically promises, pledges, and commitments are easily identified.[215] Statements such as "I will always rule in favor of the litigant whose income is lower, so that wealth can be redistributed," or "I will award damages against drug companies, whether or not the drug has been negligently designed or tested, because they charge 'too much,'" or "I will issue a search warrant every time the police ask me to," guarantee specific rulings regardless of the facts and law.[216] Unfortunately, in the Supreme Court nomination process the solicitation of such blatantly improper promises cannot be completely ruled out. In his 2016 campaign for the Democratic presidential nomination, Senator Bernie Sanders promised to an overflow crowd in Portland, Oregon: "My nominees to the U.S. Supreme Court will in fact, have a litmus test and that test will be that they will have to tell the American people that their first order of business on the Supreme Court will be to overturn *Citizens United*."[217] Senators have also requested that nominees commit to case outcomes. For example, Senator Richard Blumenthal asked Judge Kavanaugh, "Can you commit, sitting here today, that you would never

211. *Id.* at 976.
212. *Id.*
213. *Id.*
214. *Id.*
215. *See* Bauer v. Shepard, 620 F.3d 704, 714–15 (7th Cir. 2010).
216. *Id.*
217. KATU.com Staff & Associated Press, *Full Video: Bernie Sanders Rally at the Moda Center in Portland*, KATU.COM (Mar. 25, 2016), https://katu.com/news/local/full-video-bernie-sanders-rally-at-the-moda-center-in-portland [https://perma.cc/4WMJ-R36A].

overturn *Roe v. Wade*?"[218] Fortunately, no nominee has acceded to such patently unethical requests.[219]

Nominees properly use the pledges, promises, and commitment prohibition to avoid promising certain results on issues or cases. But nominees go much further and use the prohibition to avoid answering question about their views on *Roe v. Wade*, the death penalty, and other contested political, legal, and social issues. Does this"commits" clause of the ABA Model Code bar judges from expressing opinions on these subjects? Courts, judicial ethics advisory committees, and judicial disciplinary bodies unvaryingly answer this question with a resounding "no."

a. Courts

In *Bauer v. Shepard*, the Seventh Circuit Court of Appeals discussed whether a state court judge could answer questions in the Indiana Right to Life organization's candidate questionnaire without violating the state's prohibition against judicial candidates committing to issues, cases, and controversies.[220] The "commits" clause of the Indiana judicial code was identical to the "commits" clause in the 2007 ABA Model Code of Judicial Conduct.[221] The Seventh Circuit reviewed the first query of the Right to Life questionnaire which asked candidates to agree or disagree with the following statement: "I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development."[222] The court reasoned that a judicial candidate could answer this question because a statement of moral or legal views does not imply that a judge will rule on his or her personal beliefs rather than the dictates of the law.[223] The court quite properly observed that "[e]very judge

218. *Kavanaugh Hearings*, *supra* note 50, at 246.

219. *See id.* ("Senator, each of the eight Justices currently on the Supreme Court, when they were in this seat, declined to answer that question.").

220. *Bauer*, 620 F.3d at 713–14.

221. *Compare* MODEL CODE OF JUD. CONDUCT r. 2.10(B), 4.1(A) (AM. BAR ASS'N 2007), *with Bauer*, 620 F.3d at 713. The Indiana Code of Judicial Conduct provided:

> [Rule 2.10(B)] A judge shall not, in connection with 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 judicial office.
>
> [Rule 4.1(A)] Except as permitted by law, or by Rules 4.1(B), 4.1(C), 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . . (13) in connection with 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 judicial office.

INDIANA CODE OF JUD. CONDUCT (1993).

222. *Bauer*, 620 F.3d at 706–07.

