Questioning judges about their decisions

Ruth Bader Ginsburg appears before the Senate Judiciary Committee in 1993.

JAY MALLIN PHOTOS

Supreme Court nominees before the Senate Judiciary Committee

by MARGARET WILLIAMS and LAWRENCE BAUM

Interest in questioning nominees about past decisions has increased over time with senatorial recognition of the courts' importance.

There is considerable conflict involving the federal courts and the other branches of government, conflict that is widely perceived to have grown in recent years.[1] Some of it involves attacks on the courts themselves. Presidents and members of Congress have criticized judges and threatened retaliation, even impeachment, for their decisions.[2] In 2005 one senator even said that recent incidents of violence against judges might have resulted from inappropriate judicial activism.[3] In response, some federal judges and others sympathetic to them have expressed concern about what they see as serious encroachments on judicial independence.[4] Justice Sandra Day O'Connor said in 2005 that "I don't think I've ever seen relations as strained as they are now between the judiciary and some members of Congress."[5]

Other conflicts concern the selection of judges. As illustrated by the reactions to the nominations of John Roberts, Harriet Miers, and Samuel Alito, the process of selecting Supreme Court justices has come to feature greater controversy and more heated battles.[6] Con-

We benefited from comments on earlier drafts of this article by Gregory Caldeira, Kathleen McGraw, Nancy Scherer, and Kevin Scott and the reviewers for JUDICATURE.

1. *Issues in Judicial Independence and Accountability*, 88 JUDICATURE 114 (2004).
2. *E.g.*, Mike Allen, *GOP Seeks More Curbs on Courts*, Washington Post, May 12, 2005, at A3.
3. Charles Babington, *Senator Links Violence to "Political" Decisions*, Washington Post, April 5, 2005, at A7.
4. *E.g.*, William H. Rehnquist, *2004 Year-end Report on the Federal Judiciary*, 37 THE THIRD BRANCH (January 2005); John Files, *From Chicago Judge, a Plea for Safety and Softer Words*, New York Times, May 19, 2005, at A14.
5. Sarah Kershaw, *O'Connor Sees Strains Between the Judiciary and Some in Congress*, New York Times, July 22, 2005, at A14.
6. Mark Silverstein, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS (New York: W.W. Norton, 1994); Michael Comiskey, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES (Lawrence: University of Kansas Press, 2004).

tention has spread to the selection of lower-court judges, bringing a new level of visibility to that process.[7] That diffusion of contention is reflected in the conflicts over use of the filibuster by Senate Democrats to block the confirmation of some nominees to the courts of appeals.

Another development involving the courts in the current era is the growing practice of promoting judges to the federal appellate courts from lower courts. Most notably, it has become standard practice to select Supreme Court justices from judges sitting on lower courts, primarily the federal courts of appeals.[8] In fact, the attention given to Harriet Miers's lack of judicial experience suggests that this practice has won wide support from participants in American politics.

At first glance, this development seems unrelated to the apparent growth in conflict over the federal courts. But in their origins, changes in the professional backgrounds of Supreme Court nominees are similar to the growth in conflict. Both stem largely from increased recognition of the impact of federal court decisions on government and society and an interest in shaping those decisions. Seeking to minimize unpleasant surprises from their nominees, presidents have sought out nominees whose judicial records provide a basis for predicting their overall stance on the Supreme Court.[9]

There is a second link between these two developments, a link that is consequential. Just as a judicial record assists the president in scrutinizing prospective nominees, that record helps senators and other interested parties to assess actual nominees and creates a basis for supporting or opposing them. At a time of growing criticism of judicial decisions and growing scrutiny of judicial nominees, then, the practice of nominating lower-court judges to the Supreme Court provides another mechanism of accountability for judicial decisions.

This mechanism merits attention. For federal judges as a group, promotion to a higher court is very desirable, and that certainly is true of appointment to the Supreme Court. No court of appeals judge will be nominated to the Supreme Court without a favorable evaluation of the judge's record of votes and opinions by officials in the White House and Justice Department. Although the great majority of nominees are confirmed by the Senate, the defeats of some and the narrow margins of victory for others cause the Senate to loom large in the thinking of all nominees and the presidents who appoint them. To the extent that senators probe and respond to nominees' judicial records, their evaluations of those records—like the evaluations made by the president's administration—will help determine which judges win elevation to the Supreme Court.

