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THE CANDOR FACTOR: DOES NOMINEE EVASIVENESS AFFECT JUDICIARY COMMITTEE SUPPORT FOR SUPREME COURT NOMINEES?

Justin Wedeking*
Dion Farganis**

Are members of the Senate Judiciary Committee more likely to vote in favor of Supreme Court nominees who are candid and forthcoming during their confirmation hearings? Based on a line-by-line content analysis of every hearing transcript since 1955, we find that candor actually plays less of a role today than in years past. Specifically, we conclude that since 1981, when the hearings were first televised, senators have been influenced more by partisanship and ideology than by nominee forthcomingness. Thus, contrary to the claims of many lawmakers, candor does not appear to influence the amount of support that a nominee receives at the pivotal committee stage. We close by discussing the political and normative implications of these findings.

I. INTRODUCTION†

“I don’t know how we can force nominees to be forthcoming except through our votes.” – Senator John Kyl (2010).1

“In her testimony, she failed to answer many of the questions posed to her. . . . Candid answers to our questions were essential to ascertain

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whether she has the appropriate judicial philosophy for the Supreme Court.” – Senator Chuck Grassley (2010).²

“If she had been more forthcoming, perhaps I would have been able to come to a different conclusion.” – Senator George LeMieux (2010).³

The above remarks were all made by senators who voted against Elena Kagan’s nomination to the Supreme Court. Apparently these lawmakers felt that Justice Kagan’s lack of candor was a significant enough strike against her to justify their lack of support. Had she been a more forthcoming nominee—in their estimation, at least—she might have earned their votes.

Concerns about nominee evasiveness have, of course, been intensifying over the past twenty years.⁴ Legal academics, journalists, and other judicial observers routinely criticize Supreme Court confirmation hearings as exercises in obfuscation,⁵ where prospective justices give carefully crafted answers that reveal little about their views and opinions. Thus it is hardly a surprise that senators themselves have joined the chorus by proposing that a lack of candor will jeopardize a nominee’s chances of becoming a justice.

But do senators really base their votes on whether nominees are forthcoming during their hearings? Needless to say, an answer to this question is essential if we wish to understand how justices are confirmed and what factors influence their prospects. Regrettably, however, while prior research in this area has shed light on a number of important aspects of the Supreme Court nomination process,⁶ it has revealed little

5. See David A. Yalof, Confirmation Obfuscation: Supreme Court Confirmation Politics in a Conservative Era, 44 STUD. L. POL. & SOC’Y (SPECIAL ISSUE) 141, 164 (2008) (describing how senators use televised confirmation hearings as a vehicle to advance a political agenda, not to ask relevant questions of the nominee).
6. See, e.g., MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 41-43 (2004) (noting the tendency of senators to question the nominees on issues that are pertinent to their own political agenda, ignoring the “nominees’ judicial philosophies”); Jason J. Czarnecki et al., An Empirical Analysis of the Confirmation Hearings of the Justices of the

http://scholarlycommons.law.hofstra.edu/hlr/vol39/iss2/2
about nominee candor and the role it plays in determining who becomes a justice and who does not. Thus there is a rather sizable gap in what we know about this vital part of the American political and judicial process.

In this paper, we aim to help overcome that gap. Based on the results of a line-by-line content analysis of every Supreme Court confirmation hearing transcript since 1955, we attempt to shed light on a number of largely unexamined aspects of the confirmation process. In particular, we are interested here in exploring the relationship between nominee candor and Judiciary Committee votes. The quotes that began this paper suggest that evasiveness can hurt a nominee. But does this, in fact, happen? If so, have there been changes along these lines over time? Or do other factors, such as partisanship and ideology, better explain why a committee member decides to vote for or against a nominee?

We begin by reviewing prior work on confirmation hearings. We then describe how we conducted our content analysis and how it expanded and improved upon previous efforts. Next, we provide an overview of some of the more significant trends and changes that we detect in the hearings over the past half century—most notably, those involving the number and type of questions that senators ask and the ways in which nominees respond to them. We then assess these changes in the hearings against an original dataset of Judiciary Committee votes for all of the nominees in our content analysis. As noted above, we are especially interested here in whether partisanship and ideology (on the one hand) or candor (on the other) better explain how committee members vote on a given nominee. Here we find that nominee candor actually plays less of a role in influencing senators’ votes than it did in the past. That is, contrary to the claims made by Senator Kyl and others, the fate of recent nominees has been determined largely by factors such as partisanship and ideology, and not by how forthcoming they are during their testimony. Interestingly, we find that this change largely coincides with the introduction of television cameras into the hearings in

Rehnquist Natural Court, 24 CONST. COMMENT. 127, 134 (2007) (noting the lack of sincere efforts to properly question nominees at confirmation hearings); Frank Guliuzza III et al., The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria, 56 J. POL. 773, 775-78 & tbl.1 (1994) (reporting that questions on a nominee’s constitutional philosophy vary depending on the nominee); Lori A. Ringhand, “I’m Sorry, I Can’t Answer That”: Positive Scholarship and the Supreme Court Confirmation Process, 10 U. PA. J. CONST. L. 331, 333-36 (2008) (outlining the various forms of questioning that a senator may employ at a confirmation hearing); George Watson & John Stookey, Supreme Court Confirmation Hearings: A View from the Senate, 71 JUDICATURE 186, 189 (1988) (explaining that much of the questioning stems from the ideological incongruence between the nominee and the senator); Margaret Williams & Lawrence Baum, Supreme Court Nominees Before the Senate Judiciary Committee, 90 JUDICATURE 73, 74-75 (2006) (noting the relevance of the nominee’s lower court decisions in questioning).
1981. More precisely, for nominees prior to Justice Sandra Day O'Connor, we find that candor was an important factor, while for nominees during the televised hearings "era," ideology and partisanship drive committee voting. We discuss the implications of this important finding at the close of the paper.

II. PRIOR WORK ON SUPREME COURT CONFIRMATION HEARINGS

Existing studies of Supreme Court confirmation hearings fall into three main groups. The first focuses on the role of ideology during the hearings. Broadly speaking, most of these reports find that the hearings became more ideological with the nomination of Robert Bork in 1987. This view is not universal, however. Some suggest that ideology emerged as an important feature of the hearings during the early 1980s, while Bork himself argues that the changes date back even earlier to the Warren Court era of the 1950s and 1960s. These differences aside, however, scholars generally agree that ideology plays an important role in the confirmation hearings.

A second group of studies in this area looks at the content of the hearings themselves. For example, Lori A. Ringhand and Paul M. Collins, Jr. examine the topics of the questions asked by Judiciary Committee members over the past seventy years of hearings. They find, among other things, that questions are influenced by factors such as

9. See Epstein et al., supra note 7, at 302.
10. This general conclusion about the increased role of ideology aligns with the seminal work of Charles M. Cameron, Albert D. Cover, and Jeffrey A. Segal, which places partisanship and ideology at the heart of the Supreme Court confirmation vote. Charles M. Cameron et al., Senate Voting on Supreme Court Nominees: A Neoinstitutional Model, 84 Am. Pol. Sci. Rev. 525, 530-31 (1990); see also Epstein et al., supra note 7, at 306 ("Presidents who attempt to appoint well qualified but ideologically extreme nominees, a Scalia on the right or a Brennan on the left, can no longer expect their candidate to be greeted with universal acclaim in the Senate."); James Cottrill et al., The Partisan Dynamics of Supreme Court Confirmation Voting 19 (Sept. 2-5, 2010) (unpublished manuscript), http://papers.ssm.com/sol3/papers.cfm?abstract_id=1656040 (explaining that "ideological distance between the senator and nominee is a powerful and enduring influence on confirmation voting").
the senator's political party, as well as the gender and race of the nominee. Similarly, in an earlier article, Margaret Williams and Lawrence Baum found that questions about a nominee’s past judicial decisions have become more common over the years. Meanwhile, a small handful of investigations have looked at this dynamic from the nominee’s side. Ringhand, for example, finds that members of the Rehnquist Court gave answers that were often general and ambiguous. Examining the same set of justices, others have concluded that responses during the hearings do not correlate well to votes on the bench once confirmed.