223. *Id.* at 714.

enforces laws and applies judicial decisions for which he would not have voted."[224] The court further thought that a judge who expresses a belief that *Roe v. Wade* was wrongly decided, does not violate the "commits" clause because the judge has not promised any particular outcome in future cases involving abortion.[225]

Just as readily identifiable are questions that call for commitments, promises, and pledges. Thus, a judge violates the "commits" clause by answering the following questions in the affirmative, (1) "Do you vow to overturn *Roe v. Wade*,"[226] and (2) "Would you commit to supporting state funding for Planned Parenthood services . . .?"[227] Similarly, a promise to never "grant a downward departure sentence in a criminal conviction for abuse of a child" improperly commits a judge to future case outcomes.[228]

b. Judicial Ethics Advisory Committee Opinions

Since *White,* judicial ethics advisory committees have interpreted the "commits" clause in the same narrow fashion as the courts, thereby permitting judges to comment on a broad range of issues so long as they do not promise a predetermined ruling in future cases. For example, the Illinois Judicial Ethics Committee concluded that judges may express their views on gun control,[229] capital punishment,[230] abortion,[231] "the merit, or lack of merit, of proposed or enacted legislation,"[232] the merit selection of judges,[233] jail overcrowding,[234] plea bargaining,[235] "three-time loser" laws,[236] and "[l]ocal government issues, such as bond issues and school district tax referendums."[237] The Michigan Standing Commttee on Professional and

224. *Id*.
225. *Id.*
226. Kan. Jud. Rev. v. Stout, 196 P.3d 1162, 1176 (Kan. 2008).
227. N.Y. Advisory Comm. on Jud. Ethics Op. 18-95 (2018).
228. *Stout*, 196 P.3d at 1176.
229. Ill. Jud. Ethics Comm. Op. 94-5 (1994).
230. Ill. Jud. Ethics Comm. Op. 94-17 (1994).
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id. See also* Fla. Jud. Ethics Advisory Comm. Op. 2002-13 (2002) (permitting a judicial candidate to express views on abortion); *id.* (permitting a judicial candidate to state views on the issue of religious freedom); Ind. Comm'n on Jud. Qualifications Op. 1-02 (2002) (permitting a judicial candidate to state views on abortion and the death penalty); Ohio Bd. of Com. on Griev. & Discip. Op. 2002-8 (2002) ("[A] judicial candidate may not state how he or she will decide abortion issues for that is a pledge or promise still prohibited under the Ohio

Judicial Ethics advised that judicial candidates may criticize court decisions—as well as the philosophy underlying those decisions—and may publicly support a ballot proposal for capital punishment without running afoul of the "commits" clause.[238] Further, New York judges may express personal views on abortion provided the candidate does not make "commitments regarding cases, controversies, or issues likely to come before the court."[239] Of course, the line can be crossed. The New York Advisory Committee found that the following questions put to judicial candidates by an advocacy group called for commitments rather than expressions of personal opinions:

> "Will you publicly oppose any [U.S.] Supreme Court nominee who may threaten those protections [for women's reproductive health decisions]?" "Will you pledge to fight any attempts to roll back the reproductive protections afforded women by *Roe v. Wade*?"[240]

Judicial advisory committees' interpretation of state rules governing speech on legal, political, and social issues is perfectly consistent with the intent of the drafters of the ABA Model Codes of Judicial Conduct. The drafters of the 1972 ABA Code of Judicial Conduct (1972 ABA Code) accepted the difference between committing to a future ruling and the expression of a personal opinion.[241] Professor E. Wayne Thode, the reporter to the ABA committee that drafted the 1972 ABA Code, recognized that a judge could support or oppose a statute or court decision without compromising judicial impartiality even when "the very issue on which he has spoken or written" comes before the judge.[242] Thode provided an example of the type of written or oral declaration that would cross the line and indicate partiality:

> There is a significant difference between the statement, "I will grant all divorce actions that come before me—whatever the strength of the evidence to support the statutory ground for divorce—because I believe that persons who no longer live in harmony should be divorced," and the statement, "I believe that limited statutory grounds for divorce are not in the public interest. The law should be changed

Code of Judicial Conduct, however, judges are free to express their views on abortion or other disputed legal or political issues, so long as there is no pledge or promise or statement that commits the candidate with regard to a case or controversy.").

238. Mich. Standing Comm. on Prof'l and Jud. Ethics Op. JI-131 (2005).

239. N.Y. Advisory Comm. on Jud. Ethics Op. 15-71 (2015).

240. N.Y. Advisory Comm. on Jud. Ethics Op. 18-95 (2018) (alteration original).

241. *See* E. WAYNE THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 74 (1973).