This article considers that mechanism of accountability. The approach is to analyze senators' questions to Supreme Court nominees about their past decisions at their confirmation hearings. Scholars have given attention to confirmation hearings, but there has been limited analysis of senators' questioning behavior[10] and no systematic analysis of the factors that shape this behavior. Thus the article's analyses can illuminate questioning behavior as a whole. Its primary interest, however, is in understanding senators' use of questions about prior decisions.

The study encompasses confirmation hearings for sitting judges from John Marshall Harlan in 1955 to Stephen Breyer in 1994.[11] Its concerns are the frequency with which senators ask about prior decisions, the tone of the questions they ask, and the determinants of both the frequency and tone of such questions.

Hearings and accountability

Today the testimony of Supreme Court nominees before the Senate Judiciary Committee is the heart of the confirmation process. Yet in historical terms, this testimony is a relatively recent development. Until the 1950s, Supreme Court nominees seldom appeared at their hearings before the Senate Judiciary Committee. When Eisenhower nominee Harlan testified in 1955, he was the first sitting judge to do so. But this practice quickly became institutionalized. Since Harlan every Supreme Court nominee has testified, and it would be impossible for a nominee today to avoid that duty.[12]

A nominee's testimony gives members of the Judiciary Committee a chance to learn more about the nominee, if they seek information with which to guide their votes on confirmation. Senators who already have fixed positions on a nominee can use questions as a means to strengthen or weaken the nominee's case for other senators. For both types of senators, the most important area of interest is usually the pro-

7. Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *W. Bush's judiciary: The first term record*, 88 JUDICATURE 244 (2005); Nancy Scherer, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (Stanford, Calif: Stanford University Press, 2005).

8. Lee Epstein, Jack Knight, and Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903 (2003)

9. President Eisenhower, unhappy with the record of Chief Justice Warren, made that consideration explicit. Dwight D. Eisenhower, MANDATE FOR CHANGE, 1953-1956: THE WHITE HOUSE YEARS 230 (Garden City, N.Y.: Doubleday, 1963).

10. George L. Watson and John A. Stookey, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS, ch. 5 (New York: HarperCollins, 1995); Frank Guliuzza III, Daniel J. Reagan, and David M. Barrett, *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria*, 56 J. OF POLITICS 773 (1994). The roles of Judiciary Committee members in hearings on Supreme Court nominees are considered more broadly in Steven L. Vibbert, "Role Images in Committee: The Senate Judiciary Committee Hearings on Haynsworth, Carswell, and Blackmun" (Ph.D. dissertation, University of Iowa, 1981); and Katherine M. Gannon, *A Problem-Solving Perspective on Decision-Making Processes and Political Strategies in Committees: The Case of Controversial Supreme Court Justice Nomination Hearings*, in Donald A. Sylvan and James F. Voss, eds., PROBLEM REPRESENTATION IN FOREIGN POLICY DECISION MAKING 249-260 (New York: Cambridge University Press, 1998).

11. Because official transcripts were not available when the analyses were conducted, the study does not include the confirmation hearings for John Roberts and Samuel Alito.

12. Joseph P. Harris, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 117-32, 302-14 (Berkeley: University of California Press 1953); James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. OF PUB. L. 371 (1969); Stephen L. Carter, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS 58-68 (New York: Basic Books, 1994).

The length of a nominee's judicial record helps determine senators' opportunities to ask about pieces of that record. Clarence Thomas, with one year on a federal court of appeals, received only five questions about past decisions.

jected content of the votes that a prospective justice would cast and the opinions that the nominee would write on the Supreme Court.

Inquiry into this area is facilitated by the existence of a prior judicial record. Nominees who actually have cast votes and written opinions in cases can be questioned about those choices. In this way senators can probe nominees' views without asking them to violate the norm against forecasting the positions they would take on legal issues if confirmed for the Supreme Court.