The third part of the confirmation hearings literature has a more normative orientation and focuses on whether nominees should be expected to be candid and forthcoming, especially with regard to questions of constitutional law. Perhaps the most well known piece in this regard comes from Stephen Carter, who argues that questioning should be limited to a nominee’s qualifications, competence, and “capacity for moral reflection.” Others argue that it is perfectly appropriate for the Senate to ask about a nominee’s judicial philosophy or general approach to decision making. Robert Post and Reva Siegel, meanwhile, take things even further by suggesting that nominees should be expected to testify about how they would have voted in already-decided Supreme Court cases. However, as Ringhand argues, nominees often get out of this sort of dilemma by claiming that cases are “unsettled” even when a decision has been made. For example, Ringhand notes, both Justice Antonin Scalia and Chief Justice William

12. See id. at 40-48.
13. Williams & Baum, supra note 6, at 73-74.
14. Ringhand, supra note 6, at 341 (“The Rehnquist Court nominees gave general opinions on 179 different cases and firm opinions on 92 cases.”).
15. Czarneizki et al., supra note 6, at 141.
18. Robert Post & Reva Siegel, Questioning Justice: Law and Politics in Judicial Confirmation Hearings, 115 YALE L.J. POCKET PART 38, 44-45 (2006), http://www.thepocketpart.org/2006/01/post_and_siegel.html; see also Yalof, supra note 5, at 165 (“The process of confirming Supreme Court nominees...rarely offers significant insights into the views or judging philosophy of future Justices.”).
Rehnquist declined to answer questions about *Marbury v. Madison*,\(^{20}\) because they claimed some of the issues might arise again.\(^{21}\)

As a whole, this existing work strongly suggests that the confirmation hearings for Supreme Court nominees have undergone changes over the years. However, it leaves a number of questions unanswered; particularly about nominee candor and the role that it plays in securing Senate support. That sort of effort, we believe, requires an entirely new dataset—one that examines both senators’ questions and nominees’ answers in great detail. To that end, we recently undertook the task of performing a comprehensive content analysis of every Supreme Court confirmation hearing transcript since 1955, when the hearings became a regular part of the confirmation process. We turn now to an explanation of how we performed that analysis.

III. CODING METHODOLOGY

As noted, we elected to include in our analysis every confirmation hearing since Justice John M. Harlan’s in 1955. Some nominees had hearings before Justice Harlan. For example, a hearing was held for Justice Louis Brandeis in 1916, but he did not testify.\(^{22}\) In 1925, Justice Harlan Fiske Stone became the first nominee to appear at his own hearing,\(^{23}\) and Justice Felix Frankfurter had a full hearing in 1939.\(^{24}\) But Justice Harlan marks the beginning of an unbroken series of hearings that have been held for every nominee over the past fifty-five years, and as such provides us with a natural starting point for our analysis.

A. Coding Scheme

The basic unit of analysis for our coding scheme was an exchange. We defined an exchange as a question from a senator and its corresponding answer. Most often, an exchange comprised a single question and a single response, but there were some occasions where we coded multiple back-and-forths within a single exchange—usually to account for situations where a nominee and senator were talking at the same time.

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\(^{21}\) Ringhand, supra note 6, at 340-41.


\(^{24}\) *See id.* at 375-77 (discussing Justice Frankfurter’s participation in his 1939 hearing).
same time. In total, we identified 10,883 exchanges from Justice Harlan through Justice Kagan. We then proceeded by recording the following variables for each exchange, and our measures appear highly reliable.

B. Type of Question

Questions were split into two groups: Questions of Fact ("QOF") and Questions of View ("QOV"). As the name implies, QOFs were directed at obtaining basic factual information, while QOVs sought opinions, beliefs, and views. For instance, "Brown v. Board of Education was decided in 1954, correct?" would be coded as a QOF, while, "Do you believe that Brown was correctly decided?" would be a QOV. We made this distinction because we believed that QOFs were much more likely to generate candid answers, and we did not want to conflate those kind of forthcoming responses with the largely separate enterprise of giving opinions and views.

25. The coding was done by one of the principal investigators and a graduate student. The principal investigator ("PI") numbered each exchange before the coding began in order to make the process of coding more efficient. Prior to this, the PI and the graduate student coder performed a series of trial runs in order to make sure they agreed independently on what should be classified as an exchange.

26. Of the two coders, the PI coded the lion's share of the transcripts, handling approximately three-fourths of the senator-nominee exchanges, while the graduate student coder analyzed the remaining exchanges. Hearings for both coders were spread evenly over the time period under review. We used several hearings to assess inter-coder reliability, and it proceeded in multiple steps. In sum, 10.1% of the observations were used in our reliability check (1101/10,883). For the first step, we coded 100 observations of Justice Stewart and 100 observations of Justice Sotomayor. For our measure on whether the question asks about a factual nature or personal view, there was 98% agreement across the 200 observations. With respect to our measure of nominee candor/evasiveness, there was 78% agreement for Justice Stewart and 86% agreement for Justice Sotomayor. Next, the coders discussed the discrepancies to resolve the coding errors and devised a plan for how to handle them in the future. For the second step, as coding proceeded, we randomly chose an additional 901 observations to code (100-Harlan, 200-Haynsworth, 200-Marshall, and 401-Thomas). From the much larger sample, our measure on the question type (fact or viewpoint) had an agreement of 96.67% (kappa .9318, p<.001). For our measure of nominee candor, the agreement was 93.9% (kappa .8256, p<.001). In contrast, by chance alone we could expect agreement on the two measures to be approximately 51.2%, and 65%, respectively. In short, our measures of agreement are much higher than one would expect by chance alone. Further, the sample size of our reliability check is consistent with other work in the field. For example, Mark J. Richards and Herbert M. Krizter, Jurisprudential Regimes in Supreme Court Decision Making, 96 AM. POL. SCI. REV. 305, 316-17 (2002). Scott L. Althaus and Young Mie Kim report 88% agreement for 101 randomly selected news stories out of 3854 total stories. Scott L. Althaus & Young Mie Kim, Priming Effects in Complex Information Environments: Reassessing the Impact of News Discourse on Presidential Approval, 68 J. POL. 960, 964 (2006). In conclusion, our two key measures (nominee candor and question type) appear highly reliable.
There were four topics of QOF: (1) legal education; (2) biography or family; (3) non-legal employment history; and (4) nominee’s writings, speeches, previous testimony, and other issues that did not fit into the first three main categories. Again, these were all factual questions; questions that asked a nominee whether he or she remembered a particular case, speech, or activity—but not how the nominee felt about those things—would fall into this category. Meanwhile, there were nine separate topics for QOVs: (1) past Supreme Court rulings or lower court rulings; (2) hypothetical cases; (3) approach to judging and constitutional interpretation; (4) powers of Congress and the President; (5) federalism and states’ rights; (6) judicial power and administration; (7) peace, security, law and order; (8) individual rights and liberties; and (9) other topics not identified above. Some questions involved more than one issue; they were coded with the main topic listed first.

D. Candor Level

Each nominee response was assigned one of the following five values:

1. Fully/Very Forthcoming: Nominee answered the question that was asked without any qualification.27
2. Qualified: Nominee indicated some reason for not answering the question fully, but then gave at least a partial response to the question.
3. Not Forthcoming: Nominee chose not to answer the question at all.
4. Interruption: Nominee was interrupted by a senator before she/he even had a chance to give a partial response.
5. Non-Answer: Nominee gave a non-substantive response (e.g., “Senator, that is a hard question.”) to a substantive question. Or nominee gave a factual answer to a question of view (e.g., the question asked for nominee’s views on abortion rights and nominee responded simply by telling the committee that Roe v. Wade was decided in 1973). Or nominee answered the question with a question (e.g., “Is that what you are asking me?”).