242. *Id.*

> to allow persons who no longer live in harmony to obtain a divorce." The latter does not compromise a judge's capacity to apply impartially the law as written, although it clearly states his position about improvements in the law.[243]

c. Judicial Disciplinary Decisions

Judicial disciplinary bodies also give wide berth to judges expressing personal opinions on legal issues including criticism of Supreme Court decisions. Judge Alex Kozinski, writing for the Judicial Council of the Ninth Circuit Court of Appeals, observed that a judge's speech concerning current events and developments in the law is "permitted not only because judges are citizens, but because they are particularly knowledgeable on such topics. Their speech may thus enhance the public discourse and lead to a more informed citizenry."[244] Applying this rationale, the Judicial Council found no misconduct when a judge expressed the "sickening feeling in [his] stomach about what might happen to race relations and religious tolerance" after the September 11, 2001, attacks and further expressed that "the '[c]riminalization of immigration laws' constituted '[i]nstitutionalized racism.'"[245] Judge Kozinski determined that these remarks "fall squarely within the ambit of protected speech and are precisely the kind of activity that the Code of Conduct encourages."[246] The Judicial Council for the Second Circuit Court of Appeals shares the Ninth Circuit's view of the right of federal judges to criticize Court decisions. The Second Circuit Council found no ethics violation when a federal judge publicly criticized the Supreme Court's decision in *Bush v. Gore.*[247] Similarly, the Judicial Council of the District of Columbia Circuit found that a judge's "sharp" criticism of the Court's death penalty jurisprudence was consistent with a "long tradition of lower court judges criticizing the Court on issues of constitutional law."[248] The Seventh Circuit Judicial Council agrees that judges may criticize past decisions of other judges, including Supreme Court Justices, in harsh terms as long as the judge refrains from personal attacks.[249]

243. *Id.*
244. *In re* Jud. Misconduct, 632 F.3d 1289, 1289 (9th Cir. 2011).
245. *Id.*
246. *Id.*
247. *See In re* Charges of Jud. Misconduct, 404 F.3d 688, 699 (2d Cir. 2005).
248. *In re* Charges of Jud. Misconduct, 769 F.3d 762, 785–86 (D.C. Cir. 2014).
249. Resol. of Jud. Misconduct Complaints about Dist. Judge Lynn Adelman, 965 F.3d 603, 610 (7th Cir. 2020).

3. Ethics Rules Specifically Governing a Judge's Testimony Before Congress

Although overlooked by Senators and nominees, the Code of Conduct for United States Judges and the ABA Model Code specify what a judge may discuss when voluntarily testifying before a legislative or executive committee.[250] Rule 3.2 of the 2007 ABA Model Code permits judges to voluntarily testify before political branch officials on a wide range of topics including (1) matters "concerning the law, the legal system, or the administration of justice;"[251] (2) social problems and public policy issues "about which the judge acquired knowledge or expertise in the course of judicial duties;"[252] and (3) the judge's personal legal or economic interests.[253]

The Code of Conduct for United States Judges partially aligns with Rule 3.2 of the 2007 ABA Model Code. The federal judicial code adopts ABA Rule 3.2(A) and permits testimony on matters concerning "the law, the legal system, or the administration of justice."[254] However, the federal code modifies ABA Rule 3.2 (B).[255] Instead of permitting judges to testify to matters about which they have gained knowledge or expertise during their service as a judge, the federal rule allows testimony only "to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area."[256] Finally, the federal rule authorizes judges,

250. Admittedly, it is unlikely that the authors of the ABA and the federal codes of judicial conduct had judicial confirmation hearings in mind when drafting the rules governing a judge's voluntary appearance before a legislative or executive committee.

251. MODEL CODE OF JUD. CONDUCT r. 3.2(A) (AM. BAR ASS'N 2007). *See generally* JUDGES IN STREET CLOTHES, *supra* note 181, at 144–55 (providing a detailed review of the interpretation and application of ABA Model Rule 3.2).

252. MODEL CODE OF JUD. CONDUCT r. 3.2(B) (AM. BAR ASS'N 2007); CHARLES GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 59 (2009).