From one perspective, questioning of nominees with judicial experience about their records of votes and opinions—and indeed the nominees' testimony as a whole—could be regarded as symbolic rather than consequential. After all, the great majority of nominees are confirmed, and most win confirmation by large margins. But for nominees whose confirmation is uncertain, such as Robert Bork, the hearings can have considerable impact on the outcome. A nominee's testimony can increase the level of opposition, as it did in the case of Clarence Thomas, or largely dispel opposition. The extensive preparation that nominees undergo before testifying reflects a recognition that even a seemingly safe nomination can run into trouble if the testimony goes awry. And one potential source of danger is questions about a nominee's judicial record.

From John Harlan in 1955 to Stephen Breyer in 1994, 26 people won nominations to the Court and testified before the Judiciary Committee. Of these, 20 were sitting judges and a 21st (Thurgood Marshall in 1967) had judicial experience in the recent past. Of these 21 nominees, 2 (William Brennan in 1957 and Sandra Day O'Connor in 1981) came from state courts. Two nominees for chief justice (Abe Fortas in 1968 and William Rehnquist in 1986) were sitting justices, and 2 nominees for associate justice (Brennan and Potter Stewart in 1959) already held recess appointments to the Court. The other sitting judges, as well as Marshall, had their most recent judicial experience on the federal courts of appeals.

Questions about decisions

In analyzing questions about prior decisions, the first task was to identify those questions. The official transcripts of confirmation hearings were used to locate and catalogue questions. A question was treated as relating to a past decision if it mentioned a case in which a nominee participated and it concerned the nominee's position in the case. Questions phrased in terms broader than a particular case were included so long as they were premised on the nominee's position in a case. (In these questions, a senator typically began by describing the nominee's position and then asked about its implications for the nominee's approach to that area of legal policy.) Successive questions by a senator about the same case were treated as a single question.[13] In the 21 hearings that were analyzed (all of those for nominees with judicial experience) a total of 230 questions met the criteria for inclusion, a small proportion of all questions but still a substantial number.[14]

It is uncertain whether questions about prior decisions could be expected to follow systematic patterns or whether they are largely idiosyncratic. That question can be probed by testing some expectations about the use of questions about decisions. The first expectation arises from the temporal changes in congressional attitudes toward the federal courts that were described earlier. As the work of the federal courts has become more prominent and controversial, as interest groups increasingly pressure the Senate to scrutinize judicial nominees, we would expect Supreme Court nominees with judicial experience to receive more questions about their prior decisions as the period from 1955 to 1994 progressed.

The second expectation involves the prospects for the confirmation of particular nominees. Senators' interest in asking about past decisions could be expected to increase with the level of uncertainty about a nominee's confirmation, in part because uncertainty spurs mobilization by interest groups. Thus more controversial nominees are likely to elicit more questions of this type.

Finally, the length of a nominee's judicial record helps determine senators' opportunities to ask about pieces of that record. All else being equal, we would expect that a nominee such as Clarence Thomas—with one year on a federal court of

13. Successive questions about a single case were common, and sometimes successive questions seemed to indicate that a senator was especially concerned about the case in question. However, the use of multiple questions was sometimes a product of the senator's style (or a nominee's style in responding to questions before they were completed). Frequently, the senator asked a subsequent question regarding the facts of the case, or clarifying the nominee's decision. Because of the interdependence of successive questions, we concluded that it was preferable to count successive questions about a case as a single question.

14. Senators asked 8 nominees about decisions whether to recuse themselves from particular cases. Because such questions differ from questions about the substance of decisions, these questions were not included in the analyses.

appeals—will receive fewer questions about past decisions than nominees with a decade or more in the courts.

A look at the distribution of questions by nominee provides a good starting point for inquiry into the questioning behavior of senators. Table 1 shows the number of questions about prior decisions that were asked of each sitting judge. The temporal pattern is striking. In the early years the confirmation hearings for Abe Fortas as chief justice nominee stand out; Fortas and Clement Haynsworth were the only nominees prior to 1986 who were asked as many as five questions about their prior decisions. (The questions to Fortas came from three Southern senators, and one—Strom Thurmond—was responsible for 17 of the 24 questions.) Beginning in 1986, in contrast, every nominee was asked at least 10 questions except for Thomas.