27. Importantly, fully forthcoming answers did not necessarily mean long answers. For example, if the question asked, “Do you believe that people have the right to carry guns?” and the answer was, “No,” this would be a fully forthcoming response.
E. Reasons for Not Answering

Responses coded as "Qualified" or "Not Forthcoming" were then assigned one of the following six reasons for not answering the question:

1. Nominee expressed concerns about answering a question about a case or issue that was before the Court or could be before the Court.
2. Nominee said the issue should be handled by another branch of government.
3. Nominee expressed general concerns about conflict of interest and maintaining judicial independence.
4. Nominee claimed they did not have enough information, or could not remember enough about the issue, to give more than a partial response.
5. Nominee claimed they did not have enough information, or could not remember enough about the issue, to give any response.
6. Other, reason unclear, or unspecified.

IV. Empirical Analysis

A. The Changing Culture of Questioning on the Senate Judiciary Committee

In the first part of the empirical analysis, we seek to illustrate how the culture of confirmation hearings has changed over time. The first, and perhaps easiest, way to show this is by examining how many senators have "exchanges" with nominees. Figure 1 graphs the number of senators that had exchanges with each nominee, with black bars representing senators that had exchanges and gray bars representing senators that did not have exchanges. The overall size of the bars combined represents the total number of senators on the Judiciary Committee.

28. We presume the predominant reason for a senator not having an exchange with a nominee (i.e., not asking any questions) is because they were not in attendance. In future studies we plan to document the attendance at the hearings to confirm this presumption.

29. To document the size and membership of the Judiciary Committee, we used the Committee roster that is listed at the beginning of the confirmation hearing transcript. The Judiciary Committee roster only displays the rosters at the conclusion of a Congress, not at the time of a confirmation hearing. Committee Membership in Previous Congresses, U.S. Senate Committee on Judiciary, http://judiciary.senate.gov/about/PreviousCommitteeMembership.cfm (last visited Feb. 23, 2011).
Several points are worth highlighting. First, the overall raw size of the committee has increased, with its present day membership consisting of nineteen senators. While some of this is a recent phenomenon, it was the norm for many of the early nominees to face a committee composed of only fifteen senators, though fewer would typically attend. Second, during the early period, prior to Justice O’Connor, it was unusual to have over half of the senators asking questions of the nominee. In fact, only eight out of sixteen nominees, prior to Justice O’Connor, were involved in exchanges with more than half of the senators. This fact is perhaps best illustrated by the first ten nominees, where it was more common for a nominee to face only a handful of senators. Contrast this with the more recent hearings, from Justice O’Connor through Justice Kagan, where a nominee, (with a brief exception for Justice Scalia) is almost guaranteed to face questioning from all of the senators on the

30. See infra Figure 9, at 357.
31. See supra Figure 1, at 338.
32. See supra Figure 1, at 338.
33. See supra Figure 1, at 338.
Judiciary Committee. Third, this change appears to be most apparent from Justice Stevens’ hearings to Justice O’Connor’s hearings, which were the first to be televised. Finally, Bork’s hearings were the first hearings in which a nominee faced questions from all of the committee’s senators. In short, it is very rare for senators to miss an opportunity to question a nominee on television, and it has not happened since Senator Paul Simon was on the Judiciary Committee during Justice Kennedy’s confirmation hearing.

Just asking questions of the nominee, however, is not the only important change. Figure 2 graphs the average number of exchanges per senator, by nominee. The results are striking, with a gradual increase in the average number of exchanges asked by each senator. A few other points are worth noting. There are a few exceptions to the upward trend: Justice Scalia is one, Justice Ginsburg and Justice Breyer are the others. While Justice Scalia’s low question average is potentially explained by his hearing’s proximity to Chief Justice Rehnquist’s hearing, a potential explanation for Justice Ginsburg and Justice Breyer’s exceptions are, as argued by Mark Silverstein, that their nominations were not going to “rekindle” any sort of activism similar to the Warren Court era, and that President Clinton did not select his most preferred candidate. Figure 2 also confirms conventional wisdom by illustrating the large average number of exchanges nominees had with senators. Nevertheless, the only nominees prior to Justice O’Connor to receive similar treatment from the Judiciary Committee were Chief Justice Rehnquist (for associate justice), Haynsworth, and Justice Marshall. However, the average for Justice Marshall is somewhat deceiving given that those hearings were dominated by Senator Ervin, who had 339 exchanges with Justice Marshall, and Senators McClellan.

34. See supra Figure 1, at 338. We speculate the reason that there are so many “absences” in the questioning of Justice Scalia is due to the fact that his confirmation hearing directly followed Justice Rehnquist’s hearings to be elevated to Chief Justice. In other words, senators may have used up all of their “political capital” in questioning Chief Justice Rehnquist and felt little need to question Justice Scalia. The final vote for Justice Scalia is consistent with this explanation (he was confirmed 98-0). Interestingly, Justice Scalia even speculated in a recent interview that if he were nominated today, he might not get sixty votes. Debra Cassens Weiss, Scalia Doubts He Would Win Confirmation If Vote Were Today, A.B.A. J. (July 29, 2010, 8:01 AM CST), http://www.abajournal.com/news/article/scalia_doubts_he_would_win_confirmation_if_vOTEwere_today/.

35. Nina Totenberg, The Confirmation Process and the Public: To Know or Not to Know, 101 HARV. L. REV. 1213, 1213 (1988); supra Figure 1, at 338.

36. See supra Figure 1, at 338.

37. See infra Figure 2, at 340.

and Thurmond, who had 101 and 89 exchanges, respectively.\textsuperscript{39} The next highest senators each had three exchanges with Justice Marshall (Senators Hart and Kennedy).\textsuperscript{40}

**Figure 2: Average Number of Exchanges Per Senator**

To further investigate these changes in the number of questions being asked over time, Figure 3 presents a box plot of the distributions of the number of exchanges with each nominee.\textsuperscript{41} Several important insights about the changing nature of the senators’ questions are revealed there. First, the left-hand portion of the graph contains a high number of outliers compared to the right-hand side. While this may not be anomalous by itself, it is noteworthy given the fact that the vast majority of these “outliers” do not represent a large number of questions being asked. For example, Carswell had three outlier senators, but each of these would be well within the normal range of any nominee after Chief

\textsuperscript{39} See infra Figure 3, at 342.

\textsuperscript{40} See Nomination of Thurgood Marshall Before the S. Comm. on the Judiciary, 90th Cong. 11, 179 (1967).

\textsuperscript{41} A box plot shows the distribution of a given quantity of interest, and by plotting them over all twenty-nine nominees, we can observe how the distributions change. The top of the box is the seventy-fifth percentile, the bottom of box is the twenty-fifth percentile, and the line in the middle is the median. The whiskers extend to the upper and lower reaches of the data, and the dots represent outliers.
Justice Rehnquist (CJ).\textsuperscript{42} The relative dearth of outliers on the right side—there are only two from Justice O'Connor onward—suggests that it has become “normal” to ask a higher number of questions and that the distributions have become consistent.\textsuperscript{43} Second, the bottoms of the whiskers on the right-hand side of the figure are all clearly above zero.\textsuperscript{44} This is not the case for the distributions on the left-hand side of the graph, where every single one is touching zero.\textsuperscript{45} Third, the medians for all of the justices in the television era, from Justice O'Connor on, are elevated consistently higher than the pre-television era nominees.\textsuperscript{46} Finally, the distributions for the nominees of the televised era tend to be more elongated, while the distributions for the pre-television era nominees tend to be more compact.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{42} See infra Figure 3, at 342.
\bibitem{43} See infra Figure 3, at 342.
\bibitem{44} See infra Figure 3, at 342.
\bibitem{45} See infra Figure 3, at 342.
\bibitem{46} See Totenberg, supra note 35, at 1213; infra Figure 3, at 342.
\bibitem{47} See infra Figure 3, at 342.
\end{thebibliography}
These changes in the questioning patterns of the senators illustrated in Figures 1, 2, and 3 raise an interesting question: Who are the senators and nominees with the most exchanges? Table 1 lists the top fifteen senator-nominee combinations for the number of exchanges.48 It also shows, for comparative purposes, the percentage of the nominees’ answers that were “fully forthcoming” under our coding scheme.49 Unsurprisingly, Justice Marshall and Ervin, mentioned above, top the list with 339 exchanges.50 The next closest combination is Haynsworth and Bayh with 182 exchanges.51 What is particularly interesting about the results listed in Table 1 is the fact that of the top fifteen entries, eleven of them are from the television era.52