253. MODEL CODE OF JUD. CONDUCT r. 3.2(C) (AM. BAR ASS'N 2007). Rule 3.2(C) recognizes a judge's right to defend his or her private economic and legal interests if, for example, a county is considering extending a highway through the judge's back yard. *See id.* cmt. 3.

254. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(2)(a) (JUD. CONF. 2019).

255. *Compare id.* at Canon 4(A)(2)(b) (permitting judges to testify "to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area"), *with* MODEL CODE OF JUD. CONDUCT r. 3.2(B) (AM. BAR ASS'N 2007) (permitting judges to testify regarding "matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties").

256. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(2)(b) (JUD. CONF. 2019). The wording of the exception in subsection (A)(2)(b) of the federal judicial code is awkward. The exception allows a judge to testify on matters upon which the public perceives the judge to possess special expertise. Apparently, the perception of expertise is enough without regard to whether the judge, in fact, possesses expertise.

when acting on their own behalf, to testify to protect their personal interest.[257] Unlike the ABA Model Code, the federal judicial code does not limit the judge's "interests" to those of a legal or economic nature.[258]

Taking full advantage of ABA Rule 3.2 and its state and federal counterparts, judges freely provide legislative and executive committees with their personal opinions on laws, proposed legislation, court opinions, and a host of other matters of interest to judges and the judiciary.[259] Judges have testified before legislative bodies concerning bankruptcy reform,[260] public access to the courts,[261] "the gaps left by the Supreme Court's remedial holding in *United States v. Booker* and [the need] to provide greater clarity and consistency to our federal sentencing system,"[262] FISA Court procedures,[263] a bill allowing discharge of offenders without completing the treatment conditions of probation,[264] an act to establish a permanent Violence Against Women Office in the Department of Justice,[265] border security and

257. *Id.* at Canon 4(A)(2)(c).

258. *Compare id.* (permitting a judge to testify "when the judge is acting in a pro se matter involving the judge or the judge's interest[]"), *with* MODEL CODE OF JUD. CONDUCT r. 3.2(C) (AM. BAR ASS'N 2007) (permitting a judge to testify specifically regarding his or her "legal or economic interests").

259. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 955 (2000) ("[F]ederal judges now regularly appear before Congress to testify on pending legislation."). *See also* Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 832 (2018) ("Oftentimes the most valuable facts and opinions rest with officials in the executive and judicial branches."); JUDGES IN STREET CLOTHES, *supra* note 181, at 146–50 (providing examples of judges testifying before legislative committees).

260. *See Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the Subcomm. on Courts, Com. & Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. 30–52 (2011) (testimony of Frank J. Bailey, C.J. of the United States Bankruptcy Court, District of Massachusetts).

261. *See, e.g.*, *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts: Hearing Before the Subcomm. on Courts, Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of J. Audrey G. Fleissig).

262. *See, e.g.*, *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts: Hearing Before the Subcomm. on Courts, Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of J. Audrey G. Fleissig).

263. *See, e.g.*, *Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (prepared statement of J. James G. Carr).

264. *See Testimony in Opposition of H.B. 2052: Hearing Before the Kan. H. Comm. on Corr. & Juv. Just.*, 2019–20 Leg. Sess. (2019) (testimony of C.JJ. Jared B. Johnson and Nicholas St. Peter).

265. *See, e.g.*, *Leading the Fight: The Violence Against Women Office: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 107th Cong. 33–39 (2002) (testimony of J. Vincent J. Poppiti).

immigration reform,[266] veterans' courts,[267] and zero-tolerance school policies.[268] Testimony concerning these topics easily comes within the parameters of the law, the legal system, and the administration of justice or areas of expertise developed by judges while on the bench.

ABA Model Rule 3.2, and its state and federal counterparts, permit judges to testify concerning law-related and other subjects about which they have gained knowledge or expertise; these rules provides sufficient authority for judges, including Court nominees, to discuss constitutional and other issues at confirmation hearings.[269] But even if a topic does not relate to the law, legal system, administration of justice, or expertise developed on the bench, the federal judicial code permits judges to testify in a pro se capacity "in a matter involving the judge or the judge's interest."[270] In their quest for a new job, nominees to the Court testify in a pro se capacity and therefore are free to discuss their interests with the Senators.