Table 1: Numbers of questions about prior decisions, by nominee

Nominee	Year	Questions
Harlan	1955	0
Brennan	1957	0
Whittaker	1957	2
Stewart	1959	4
Marshall	1967	4
Fortas	1968	24
Thornberry	1968	2
Burger	1969	0
Haynsworth	1969	9
Carswell	1970	2
Blackmun	1970	1
Stevens	1975	1
O'Connor	1981	1
Rehnquist	1986	18
Scalia	1986	10
Bork	1987	50
Kennedy	1987	34
Souter	1990	15
Thomas	1991	5
Ginsburg	1993	23
Breyer	1994	25

The table is not so clear about the impact of controversy over nominees and about the length of a nominee's judicial service. A statistical analysis was employed to provide a sense of their impact and a more precise picture of the effect of time. This analysis considered the effects of three variables on the number of questions about prior cases that are asked of each nominee: time (measured by calendar year), the level of controversy surrounding the nominee (measured by the number of predicted negative votes on confirmation),[15] and the number of years the nominee had served as a judge. The analysis employed a Poisson regression model, one in which the dependent variable is a count of occurrences of a phenomenon—in this case, the number of questions asked of each nominee.[16]

The analysis showed, somewhat surprisingly, that the number of years served as a judge had no independent impact on the number of questions asked about prior decisions. It may be that senators who were inclined to ask nominees about their prior decisions simply made use of whatever body of decisions was available. However, the level of controversy over a nominee had some impact and time even more impact.

The impact of these two variables can be gauged from estimates of the numbers of questions that would be asked of nominees under various conditions, estimates based on the results of the regression equation. To gauge the effect of controversy, consider a nominee who was nominated in 1975. If that nominee was completely uncontroversial, in that no negative votes were predicted, we would expect the nominee to be asked five questions about prior decisions. But if the nominee was highly controversial, so that 36 negative votes were predicted, we would expect 11 such questions.[17]

For nominees who were not at all controversial, the estimated number of questions asked about prior decisions increased from 1 in 1955 to 22 in 1994. For nominees facing an average amount of controversy, the estimated number increased from just over 1 in 1955 to 31 in 1994. Finally, for nominees who were facing a high level of controversy, the estimated number of questions about prior decisions was 2 in 1955 but over 50 in 1994.

Growth in questioning

The temporal growth in questioning about prior decisions should be considered from a different perspective.

15. The predicted number of negative votes was obtained from two studies in which that number was estimated from several characteristics of each nomination, such as the nominee's perceived qualifications, the ideological distance between senators and the nominee, party control of the Senate, and testimony of interest groups for and against the nominee. Nominees' judicial experience and records were not taken directly into account. Charles M. Cameron, Albert D. Cover, and Jeffrey A. Segal, *Senate Voting on Supreme Court Nominations: A Neoinstitutional Model,* 84 AM. POL. SCI. REV. 525, 532 (1990); Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 216 (New York: Cambridge University Press, 2002). Because those studies did not compute a predicted number of negative votes for Judge Thornberry, he is excluded from this analysis and the analysis of the tone of senators' questioning behavior in the next section.

16. We carried out diagnostic tests to ascertain that this model was appropriate for the data.

Readers who would like to see the tables on which this discussion and the later discussion of the tone of senators' questioning behavior are based may contact the authors at baum.4@osu.edu.

17. In making these estimates we held the length of judicial service constant at its mean value. We chose 36 negative votes as the high value because it was one standard deviation above the mean.

It was not just these questions that became more common over the past half century; senators scrutinized nominees more closely in general. To what extent was the growth of questions about prior cases independent of the general increase in scrutiny?

To address this question, the number of pages of nominees' testimony in each hearing was used as a measure of the length of testimony. To assess the effect of time on questions about past decisions independent of the general growth in scrutiny, a new variable was calculated, questions (about prior decisions) per page,[18] and its correlation with calendar year was determined. This approach made it possible to determine whether questions about prior decisions simply grew with the overall level of Senate scrutiny or whether they grew more quickly, reflecting an independent growth of interest in accountability for past decisions.