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48. See infra Table 1, at 343.
49. See infra Table 1, at 343.
50. See infra Table 1, at 343.
51. See infra Table 1, at 343.
52. See infra Table 1, at 343.
Two other interesting changes in the questioning pattern are not shown here, but have been reported earlier. The first change is in the type of inquiries that senators are making. For example, during the early hearings, most of the questions asked by senators sought a factual answer.\(^5\) In contrast, there has been a growing trend over the last three decades for senators to shift their focus to more of a substantive basis, and seek to ascertain the nominee’s views on a wide variety of issues. In the six most recent hearings, a majority of the questions sought a nominee’s views, whereas earlier nominees were likely to face a higher percentage of fact-based questions.\(^4\) In earlier work, we theorize how this change is linked to the increasing importance of ideological cues in the voting of senators. In other words, while senators have always valued ideologically-laden information, it has become increasingly more important in recent years.

The second trend is characterized by the changing balance of senatorial scrutiny. During the early hearings, it was common for nominees to face a lion’s share of questions from either senators of the
president’s party, or from the opposing party, but not an equal balance.\textsuperscript{55} By contrast, ever since Justice O’Connor, it is fairly routine to have 60% of the questions originating from senators of the opposing party.\textsuperscript{56}

\textbf{B. Nominee Candor and Evasiveness}

The analyses in the previous section show that a number of factors are changing in how the Senate Judiciary Committee questions nominees—in particular, we note, since televised coverage of the hearings began in 1981.\textsuperscript{57} In addition, we noted earlier that there is a strong perception that the nominees’ candor has also declined to levels that are unacceptable.\textsuperscript{58} But has the level of nominee candor in fact changed over time?

To answer this question, using our coding scheme outlined earlier, we graph the candor of all nominees from Justice Harlan through Justice Kagan. Figure 4 shows these results. Specifically, it graphs four of the answer types that our coding scheme allows for: (1) fully forthcoming answers; (2) qualified or partially forthcoming answers; (3) not forthcoming or refusing to answer a question; and (4) non-answers where nominees talk at length about factual or historical matters but do not say anything substantive about their own views.\textsuperscript{59} The results are somewhat surprising, especially given the amount of rhetoric in recent years about the declining state of the hearings and the low level of candor. What we find is that nominees, on average, provide “fully forthcoming” answers to approximately 65\% to 70\% of the questions they are asked.\textsuperscript{60} While there has been some fluctuation over time, there is no strong pattern of decline. If anything, there has been a slow, gradual decline over time in fully forthcoming responses originating back in the first string of hearings of Justice Harlan, Justice Brennan, and Justice Whittaker, who all evidenced higher than average levels of candor.

\begin{itemize}
\item \textsuperscript{55} Dion Farganis & Justin Wedeking, “No Hints, No Forecasts, No Previews”: An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan, LAW & SOC’Y REV. (forthcoming) (manuscript at 5 & n.3) (on file with the Hofstra Law Review).
\item \textsuperscript{56} Id. at 5 & fig.2.
\item \textsuperscript{57} See supra Part IV.A.
\item \textsuperscript{58} See supra notes 4-5 and accompanying text.
\item \textsuperscript{59} See infra Figure 4, at 345. We also coded for “interruptions” but did not graph those due to their low levels.
\item \textsuperscript{60} See infra Figure 4, at 345.
\end{itemize}
Figure 4 also shows that Justice Fortas’ hearings for chief justice evidenced the lowest level of candor for any nominee, dipping slightly below 50%. This is noteworthy in part because it is one of the few hearings that dip below the 60% mark. The other trend lines illustrated in Figure 4 show that with this gradual decline in fully forthcomingness, the three types of evasiveness all show gradual increases. Perhaps the most pronounced of these trends are the increase in “non-answers” in recent years, though they have not reached their “high water” mark, which was with Thornberry back in the 1960s. One trend that is masked by Figure 4, however, is when fully forthcoming responses are disaggregated into question type (fact vs. viewpoint). For example, in the 1980s we see a decline in candor for questions that focus on nominees’ views, but not for factual questions. However, this decline

61. See supra Figure 4, at 345.
62. See supra Figure 4, at 345.
63. See supra Figure 4, at 345.
64. See infra Figure 6, at 350 (graphing a higher percentage of “Fully Forthcoming” answers with regard to questions assessing nominees’ views); see also Farganis & Wedeking, supra note 55, at 31 (noting the general decline in candor since the late 1980s).
appears to hover around the 60% mark, so it is not a marked departure from the overall level of candor.  

These results lead to another interesting question: Which combinations of senators and nominees have the highest and lowest levels of candor? Given the commentary surrounding the hearings, especially of late, one would expect to see most, if not all, of the low-candor combinations from recent years. Table 2 lists the top and bottom ten combinations of candor, and reveals some intriguing results. For example, there is a tremendous range of candor, from a high of 100% with 9 of the combinations, to a low of 7.7% for the McClellan-Stewart combination. Additionally, Table 2 shows that Justice Ginsburg was in the bottom 10 with 4 different senators, perhaps helping to explain the origins of the so-called “Ginsburg Rule” that has been attributed to her setting a standard for refusing to answer questions. Crucially, however, our evidence in Figure 4 indicates that Justice Ginsburg’s overall candor level was well within range of other recent nominees. Table 2 also shows that Senator Specter was in the bottom ten on three different occasions, with Justices Ginsburg, Sotomayor, and Kagan. Also of note, Justice Kagan is listed in the top ten for her responses to Senator Leahy, with 100% candor. This matches the statement made by Senator Leahy afterwards, who remarked that Justice Kagan “has been more forthcoming than certainly any nominee that I can recall since I’ve been in the Senate.”

65. See Farganis & Wedeking, supra note 55, at 31-32.
66. See infra Table 2, at 347.
67. See infra Table 2, at 347; see also Farganis & Wedeking, supra note 55, at 32 (describing the “Ginsburg Rule”).
68. See supra Figure 4, at 345.
69. See infra Table 2, at 347.
70. See infra Table 2, at 347.
Table 2: Top and Bottom 10 Senator-Nominee Combinations for Candor Levels