D. Disqualification

Requiring judges to remove themselves from cases in which they have a conflict or apparent conflict serves two purposes. First, it protects the parties' constitutional right to an impartial tribunal.[271] Second, recusal aims to preserve public confidence in the fairness of the judiciary.[272] Nearly every jurisdiction's code of conduct includes rules governing the mandatory disqualification of judges.[273] Each code sets forth specific grounds requiring

266. *See, e.g.*, *Measuring Outcomes to Understand the State of Border Security*: *Hearing Before Subcomm. on Border & Maritime Sec. of the H. Comm. on Homeland Sec.,* 113th Cong. (2013) (testimony of Veronica Escobar, County J., El Paso, Texas).

267. *See, e.g.*, *Drug and Veterans Treatment Courts: Seeking Cost Effective Solutions for Protecting Public Safety and Reducing Recidivism: Hearing Before the Subcomm. on Crime & Terrorism of the S. Comm. on the Judiciary*, 112th Cong. 16–18 (2011) (testimony of C.J. Jeanne E. LaFazia).

268. *See, e.g.*, *Ending School-to-Prison Pipeline: Hearing Before the Subcomm. on the Const., C.R., & Hum. Rts. of the S. Comm. on the Judiciary*, 112th Cong. 71–79 (2012) (testimony of C.J. Steven C. Teske).

269. MODEL CODE OF JUD. CONDUCT r. 3.2 (AM. BAR ASS'N 2007).

270. CODE OF CONDUCT FOR U.S. JUDGES r. 3.2(C) (2019).

271. Weiss v. United States, 510 U.S. 163, 178 (1994) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)) ("It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.'").

272. S*ee Disqualifying Judges*, *supra* note 39 at 432–33.

273. *Id.* at 473. *See also* COMM. ON CPR POL'Y IMPLEMENTATION, ABA, COMPARISON OF ABA MODEL CODE OF JUDICIAL CONDUCT AND STATE VARIATIONS (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.pdf [https://perma.cc/X4X5-433L] (comparing the disqualification provisions of the codes of judicial conduct enacted in thirty-two states since the issuance of the 2007 ABA Model Code of Judicial Conduct).

disqualification. For example, the Code of Conduct for U.S. Judges mandates recusal in cases in which the judge has (1) a financial interest, (2) a bias or prejudice, (3) personal knowledge of disputed facts, (4) prior service as a lawyer in the matter, or (5) a specified relationship to a party or party's lawyer.[274] In addition to specific disqualifying circumstances, every judicial code, including the federal code, requires disqualification whenever a judge's "impartiality might reasonably be questioned."[275]

Nominees frequently decline to answer questions, claiming that to do so would cause their impartiality to be reasonably questioned in future cases.[276] But not every extrajudicial comment on an issue requires the judge's disqualification from a case involving that issue. The long-standing principle is simple: Disqualification is not required unless a judge's statement commits the judge to rule a certain way in a pending or impending case or demonstrates a closed mind on an issue.[277] Simply expressing a personal opinion on a legal issue rarely requires disqualification. Professor Steven Lubet applied the rule to Senate confirmation hearings this way:

> Only actual commitments to specified outcomes violate the Code of Judicial Conduct.
>
> . . . .
>
> . . . So long as the questions are framed in terms of one's general view of the law and avoid inquiry into pending cases or identifiable proceedings, the answers should not raise the reasonable appearance of partiality and will virtually never require recusal.[278]

The undeniable fact is that "a judge's expression of a viewpoint on a legal issue, in and of itself, is generally not deemed to provide a legitimate basis for disqualification."[279] Indeed, state and federal "judges frequently hear cases concerning subjects about which they have previously expressed some

274. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C) (JUD. CONF. 2019).

275. *Disqualifying Judges, supra* note 39, at 416, nn. 29–31.

276. *See, e.g.*, *O'Connor Hearings*, *supra* note 41, at 57–58 (refusing to "endorse or criticize" Court decisions because that would demonstrate that she had "prejudged the matter" or had "morally committed [herself] to a certain position," thereby requiring disqualification from cases involving the same issue).