The initial result was a weak negative correlation of -.127. This result suggests that questioning about past decisions did not grow at a speedier pace than questions of all types. However, this correlation was a function of one highly anomalous case: Charles Whittaker was asked two questions about prior cases in three pages of testimony in 1957, the shortest testimony by far. His ratio of questions per page was three times that of any other nominee. When the Whittaker hearings were removed from the analysis, the correlation between questions per page and calendar year became +.420, strongly positive and statistically significant despite the small number of cases.[19] And the nominees with high ratios of questions per page came primarily in the later stages of the 1955-1994 period, while those with low ratios came primarily in the early part of that period. While some caution is required in interpreting this pattern, it indicates that the growth in senators' quest for accountability was even steeper than the overall growth in scrutiny of nominees. In other words, and perhaps surprisingly, senators' interest in probing nominees' decisional records was not simply a product of that growing scrutiny.

The tone of questions

The president's nomination of someone with judicial experience gives senators a chance to question the nominee about prior decisions. As the data in Table 1 suggest, however, not all senators make use of that chance. Indeed, senators often question nominees closely and at length without asking about past decisions.

When senators do ask such questions, their tone can differ considerably. Of course, this is true of senators' questions to nominees in general. George Watson and John Stookey have catalogued the various stances that senators take toward the nominees they question.[20] The most obvious and most important dimension of variation might be called directional. As Watson and Stookey show, some senators (whom they call "evaluators") take a relatively neutral stance, seeking to gain information with which to make their decisions about a nominee. In contrast, "partisans" ask questions in ways that are intended to bolster or weaken a nominee's position.

This article's focus on questions about prior decisions allows it to probe senators' stances and the forces that shape those stances. What distinguishes senators who ask about prior decisions from those who do not? Among those who do ask such questions, what causes them to frame questions in positive, negative, or neutral terms?

To address these questions, senators were first divided into four groups: those who asked no questions about prior cases, those whose questions were positive in tone, those whose questions were negative in tone, and those whose questions were neutral. To characterize senators in this way, the tone of the 230 questions about prior decisions had to be coded. The following criteria were used:

1. *Positive*. This category includes questions that contained a positive evaluation of the nominee's position. Specifically, the senator indicated agreement with the nominee's position or asserted that the nominee's position refuted a criticism of the nominee. An example is Senator Orrin Hatch's question of Justice Rehnquist about his dissent in *Wallace v. Jaffree* (1985):

> We heard charges in the last day or so that you might be too extreme. One example raised was your dissent in the Jaffrey v. Wallace [sic] silent prayer case. It might put this case in context to realize that Justice White and Mr. Justice Burger also dissented in that case....More importantly, 12 members of this committee have dissented in the same case because my constitutional amendment proposal would reverse Jaffrey and permit silent prayer reflection or reflections. It was approved by this committee on a 12 to 6 vote on October 3, 1985. Are you embarrassed to find yourself in agreement with two thirds of this Judiciary Committee?[21]

2. *Negative*. Questions were counted as negative if they contained a negative evaluation of the nominee's position in the case. A clear example is Senator Howard Metzenbaum's request that Judge Robert Bork account for his position in *Oil, Chemical and Atomic Workers v. American Cyanamid* (1984): "Judge, I must tell you that it is such a shocking decision, and I cannot understand how you as a jurist could put women to the choice of work or be sterilized, and I would think you are entitled to comment on how you arrived at that decision."[22]

3. *Neutral*. This category includes questions that did not fit either of the first two categories. One example is Senator Howell Heflin's question to Judge David Souter about his opinion in *State v. Hewitt* (1986), a

18. All the hearings but one (for Potter Stewart) were in the same typeface. We corrected the length of the Stewart hearings based on the number of words per page. For Clarence Thomas, we did not include the second set of hearings dealing with sexual harassment.

19. The correlation was significant at the .033 level with a one-tailed test.

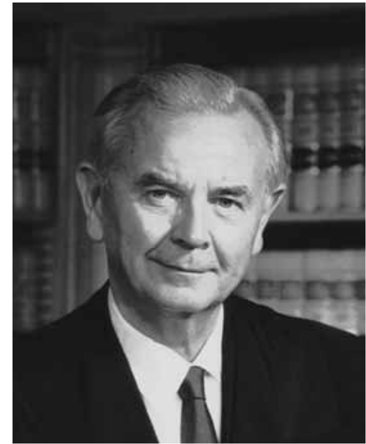
20. Watson and Stookey, *supra* n. 10, at 148-155.