<table>
<thead>
<tr>
<th>Top 10</th>
<th>Senator</th>
<th>% Fully Forthcoming</th>
<th># of Exchanges (minimum of 10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Kennedy</td>
<td>Simpson</td>
<td>100%</td>
</tr>
<tr>
<td>2.</td>
<td>Carswell</td>
<td>Thurmond</td>
<td>100%</td>
</tr>
<tr>
<td>3.</td>
<td>Goldberg</td>
<td>Ervin</td>
<td>100%</td>
</tr>
<tr>
<td>4.</td>
<td>Souter</td>
<td>Grassley</td>
<td>100%</td>
</tr>
<tr>
<td>5.</td>
<td>Sotomayor</td>
<td>Schumer</td>
<td>100%</td>
</tr>
<tr>
<td>6.</td>
<td>Souter</td>
<td>Thurmond</td>
<td>100%</td>
</tr>
<tr>
<td>7.</td>
<td>Haynsworth</td>
<td>Ervin</td>
<td>100%</td>
</tr>
<tr>
<td>8.</td>
<td>Stewart</td>
<td>O’Mahoney</td>
<td>100%</td>
</tr>
<tr>
<td>9.</td>
<td>Kagan</td>
<td>Leahy</td>
<td>100%</td>
</tr>
<tr>
<td>10.</td>
<td>Haynsworth</td>
<td>McClellan</td>
<td>97.4%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Bottom 10</th>
<th>Senator</th>
<th>% Fully Forthcoming</th>
<th># of Exchanges (minimum of 10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Stewart</td>
<td>McClellan</td>
<td>7.7%</td>
</tr>
<tr>
<td>2.</td>
<td>Ginsburg</td>
<td>Moseley-Braun</td>
<td>21.4%</td>
</tr>
<tr>
<td>3.</td>
<td>Ginsburg</td>
<td>Pressler</td>
<td>22.9%</td>
</tr>
<tr>
<td>4.</td>
<td>Sotomayor</td>
<td>Specter</td>
<td>27.6%</td>
</tr>
<tr>
<td>5.</td>
<td>Fortas (CJ)</td>
<td>Thurmond</td>
<td>32.2%</td>
</tr>
<tr>
<td>6.</td>
<td>Kagan</td>
<td>Specter</td>
<td>32.3%</td>
</tr>
<tr>
<td>7.</td>
<td>Ginsburg</td>
<td>Specter</td>
<td>35.5%</td>
</tr>
<tr>
<td>8.</td>
<td>Ginsburg</td>
<td>Metzenbaum</td>
<td>40.0%</td>
</tr>
<tr>
<td>9.</td>
<td>Roberts</td>
<td>Biden</td>
<td>40.8%</td>
</tr>
<tr>
<td>10.</td>
<td>Kagan</td>
<td>Feingold</td>
<td>40.9%</td>
</tr>
</tbody>
</table>

We pause briefly to put the four most recent hearings (Justices Roberts, Alito, Sotomayor, and Kagan) under a spotlight. Because these hearings occurred in a relatively short time span, and because they involved mostly the same group of senators, we think this set of proceedings provides an opportunity to perform some interesting and highly relevant comparative analyses. Figure 5 graphs the different levels of candor for these four hearings, across senators. It reveals a few key findings. First, for almost all senators who were present at all four hearings, there is great variation in the types of responses they received. In other words, some nominees displayed very high levels of candor with a given senator, but other nominees displayed low levels of candor with that same senator. Second, only a few senators (Senators Sessions, Kohl, Graham, and to some extent, Feingold) received consistent...

72. See infra Figure 5, at 348.
responses from nominees (evidenced by a “bunching” of the dots). Coupled together, these two findings help explain why senators can emerge from the same hearing and give dramatically different portrayals of how they perceived the nominee’s performance. They also point to the fact that the hearings have clearly found a groove of late, with quite a bit of stability in terms of candor level.

Figure 5: Comparisons of Candor From the Last Four Confirmation Hearings, By Senator

C. Explaining the Gap Between Perception and Reality: What Explains Changes in Candor?

The results discussed thus far leave us with a puzzle. On the one hand, several important and salient changes have taken place in the way senators question the nominees, and there is a widespread belief that nominee candor has declined to unacceptable levels. Yet, in spite of this,
our results suggest that there has been only a modest decline in candor, if any decline at all. What can resolve this puzzle?

To start, we argue three factors contribute to this puzzle, and they can be identified by their linkage to candor. The first factor is the type of inquiries that senators are making. We have already commented on how this is changing over time, with more of a focus on the nominees’ views at the expense of facts. This suggests that as the percentage of questions that attempt to ascertain nominees’ views increases, we should see a decline in candor. However, to further push the limits of our argument, we also expect this negative association should become more apparent in recent years to coincide with the rise in rhetoric about the lack of candor.

Figure 6 graphs the twenty-nine nominees who eventually received a vote. The horizontal axis represents the percentage of questions assessing a nominee’s views and the vertical axis represents the level of candor. Each individual graph plots the senators and also contains a regression-based prediction line that represents the best linear fit of the data points. What it shows is that for almost all nominees from Justices Harlan through Thomas, there is very little relationship between question type and candor (as evidenced by a flat line or dots that are distant from the line). However, beginning with Justice Ginsburg, and persisting through Justice Kagan, all nominees show a strong, negative relationship. The correlation for observations from Justice Harlan through Justice Thomas is -.06, and it is not statistically significant (p<.35). However, for the last six nominees, the correlation is -.47 and it is statistically significant (p<.001). This break is very sharp, and perhaps also contributes to the proliferation of rhetoric surrounding the “Ginsburg Rule.” This result is somewhat ironic given that it appears the senators are partly responsible for this change, despite it being attributed to the nominees. While this shift does not coincide perfectly with Justice O’Connor and the advent of televised hearings, it still helps contribute to our understanding of why this perceptual gap exists.

74. See supra note 64 and accompanying text.
75. See supra notes 4-5 and accompanying text (discussing the increasing instances of nominee evasiveness).
76. See infra Figure 6, at 350.
77. See infra Figure 6, at 350.
78. See infra Figure 6, at 350.
79. See infra Figure 6, at 350.
80. See infra Figure 6, at 350.
Figure 6: Assessing the Relationship Between Question Type and Candor

Note: The correlation between question type and candor for all observations is -0.17 (p< .002). For Justices Harlan through Thomas, the correlation is -0.06 (p< .35, n=232), but for Justices Ginsburg through Kagan it is -0.47 (p< .001, n=110).

The second factor related to candor is partisanship, and while it also has its roots in party polarization, it stems from the idea that televising confirmation hearings allows senators to be directly observable to their constituents. The basic idea here is relatively straightforward. Television brings in a wider audience, and allows constituents to observe senators at work. In conjunction, L. Marvin Overby, Beth M. Henschen, Michael H.
Walsh, and Julie Strauss find that constituent preferences did influence the roll call behavior of senators in Justice Clarence Thomas’ confirmation vote.\(^{81}\) Moreover, as a senator’s work becomes more visible, he or she will “toe the party line” more closely and ask more probing questions of the nominee to better represent the partisan interests of their constituents in their home states. Additionally, the advent of televised hearings also enables senators to “take positions” on issues and communicate them directly to their constituents back home. And for those senators up for reelection, television also helps senators support their quest of winning reelection.\(^{82}\) This suggests that as senators of the opposite party of the president begin to treat the nominees differently, the responses they receive should be less forthcoming compared to those elicited at earlier hearings.

Figure 7 graphs the candor of the nominees for all exchanges, but separates the responses according to the party of the senators posing the question.\(^{83}\) The trend in this figure illustrates how candor has been changing in correlation with the changing nature of the senators’ questions. For the early hearings, it was common for nominees to have a very large percentage of their fully forthcoming responses to be with senators of the opposite party.\(^{84}\) This changes, however, beginning with Justice O’Connor, when it becomes just as likely to have the same proportion of fully forthcoming exchanges with senators of the president’s party.\(^{85}\) In sum, the results from this indicator of partisanship suggests that our perception of candid hearings in the past may have been altered by the changing role of partisanship in the Senate, but ironically, it had little to do with the overall level of candor.


\(^{83}\) See infra Figure 7, at 352. Each bar represents the cell total of a cross tabulation between our five categories of candor and the two partisanship categories. Thus, Figure 7 only shows two of the cells. In other words, if the two bars were “stacked,” the total would equal the same “fully forthcoming” line in Figure 4.

\(^{84}\) Out of the sixteen nominees who preceded Justice O’Connor, nine of them gave significantly more forthcoming answers to senators of the opposite party. See infra Figure 7, at 352.

\(^{85}\) See infra Figure 7, at 352.
Figure 7: Fully Forthcomingness, By Party

Note: Each bar represents the cell total of a cross tabulation between our five categories of candor and the two partisanship categories. Thus, the graph only shows two of the cells. In other words, if the two bars were “stacked,” the total would equal the same “fully forthcoming” line in Figure 4.