277. *See* United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976) (quoting United States v. Grinnel Corp., 384 U.S. 563, 583 (1966)) (explaining that an extrajudicial remark is "disqualifying only if it connotes a fixed opinion 'a closed mind on the merits of the case'").

278. Steven Lubet, *Confirmation Ethics: President Reagan's Nominees to the United States Supreme Court*, 13 HARV. J.L & PUB. POL'Y 229, 251, 259 (1990).

279. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 10.9 (2007).

views."[280] The Seventh Circuit Court of Appeals found that a judge was not disqualified from deciding issues concerning contingent fees even though he had expressed strong views on the topic in extrajudicial writings and speeches.[281] Similarly, the Ninth Circuit Court of Appeals refused to find that a judge's media statements describing marijuana distribution as a serious and pervasive social problem required recusal in a prosecution for conspiracy to manufacture marijuana because, "[a] judge's views on legal issues may not serve as the basis for motions to disqualify."[282] The Eighth Circuit Court of Appeals determined that a judge's assertion that the usury law was '"harsh' and amounted to a 'gift'" did not warrant recusal from cases involving the issue because "[t]he judge merely expressed a viewpoint concerning a legal issue."[283] Applying this well-established rule, federal district court judges routinely deny disqualification motions based on statements made by judges during Senate confirmation hearings.[284] Of course, if a judge's comment about a legal, social, or political issue suggests a closed, fixed mind, or constitutes a commitment to rule in a preordained way, disqualification is required.[285] Thus, a judge who announces a policy of sentencing selective service violators to "at least thirty months in jail no matter how 'good' they are" must disqualify himself from selective service cases.[286] Judges usually avoid any implication that extrajudicial comments foreshadow a closed mind or predetermined ruling by emphasizing that they have an open mind and will execute adjudicatory duties impartially without regard to personal views.[287] Relying on disclaimers to follow the law, no Supreme Court Justice has ever recused

280. *Id.*

281. Rosquist v. Soo Line R.R., 692 F.2d 1107, 1112 (7th Cir. 1982).

282. United States v. Bauer, 84 F.3d 1549, 1560 (9th Cir. 1996) (quoting United States v. Conforte, 624 F.2d 869, 882 (9th Cir. 1980)).

283. Johnston v. Citizens Bank & Trust Co., 659 F.2d 865, 869 (8th Cir. 1981).

284. *See, e.g.*, *In re* Afr.-Am. Slave Descendants Litig., 307 F. Supp. 2d 977, 984 (N.D. Ill. 2004); Murray v. Sevier, 929 F. Supp. 1461, 1469 (M.D. Ala. 1996), *vacated sub nom.* Murray v. Scott, 253 F.3d 1308 (11th Cir. 2001).

285. *See* United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976). *See also* MODEL CODE OF JUD. CONDUCT R. 2.10(B) (AM. BAR ASS'N 2007) (providing that a judge shall not make statements regarding matters that may come before the court that are "inconsistent with the impartial performance of the adjudicative duties of judicial office").

286. United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973). *Compare id.* at 528–29 (finding that the judge's statements regarding sentencing of selective service violators disqualified him from hearing selective service cases), *with* Lawton v. Tarr, 327 F. Supp. 670, 673 (E.D.N.C. 1971) (finding that a public proclamation of a "strong aversion to the Vietnam War" did not require the judge's disqualification in a selective service case).

287. *See* MODEL CODE OF JUD. CONDUCT r. 4.1 cmts. 13, 15 (AM. BAR ASS'N 2007); *see also supra* note 168 (citing testimony of nominees promising to keep an open mind).

themselves because of statements made during Senate confirmation hearings.[288]