21. U.S. Senate, Nomination of Justice William Hubbs Rehnquist: Hearings Before the Committee on the Judiciary, 99th Congress, 2nd Session, 307 (Committee Print, 1987).

22. U.S. Senate, Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, 100th Congress, 1st Session, 467 (Washington D.C.: U.S. Government Printing Office, 1989).

Table 2: Numbers of questions about prior decisions, by tone and nominee

Nominee	Year	Positive	Negative	Neutral
Harlan	1955	0	0	0
Brennan	1957	0	0	0
Whittaker	1957	2	0	0
Stewart	1959	1	2	1
Marshall	1967	0	4	0
Fortas	1968	0	24	0
Thornberry	1968	0	2	0
Burger	1969	0	0	0
Haynsworth	1969	9	0	0
Carswell	1970	1	1	0
Blackmun	1970	0	0	1
Stevens	1975	1	0	0
O'Connor	1981	1	0	0
Rehnquist	1986	4	8	6
Scalia	1986	4	5	1
Bork	1987	24	17	9
Kennedy	1987	2	22	10
Souter	1990	2	5	8
Thomas	1991	3	2	0
Ginsburg	1993	5	10	8
Breyer	1994	7	11	7



In 1957 William Brennan received no questions about prior decisions; in 1987 Robert Bork received 50.

criminal procedure case in the New Hampshire Supreme Court:

> Heflin: You made a determination to decide the case on the New Hampshire Constitution?
>
> Souter: Yes, sir.
>
> Heflin: Now, would you tell us basically your reasoning for doing that?[23]

Altogether, 66 questions (29 percent) were coded as positive, 113 (49 percent) as negative, and 51 (22 percent) as neutral. Table 2 shows the distribution of question tone by nominee.

These codings then were used to characterize the questioning behavior of each senator who served on the Judiciary Committee during the hearings for a particular nominee. (Of course, many senators participated in the hearings for multiple nominees, but each senator-nominee combination was counted separately.) Senators who asked no questions fall into one category. Those senators who did question nominees about prior decisions were categorized according to the following rules:

Positive: The senator asked at least one question that was positive in tone and no negative questions, with or without neutral questions.

Negative: At least one question that was negative in tone and no positive questions, with or without neutral questions.

Neutral: Both positive and negative questions, with or without neutral questions; or neutral questions only.

Of the 337 senators, 252 (75 percent) asked no questions about nominees' past decisions, 15 (4 percent) were coded as positive, 41 (12 percent) as negative, and 29 (9 percent) as neutral. Thus, most senators asked no questions about cases, but a substantial minority did so. Consistent with the distribution of questions, negative stances by senators were far more common than positive stances.

Explanations

Possible explanations of senators' questioning behavior fall into two categories. The first concerns senators' incentives to ask questions about cases of any tone or questions of a specific tone. The second concerns senators' opportunities to ask questions of any tone about nominees' prior decisions.

The explanations related to incentives include two characteristics of nominations that were considered earlier: the year in which the Senate considered a nominee and the extent of controversy over a nominee. It was posited that senators were more likely to fall into one of the three "questioning" categories rather than asking no questions about prior decisions if a nomination came later and if the nomination was more controversial.

The other explanation related to incentives is a characteristic of senators, their inclinations toward a nominee. Studies of senators' behavior in confirmation hearings show the connection between their views about a

23. U.S. Senate, Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, 101st Congress, 2nd Session, 280 (Washington D.C.: U.S. Government Printing Office, 1991).

nominee and the roles they play. Thus, we would expect that senators who are favorably inclined will tend to engage in positive questioning, those who are unfavorably inclined to engage in negative questioning. (We would not expect these inclinations to affect the incidence of neutral questioning.)