The third factor that we believe may be affecting candor is ideology. The importance of ideology in Senate confirmation hearings has been well-documented, of course. But we find that it is also linked to candor. Figure 8 graphs the level of candor for all nominees separately as a function of the ideological distance between the senator and the nominee. It also provides a regression-based prediction line of the best linear fit of the data points. The results here are consistent with

86. See supra notes 7-10 and accompanying text.
87. To generate ideological measures of senators’ ideal points, we follow the same procedure as Epstein, Segal, and Chad Westerland. See Lee Epstein et al., The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices, 56 Drake L. Rev. 609, 626, 632 (2008). However, we used Poole’s Common Space scores for the 111th Congress to estimate Common Space scores. See Keith T. Poole, Recovering a Basic Space from a Set of Issue Scales, 42 Am. J. Pol. Sci. 954, 958-66 (1998). Scores for the nominees were also generated similarly to the methodology employed by Epstein et al. See Epstein et al., supra, at 626-27. The distance measure was calculated by subtracting a nominee’s Common Space score from the senator’s, and squaring the value.
earlier findings. For Justices Harlan through Stevens, there is no consistent trend for the nominees. With some nominees, the line angles in either an upward or downward trend, yet at other times it is flat and displays no trend. For Justice O'Connor onward, nine out of thirteen hearings show a downward trend, suggesting a negative relationship between ideological distance and candor. In other words, for the recent nominees, as the ideological distance between the senator and nominee increases, the level of candor decreases. This trend appears to become stronger post-Bork, with the exception of Justices Ginsburg and Breyer. This is consistent with the literature on confirmation hearings that finds a heightened effect of ideology on votes after the Bork hearings. In sum, it appears that ideology has also contributed to this perceptual gap despite the overall level of candor changing relatively little.

88. See infra Figure 8, at 354.
89. See infra Figure 8, at 354.
90. See infra Figure 8, at 354.
91. See Epstein et al., supra note 7, at 296.
Figure 8: Assessing the Relationship Between Ideology and Candor

Note: The correlation for all observations is -0.18 (p < .001).

D. Candor and the Judiciary Committee Vote

Thus far, we have found that, over time, committee members are more likely to ask questions, that they are more likely to ask more questions, that the distributions of these questions has shifted, and that
senators are more likely to ask about a nominee’s views.\textsuperscript{92} We have also shown that candor, by itself, has not changed much over time, though there has been considerable variation in the level of candor for each senator.\textsuperscript{93} We then began to try to explain the perceptual gap between senators who decry the decline in nominee candor and the actual level of nominee forthcomingness—which, in recent years, has been both relatively high and quite stable.\textsuperscript{94} In this vein, we demonstrated a strong link between the type of question asked (viewpoint or fact based) and declining candor.\textsuperscript{95} This suggested that, perhaps, there were important but subtle shifts taking place. We also investigated whether partisanship or ideology were responsible for contributing to this perceptual gap and found that nominees were more likely to be candid with senators from their own party and senators who were ideologically close; but this changed over time.\textsuperscript{96} All of this groundwork allows us to turn to our central inquiry in this paper: Does candor—and any of the corresponding changes with partisanship, ideology, and senatorial scrutiny—have any implications for the senators’ Judiciary Committee votes? Based on what we have seen thus far, we expect to see some important shifts in voting patterns over time. In particular, we anticipate: (1) changes in the degree of unanimous votes between the pre-television and television era, and (2) little or no relationship between candor and voting in the television era.

We pause briefly to acknowledge that the votes cast by senators in the Judiciary Committee are not formally binding upon the nominee or the senator.\textsuperscript{97} The nominee will not be held up in committee, regardless of the Judiciary Committee’s recommendation.\textsuperscript{98} And senators can vote one way in the committee and another on the senate floor if they desire.\textsuperscript{99} The usual motion on which committee members vote is to send

\begin{itemize}
\item \textsuperscript{92} See supra Figure 2, at 340; supra Figure 3, at 342; supra Figure 6, at 350.
\item \textsuperscript{93} See supra Figure 4, at 345 (reflecting the general steadiness of candor levels); supra Table 2, at 347 (suggesting a significant variation in the level of candor for various senator-nominee combinations).
\item \textsuperscript{94} See supra Figure 4, at 345.
\item \textsuperscript{95} See supra Figure 6, at 350.
\item \textsuperscript{96} See supra Figure 7, at 352; supra Figure 8, at 354.
\item \textsuperscript{97} See DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL 31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 26 (2005), available at http://fpc.state.gov/documents/organization/50146.pdf (noting that the Judiciary Committee may only make a recommendation).
\item \textsuperscript{98} See id. at 26-27.
\end{itemize}
the nominee to the floor with a favorable recommendation. If it fails, a new motion is offered. The new motion is either to send the nominee to the Senate floor without recommendation (e.g., Justice Clarence Thomas) or with an unfavorable recommendation (e.g., Robert Bork).

Nevertheless, the committee vote represents an important signal to the full Senate and to the public. Nominees who do not generate sufficient support from the committee may not suffer a formal setback, but it would be a mistake to underestimate the practical importance of the vote at this stage.

Turning to the results, Figure 9 shows the distribution of committee votes for all 29 nominees who received votes. The results reveal several noteworthy trends. First, during the pre-television era, there are twice as many unanimous votes (7 out of 16) compared to the television era (3 out of 13). Second, “no” votes are, in general, more common during the television era. Third, while much of this trend starts with Bork, it is also evident in Chief Justice Rehnquist’s (CJ) hearing.

100. See RUTKUS, supra note 97, at 26 n.76 (noting the few candidates who have received unfavorable recommendations).
101. See id. at 26.
102. See id. at 27 n.76.
103. See infra Figure 9, at 357.
104. See infra Figure 9, at 357.
105. See infra Figure 9, at 357.
106. See infra Figure 9, at 357.
Figure 9: Distribution of Judiciary Committee Votes

Note: On the Judiciary Committee vote, there were two senators who voted “present,” Senator McClellan for Justice Harlan, and Senator Denton for Justice O’Connor. There were eight senators absent for the Judiciary Committee vote. Four of the absences occurred with Chief Justice Burger. While newspaper accounts suggest Chief Justice Burger’s vote was unanimous with only one absent senator (Senator Hart), the committee roster at the beginning of the hearings lists three additional senators; they were included as absent in the above vote totals (Senators Burdick, Fong, and H. Scott). The other four absences occurred with Justice Brennan, and his vote was also unanimous. While an exact source could not indicate which four senators were absent, it was discovered that four senators never attended either day of Justice Brennan’s two-day hearing (and did not ask any questions). Thus, for Justice Brennan,
we used attendance of earlier hearings as the record of who voted, as recorded at the beginning of the hearing transcripts.

While this figure is illustrative, it does not provide a robust test of the link between candor and voting. In addition, we still need to test the other part of the argument, that partisanship plays an increased role during the television era at the expense of candor. For that, we turn to a multivariate analysis to examine the effect of candor, partisanship, and ideology on the individual votes of committee members. For our dependent variable, we use the Judiciary Committee vote, with a “yes” (in favor of the nominee) coded as 1, and a “no” vote coded as 0.112 Because our dependent variable is binary, we use logit to estimate our model.