IV. CONCLUSION

Presidents nominate Supreme Court Justices "whose political and ideological views mirror their own in the hope that the new Justice will decide cases in a manner consistent with the President's views."[289] Similarly, during the confirmation process, Senators quiz nominees on their legal, political, and social beliefs in the hope of determining whether a potential Justice's rulings will conform to the Senator's ideology.[290] If for no other reason than to lessen the likelihood of ending up like Judge Bork, nominees hesitate to reveal personal leanings.[291] To avoid substantive discussions, nominees construct legal arguments to justify their refusal to offer personal views on legal, political, and social subjects. Nominees claim that the judicial oaths of office, codes of judicial conduct, and disqualification rules prohibit judges and judicial candidates from expressing personal opinions on past cases and on issues that may come before the Court.[292] But that is simply inaccurate. Courts, judicial ethics committees, and judicial disciplinary bodies all agree that a judge may express personal opinions so long as the judge does not (1) make a pledge or promise to rule in a preordained way, (2) comment on a pending or impending case, or (3) demonstrate a closed mind on an issue.[293]

Courts have consistently determined that judges may announce their personal opinions on matters such as abortion, the death penalty, and gun control—the very subjects that Court nominees claim that ethics rules prevent

288. *See Roberts Hearings*, *supra* note 130, at 377 (statement of Senator Schumer) (challenging Justice Roberts to name a single justice who recused from a case because of testimony given before the Senate Judiciary Committee).

289. Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 294 (2010).

290. *See* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments,* 102 NW. U. L. REV. 1869, 1899 (2008) ("[S]enators are more likely to vote for a nominee who shares or approximates their own political ideology than for a nominee who is ideologically distant.").

291. *See, e.g.*, *Roberts Hearings*, *supra* note 130, at 374–78 (statement of Senator Schumer) (criticizing Justice Roberts' general unwillingness to answer the Senators' questions during the course of his confirmation hearing).

292. *See id.* at 361–62, 373 (statement of Justice Roberts) (expressing various arguments in support of his decision to withhold his opinions on various legal and social matters); *see also Ginsburg Hearings*, *supra* note 68, at 52 (statement of Justice Ginsburg) (expressing her belief that the judicial oath of office prevented her from expressing views on certain legal issues).

293. *See* MODEL CODE OF JUD. CONDUCT r. 2.10(A)–(B) (AM. BAR ASS'N 2007). *See also, e.g.*, United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976).

them from discussing.[294] Until nominated by a President, nominees accept the settled principle that no legal or ethical rule bars them from expressing personal views. For example, during her tenure as a law professor at the University of Chicago, Elena Kagan advocated that to fulfill their constitutional duty, Senators should require nominees to engage in substantive discussion of legal issues, similar to the discussion between the Senators and Judge Bork.[295] Professor Kagan concluded that such open and frank discussion would not violate the ABA Model Code or the concepts of judicial independence and impartiality unless, of course, a nominee promised to rule in a certain way.[296] Similarly, lawyer William Rehnquist believed that the Senate Judiciary Committee abdicated its constitutional responsibility by failing to press nominees on their views concerning recent Court decisions, the meaning of due process and equal protection, and other issues.[297] Once nominated, however, Kagan's and Rehnquist's views changed on the propriety of open and frank discussions of legal issues during confirmation hearings.[298] The change is understandable because answering the Senators' questions was no longer a purely academic exercise but had real life consequences. Nominees certainly are free to refuse to answer questions when they believe the answers would violate their idiosyncratic interpretation of the meaning of impartiality or would increase the likelihood of Senate rejection. But in such cases, nominees should be frank in stating the reason for sidestepping an issue. Refusing to express personal opinions because of individualized interpretations of judicial oaths, judicial codes, or disqualification rules that have been rejected by the courts is simply below the dignity, probity, and candor required of any judge.

294. *See* Bauer v. Shepard, 634 F. Supp. 2d 912, 947 (N.D. Ind. 2009). *See also In re* Charges of Jud. Misconduct, 769 F.3d 762, 785–86 (D.C. Cir. 2014); Ill. Jud. Ethics Comm. Op. 94-5 (1994).

295. Kagan, *supra* note 41, at 935–42.

296. *Id.* at 939–40.

297. William H. Rehnquist, *The Making of a Supreme Court Justice*, HARV. L. REC., Oct. 8, 1959, at 7, 8, 10 (arguing that the Senators should have questioned Justice Charles Evans Whittaker concerning his views about recent Court decisions on segregation and communism and the due process and equal protection clauses).

298. *See Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 320 (1986) ("I really had no idea what the problems confronting a nominee were then."). *See also Kagan Hearings*, *supra* note 100, at 62–64.