Senators' ultimate decisions whether to vote for or against a nominee are based on a variety of considerations.[24] Senators' initial inclinations toward a nominee, reflected in questions at confirmation hearings, are largely a product of partisan and ideological considerations. Senators are more favorable toward nominations by presidents of their own party, and they are more favorable toward nominees whom they perceive as ideologically close to them. Partisan agreement and ideological agreement are highly correlated; measures of the two types of agreement were included in the analyses alternately.[25]

One explanation related to opportunities is the third characteristic of nominations considered earlier, the number of years that a nominee had served as a judge. It was posited that senators were more likely to fall into one of the three "questioning" categories if a nominee served longer.

A second explanation related to opportunities is a characteristic of senators: the senator's committee rank within the party. More senior senators, who can question nominees earlier in a sequence, would seem more likely to ask questions about prior cases because fewer topics are exhausted when their turn comes.

To determine the impact of these variables, multinomial logistic regression analysis was conducted. This form of analysis estimates the effect of independent variables on the likelihood that a case will fall in one category rather than another. In this instance, the analysis probed the relationship between each variable and the likelihood that a senator would ask questions with a positive tone, a negative tone, or a neutral tone rather than asking no questions about a nominee's prior decisions. From these analyses, as with the earlier analysis of the number of questions asked by each senator, calculations were carried out to estimate the effect of each variable on the probability that a senator will fall into each of the four questioning categories.[26]

> The liklihood of negative questioning grew the most over time, from 1 percent in 1955 to 32 percent in 1994.

The variables related to senators' opportunities had some impact on their questioning behavior. Compared with asking no questions, higher-ranking senators were more likely to engage in negative or neutral questioning behavior. (They were also more likely to engage in positive questioning behavior, but that effect was weaker and was not statistically significant.) In that same comparison, judges who had served for longer periods were more likely to be the recipients of neutral questioning but not positive or negative questioning.

The more powerful predictors of senators' questioning behavior, however, were two of the variables related to their incentives. (The third variable involving incentives, the level of controversy over a nomination, had little impact on senators' questioning behavior.)[27] As in the earlier analysis of questions asked each nominee, the most pronounced impact for any variable was that of the calendar year. Each type of questioning behavior increased substantially in frequency compared with no questioning as time went on. In 1955, holding other variables constant at their mean values, there was only a 4 percent estimated chance that a senator would ask any questions about a nominee's prior decisions. The likelihood of asking a question increased to 15 percent in 1975 and then to 55 percent in 1994. The fact of growth is not surprising, but its extent—especially after 1975—is striking.

Thus interest in questioning nominees about past decisions grew over time with senatorial recognition of the courts' importance. The likelihood of negative questioning grew the most over time, from 1 percent in 1955 to 32 percent in 1994, but neutral questioning grew quite substantially as well (from 1 percent to

24. Cameron, Cover, and Segal, *supra*. n. 15; Jeffrey A. Segal, Charles M. Cameron, and Albert D. Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992); L. Marvin Overby, Beth M. Henschen, Michael H. Walsh, and Julie Strauss, *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 997 (1992); Gregory A. Caldeira and John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499 (1998).

25. Ideological distance between senators and nominees is difficult to calculate. We measured this distance as a function of senators' "DW-nominate" scores that measure their overall ideological positions and the "Segal-Cover" estimates of nominees' ideological positions, rescaling the DW-nominate scores to put them on the same scale as the Segal-Cover scores. The Segal-Cover scores are discussed in Jeffrey A. Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). The DW-nominate scores are discussed in Nolan M. McCarty, Keith T. Poole, and Howard Rosenthal, INCOME REDISTRIBUTION AND THE REALIGNMENT OF AMERICAN POLITICS 45-54 (Washington, D.C.: AEI Press, 1997).

26. As this description suggests, "no questions" was the base category. We conducted two analyses, one with the variable for party agreement between president and senator, the other with the variable for ideological distance between nominee and senator. The use of a multinomial logit model incorporates the assumption that senators simultaneously determine whether to ask questions about cases and what type or types of questions to ask. We tested the appropriateness of this assumption through a version of the Hausman test. Jeroen D. Weesie, *Seemingly Unrelated Estimation and the Cluster-Adjusted Sandwich Estimator*, STATE TECHNICAL BULL., November 1999, 34-47. The results indicate that this assumption is appropriate.