For our explanatory factors, the first variable is our measure of candor—the percentage of fully forthcoming responses that a nominee gave to a particular senator. If candor is as important as the senators’ quotes at the beginning of the paper suggest, it should be significant and positively signed. However, if candor has lost its meaning during the television era, then it should not be significant. In this context, candor can be thought of as a causal variable if one considers the very purpose of holding hearings is to extract information from the nominees. That is to say, if a nominee is not forthcoming, we would expect a senator to vote against the nominee.113 Our second variable is the number of questions asked by individual senators. As a senator asks more questions of a nominee, we expect it to be negatively signed. This expectation is also supported by the literature on questioning at oral arguments, where

112. There were 473 total senator votes. Of the two senators who voted “present” and the eight who were absent during the committee vote, these were left out of the analysis. Other senators who voted but were excluded from the analysis were senators who did not ask any questions (n=122). We excluded them because it is impossible for the nominee’s candor in response to that senator’s questions to have any impact on their vote. To determine if this caused any selection bias problems, we also estimated a Heckman probit sample selection model (including the appropriate interactions in the outcome equation) and the results lead to the same conclusions that are drawn from the results listed in Table 3. Namely, that candor has an initial effect during the pre-television era, but has no effect since, and that partisanship has no effect during the pre-television era, but it has a substantial effect since then. Moreover, the rho coefficient of the Heckman model, which tests for the correlation between the sample selection model and the outcome model, was not significant. This indicates that there is no “selection bias” problem and it is appropriate to use a single equation model.

113. We should also note that most senators, prior to the confirmation hearings, have already met privately with the nominees and may have received forthcoming responses during those exchanges. See RUTKUS, supra note 97, at 21 (noting that nominees will make courtesy calls to senators before the actual hearing). Unfortunately, there is no way to track this behavior for all nominees over time or account for what was said behind closed doors. If anything, it will contribute to our expectation that candor should not influence senators’ votes during the televised hearings.
the side that faces more questions generally loses the case.114 Our third variable is ideological distance, and it is the same measure as used in Figure 8. Based on the literature, we expect it to be statistically significant and negatively signed for both the pre-television and television eras.115 Our fourth variable of interest is our measure of partisanship, whether the nominee and senator are of a different party, coded 1 if yes, 0 otherwise. Based on the arguments presented earlier, that senators are basing their votes on the nominees’ candor (and not partisan rhetoric),116 this variable should not be significant. However, research suggests that partisan considerations influence senate vote outcomes in confirmation hearings.117 Lastly, we control for the nominees’ perceived qualifications, using Jeffrey A. Segal and Albert D. Cover’s measure.118 We expect that higher qualified nominees should have an increased likelihood of receiving a favorable “yes” vote at the committee stage.

To test the temporal dynamics of our argument in comparison to that of the senators’ argument quoted at the beginning of the paper, we estimate two separate equations. Namely, we split the observations based on the start of the hearings being televised. Thus, for our first equation, we estimate our model on observations before Justice O’Connor (pre-television era), and for our second equation, we estimate our model on the observations from Justice O’Connor onward (television era). Lastly, for comparative purposes, we estimate a full model with all of the observations.119

The results are shown in Table 3 and they are striking. Model 1 correctly classifies 88.6% of the votes, and Model 2 correctly classifies

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115. See, e.g., Epstein et al., supra note 7, at 300-01 & fig.1 (noting the importance of ideology in the confirmation hearings); supra Figure 8, at 354.
116. See supra text accompanying notes 1-3 (noting the importance that several senators place on the role of candor in Judiciary Committee hearings).
117. See, e.g., Jeffrey Segal, Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics, 49 J. POL. 998, 1007 (1987) ("Nominees were confirmed 93 out of 104 times (89%) the president had partisan control of the Senate.").
118. See Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 AM. POL. SCI. REV. 557, 559 (1989). We note that this measure of qualifications, within a nominee, does not vary across senators.
119. To account for an alternative modeling strategy, rather than splitting the observations at a given time point, we could have estimated the full model and included a control variable for the appropriate time period and then include interaction terms between the time period, partisanship, and candor. As a robustness check, we did this, and the results reveal the same conclusions as shown in Table 3. Moreover, we graphed out the interaction effect and it was significant. These results are available upon request. See infra Table 3, at 361.
87.1%.\textsuperscript{120} The full model correctly classifies 86.5%.\textsuperscript{121} For comparative purposes, simply guessing the modal category in Model 1 would be correct 79.5% of the time, and Model 2 would be correct 77.4% of the time.\textsuperscript{122} The proportional reduction of error measure for both models is above 42%.\textsuperscript{123} In short, the models do an excellent job of explaining the senators’ committee votes. In other words, it would be very difficult to add another explanatory variable to the equation and improve upon the degree to which these models correctly classify senator votes.\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
\item See infra Table 3, at 361.
\item See infra Table 3, at 361.
\item See infra Table 3, at 361.
\item See infra Table 3, at 361.
\item For example, we included a control for divided government and it is not significant in either equation and it does not increase the explanatory power of the model.
\end{enumerate}
\end{footnotesize}
Table 3: Logit Estimates of Senators Judiciary Committee Votes

<table>
<thead>
<tr>
<th></th>
<th>(1) Pre-Television Era</th>
<th>(2) Television Era</th>
<th>(3) Full</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Fully Forthcoming</td>
<td>0.026**</td>
<td>0.008</td>
<td>0.024**</td>
</tr>
<tr>
<td></td>
<td>(0.008)</td>
<td>(0.018)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Number of Questions</td>
<td>-0.044**</td>
<td>-0.034**</td>
<td>-0.032**</td>
</tr>
<tr>
<td></td>
<td>(0.013)</td>
<td>(0.010)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Ideological Distance</td>
<td>-2.100*</td>
<td>-4.702**</td>
<td>-3.568**</td>
</tr>
<tr>
<td></td>
<td>(1.184)</td>
<td>(1.673)</td>
<td>(0.881)</td>
</tr>
<tr>
<td>Senator-Nominee Different Party (Partisanship)</td>
<td>-0.015</td>
<td>-3.393**</td>
<td>-1.524*</td>
</tr>
<tr>
<td></td>
<td>(0.830)</td>
<td>(1.206)</td>
<td>(0.723)</td>
</tr>
<tr>
<td>Perceived Qualifications</td>
<td>2.566**</td>
<td>3.799**</td>
<td>2.946**</td>
</tr>
<tr>
<td></td>
<td>(0.881)</td>
<td>(1.473)</td>
<td>(0.916)</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.491</td>
<td>3.455</td>
<td>0.799</td>
</tr>
<tr>
<td></td>
<td>(1.229)</td>
<td>(2.714)</td>
<td>(1.157)</td>
</tr>
</tbody>
</table>

| N     | 132  | 209  | 341  |
| Percent Correctly Classified  | 88.6 | 87.1 | 86.5 |

Note: Robust standard errors in parentheses, clustered on the nominee
* p < .05; ** p < .01 one-tailed.

Focusing on Model 1, the pre-television era, we see that our measure of candor is significant and positively signed.\textsuperscript{125} This indicates that as a nominee's candor increases, a senator becomes more likely to vote favorably. However, in Model 2, the television era, we see that this effect goes away. Specifically, candor is no longer statistically

\textsuperscript{125} See supra Table 3, at 361.
significant.\textsuperscript{126} This is contrary to the expectations of the senators’ quotes listed at the beginning of the paper.\textsuperscript{127} Namely, during the present era, candor has little, if any, relevance for senators in their committee votes.

Shifting the focus to the number of questions, we see that it is significant in all equations and signed in the expected direction.\textsuperscript{128} As senators ask more questions, they are less likely to vote in favor of the nominee.\textsuperscript{129} The same finding holds true for ideological distance. It is significant and negatively signed, indicating senators are less likely to vote favorably when they are more distant from the nominee.\textsuperscript{130} Moreover, the size of the coefficient doubles from the pre-television era to the television era.\textsuperscript{131} While we do not want to say too much about this because the models are being estimated on different observations, it is consistent with the literature that has found ideology has taken on a heightened importance in recent years.\textsuperscript{132}

The partisanship variable reveals an important finding, namely that during the pre-television era, it was not statistically significant.\textsuperscript{133} This suggests that partisanship was not a driving factor for the senators. However, during the television era, we see that partisanship does play a role in explaining their committee votes.\textsuperscript{134} This finding, coupled with the earlier switch in the candor variable, suggests that partisanship has increased its effect on voting at the expense of nominee candor. Finally, our control variable for nominee qualifications is significant and signed in the expected direction.\textsuperscript{135} In sum, it appears that when senators decry the current state of the hearings and claim that a nominee’s lack of candor is causing them to vote against him or her at the committee stage, the evidence presented here suggests otherwise.