To estimate the probabilities of each type of questioning behavior for particular variables, other variables were set at their mean values. Probabilities for all the variables except party agreement were obtained from the analysis with ideological distance between senators and nominees as one of the variables.

27. As discussed earlier, the level of controversy did affect the numbers of questions about prior decisions that nominees were asked.

18 percent). The likelihood of positive questioning also grew, but at a slower pace, from 2 percent to 5 percent.

Party disagreement between senators and presidents and ideological distance between senators and nominees had the expected effects on questioning behavior. These effects were especially strong for ideological distance. A senator who was relatively distant from a nominee[28] was three times as likely to engage in negative questioning as a senator who was relatively close to the nominee and only one-sixth as likely to engage in positive questioning. If senators were using questions about prior cases to bolster nominees they favored or attack those they disliked, ideology was even more powerful than party in determining their inclinations toward nominees.

Conclusions

This is an era in which both the work of the federal courts and Supreme Court nominees receive close scrutiny from Congress. The practice of nominating lower-court judges to the Court, the dominant practice for the last 30 years, helps to link the increases in these two types of scrutiny. Presidents' nominations of sitting judges to the Court allow senators to scrutinize the judicial records of nominees. In particular, senators who serve on the Judiciary Committee have the opportunity to question nominees directly about their past judicial decisions.

This study shows that senators today make considerable use of that opportunity. Increasingly, committee members ask nominees about past decisions. The tone of their questions varies, underlining variation in the motives that underlie those questions. Some questions seem designed primarily to help the inquiring senator to make a decision about confirmation. More often, the questions are intended to strengthen or weaken the case for confirmation—usually to weaken it. Thus, in the terms used by Watson and Stookey, these findings suggest that senators who play active roles in probing the judicial records of nominees act more as partisans than as evaluators.

By asking nominees about their prior decisions, senators have created a mechanism of accountability for judges who seek promotion to the Supreme Court. A nominee's record of decisions has become a basis for senators' choices about confirmation. Members of the Judiciary Committee are not the only participants in the confirmation process who make use of nominees' records in that way; interest groups are often active in publicizing past decisions that they see as strengthening or weakening the case for confirmation. But the ability of committee members to confront nominees directly about their decisions in a highly public forum puts them in a unique position to enforce accountability.

Some scholars and judges have considered the possibility that judges' interest in promotion may affect their decisions.[29] That possibility is speculative, and there are reasons to question whether this effect occurs.[30] But if judges do think about the consequences of their decisions for promotion, they now need to take the Senate into consideration along with the president. The real possibility of Senate defeat and the willingness of senators to ask nominees about their judicial votes and opinions enhance the relevance of the Senate to judges who are interested in promotion to the highest court.

This possibility aside, the questioning of Supreme Court nominees about their decisions is one indication of the attention that senators now give to judges' work. In itself, senators' growing interest in asking such questions enhances attention to judges' work and thus enhances judges' accountability for their decisions. As the recent nominations to the Court by President George W. Bush indicate, the result has been to complicate the president's task. The choice of a nominee without judicial experience can raise questions about the nominee's qualifications that a president would prefer to avoid, but nominees with that experience are open to scrutiny based on their records of decisions. As this study found, senators are increasingly willing to undertake that scrutiny.

MARGARET WILLIAMS
is an assistant professor in the Department of Political Science at Goucher College. (margaret.williams@goucher.edu)

LAWRENCE BAUM
is a professor in the Department of Political Science at The Ohio State University. (baum.4@osu.edu)

28. A relatively distant senator was one whose ideological distance from the nominee was one standard deviation greater than the mean distance; a relatively close senator was one whose distance from the nominee was one standard deviation less than the mean distance.
29. Mark A. Cohen, *The Motives of Judges: Empirical Evidence From Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13 (1992); Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 NYU L. REV. 1377 (1998); Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CALIF. L. REV. 455 (1999); Alex Kozinski, *The* Real *Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1104 (2004).
30. Richard A. Posner, OVERCOMING LAW 111 (Cambridge, Mass.: Harvard University Press, 1995).