While the changing significance levels of the coefficients tell us that something meaningful has changed about the importance of candor and partisanship, we do not have a clear idea about how these two factors probabilistically influence the “yes” or “no” vote of senators on the Judiciary Committee during the two eras. To help in this regard, predicted probabilities were generated from the two models in Table 3

\textsuperscript{126} See supra Table 3, at 361.
\textsuperscript{127} See supra text accompanying notes 1-3.
\textsuperscript{128} See supra Table 3, at 361.
\textsuperscript{129} See supra Table 3, at 361.
\textsuperscript{130} See supra Table 3, at 361.
\textsuperscript{131} See supra Table 3, at 361.
\textsuperscript{132} Epstein et al., supra note 87, at 620-21.
\textsuperscript{133} See supra Table 3, at 361.
\textsuperscript{134} See supra Table 3, at 361.
\textsuperscript{135} See supra Table 3, at 361.
using the SPost commands. These illustrate how the probability of a “yes” or “no” vote will change when we vary our factors of interest: candor, partisanship, and the era. Figure 10 contains two graphs that show how candor influences the probability of voting. Figure 10(A) is for the pre-television era, and Figure 10(B) is for the television era. The difference between the two is striking. In Figure 10(A), we see that under low levels of candor, a “yes” vote is just as likely as a “no” vote. This is evidenced by their “mean” lines overlapping, as well as their confidence intervals overlapping considerably. As candor increases, however, the likelihood of a “yes” vote also increases. With high levels of candor, a “yes” vote becomes very probable and clearly distinguishable from a “no” vote. In contrast, Figure 10(B) shows how unhelpful candor is as an explanatory variable during the television era. No matter the level of candor, the probability of a “yes” (or “no”) vote does not change. In short, candor has lost its explanatory power in terms of explaining why senators vote “yes” or “no” at the Judiciary Committee stage.

136. See J. SCOTT LONG & JEREMY FRESEE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 9 (2d ed. 2006).
137. See infra Figure 10(A), at 364.
138. See infra Figure 10(A), at 364.
139. See infra Figure 10(A), at 364.
140. See infra Figure 10(A), at 364. All predicted probabilities were generated by setting the other variables in Table 3 to their mean values. See supra Table 3, at 361.
141. See infra Figure 10(B), at 364.
Figure 10: Predicted Probabilities of Judiciary Committee Voting as a Function of Candor

(A) Pre-Television Era

(B) Television Era
Note: Predicted probabilities were generated with other variables set to their mean values. The dotted lines surrounding the solid line represent 95% confidence intervals. Values were generated with the SPost commands from J. Scott Long and Jeremy Freese (2006).

Figure 11: Predicted Probability of a “Yes” Vote: The Growing Importance of Partisanship

But what about partisanship? Figure 11 contains predicted probabilities for senators of the same and opposing party, and from the two different television eras. The dots represent mean probabilities and the lines on both sides represent 95% confidence intervals. Here, we see the same striking contrast that we saw in Table 3 and Figure 10. During the pre-television era, the likelihood of a “yes” vote is the same regardless of whether the senator is of the same party as the president. However, during the television era, the probabilities shift considerably. A senator of the same party as the president is very

142. See supra Figure 11, at 365.
143. See supra Figure 11, at 365.
144. See supra Figure 11, at 365.
likely to vote in favor of the nominee (close to 1), while the likelihood that a senator of the opposite party will vote favorably drops below 0.8.\textsuperscript{145} Importantly, the confidence intervals for the two do not overlap. In sum, partisanship during the television era can decrease the probability of a favorable vote by as much as 20%.\textsuperscript{146} To keep things in perspective, it is important to note that this prediction assumes that the senator is of average ideological distance from the nominee. If the nominee were even further ideologically distant from the nominee, then the probability of a “yes” vote will decrease more so. In other words, Figure 11 only isolates the impact that partisanship has had on the senators’ votes. From other research, we also know that ideology has grown in importance, and only if we varied both ideology and partisanship would we be able to gauge the full effect that these two factors have had on the Senate confirmation hearings.

V. CONCLUSION

We began this paper with a series of recent remarks from senators who voted against Justice Kagan’s nomination to the Supreme Court. Along with other similar comments that we have seen in the past few years, these quotes suggest that there is a growing sense among lawmakers that Supreme Court nominees should only be confirmed if they provide candid and forthcoming answers. Evasiveness during the confirmation hearing, this sentiment suggests, will be punished with a “no” vote at the Judiciary Committee stage—or perhaps even at the confirmation stage as well.

What our analysis revealed, however, was that this threat to withhold support for lack of candor is both misleading and ill-informed. It is misleading because senators do not in fact vote only for candid nominees and against evasive ones. In point of fact, over the past thirty years, nominee candor has played essentially no role in determining how members of the Judiciary Committee vote. They are influenced much more by partisanship and ideology—a fact that has been well established by prior investigations. Meanwhile, the threat is ill-informed because nominees—and particularly, recent nominees—are not nearly as evasive as they are generally portrayed. Outright refusal to answer a question is a rare event, and even qualified answers or cagey “non-answers” do not dominate the testimony for any nominee. Instead, nominees tend to answer most questions they are asked in a fully forthcoming manner—

\textsuperscript{145} See supra Figure 11, at 365.
\textsuperscript{146} See supra Figure 11, at 365.
quite the opposite of the way in which they are described (and derided) by senators, pundits, and some scholars.

What all of this suggests is that there is a persistent gap between the perception of recent nominees as evasive on the one hand, and the reality of the hearings on the other. We believe that televised coverage of the hearings—and the increased attention that the hearings have gotten as a result—is primarily responsible for this gap. If those who are critical of recent nominees were to watch older hearings the way they have watched recent hearings, we might suspect that they would be forced to modify or revise their views. At the very least, it would become clear that nominees have been reluctant to answer some questions for as long as there have been hearings. Interestingly, given the recent statements of one senator, senators may be reluctant to acknowledge this fact. Ruth Marcus notes that Senator Mitch McConnell, in a 1971 law review article written shortly after two of President Nixon’s nominations failed (Haynsworth and Carswell), commented on the importance of rising above partisan political considerations when making judgments about others. 147 Senator McConnell applied this deferential standard to Justice Breyer and Justice Ginsburg, voting for both, yet he could not adhere to this standard for Justice Kagan because the process has become more political. 148

Were this perception gap confined to non-actors, it might be easier to dismiss it or ignore it. But to the extent that some senators at least claim to base their confirmation votes on a nominee’s candor, the stakes of this gap are quite high. Again, we believe that despite what they say, senators have not yet begun to use perceived lack of candor to vote against nominees. But if they were to begin doing this in future confirmation battles, we might then be faced with a situation where a Supreme Court nominee is prevented from becoming a justice simply because a senator believes, without empirical evidence, that he or she is not answering enough questions. The normative implications of such a scenario seem both obvious and troubling.

As all of this relates to future research, it has become increasingly clear to us that the lack of reliable data concerning Supreme Court nominee testimony is a serious problem both for those who study the hearings and those who participate in them. The dataset of senator-nominee exchanges that we have compiled should help to provide investigators with an opportunity to begin filling in some of these

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148. *Id.*
blanks. The role of gender and race, for example, which has been addressed by Ringhand and Collins as it pertains to the types of questions that are asked, may also be relevant to the types of answers that are given and the perception of candor and evasiveness. It would also be interesting to see how press coverage of the hearings—and in particular, coverage of the supposed evasiveness of recent nominees—has helped frame the hearings and the confirmation process. Ideally, these and other similar efforts will help close the gap between the perception of recent nominees as highly evasive and the reality that they are not all that different, for better or worse, than their predecessors.

149. See Ringhand & Collins, supra note 11, at 44-48.