

**Senatorial Deliberation and Supreme Court Nominations**

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Most of all, I want to thank my mom. Without her, I would not be where I am today. I love you mom and I always will.

For my son, my wife, and my mom.

Although senators actively participate in the confirmation debates, existing research that examines the confirmation debates has questioned whether the Senate is capable of fulfilling its constitutional duties. Unfortunately, this research does not fully investigate why senators participate in these important debates. To investigate the factors that influence senatorial deliberation I build on previous research that describes confirmation votes as opportunities for position taking and formally models the selection stage. I argue these two strands of research provide a framework for understanding what factors influence senatorial deliberation across the Supreme Court appointment process. Overall, I find strong support for the hypothesis that senators strategically engage Supreme Court confirmation debates. More specifically, I find political, electoral, and institutional considerations affect the willingness of senators to participate in these important debates.

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# Chapter 1

## Introduction

On 26 May 2009, President Barack Obama announced he was nominating Judge Sonia Sotomayor to replace Justice David H. Souter on the United States Supreme Court. Besides announcing her nomination, the President explained his reasons for nominating Judge Sotomayor, reasons that highlighted her judicial experience and her *extraordinary journey* from a Bronx public housing project to the Ivy League: “What Sonia will bring to the Court, then, is not only the knowledge and experience acquired over a course of a brilliant legal career, but the wisdom accumulated from an inspiring life’s journey.” Following the announcement, the President and his administration “moved aggressively” to raise support for her nomination by waging a public battle over her experience, and not her ideology (Baker and Zeleny 2009; Stolberg 2009). Within days of the announcement, the White House held a conference call with legal experts<sup>1</sup> to discuss the nomination, held a press briefing to discuss the nomination, and issued two press

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<sup>1</sup>The following legal experts participated in the conference call: Professor Stephen L. Carter, Professor of Law at Yale Law School; Paul M. Smith, Law Partner at Jenner & Block, LLP; Professor William P. Marshall, Professor of Law at University of North Carolina School of Law; Professor Martha L. Minow, Professor of Law at Harvard Law School; Kevin K. Russell, Law Partner at Howe & Russell, LLP; and Dean Evan H. Caminker, Dean of the University of Michigan Law School and Professor of Law (<http://www.whitehouse.gov/the-press-office/advisory-conference-call-with-legal-experts-discuss-nomination-judge-sotomayor>, accessed 4 September 2013).

releases listing individuals and organizations supporting the nomination.<sup>2</sup> In conjunction with the activities of his administration, President Obama personally participated in the campaign to raise public support for Judge Sotomayor. His first weekly radio address following the announcement as well as his television interview with NBC Nightly News anchor Brian Williams focused on Sotomayor, his first Supreme Court nomination. The President in both the radio address and television interview emphasized Sotomayor's life journey and judicial experience for why the Senate ought to confirm her nomination. These activities were not confined to the first couple of weeks after the nomination announcement, but continued throughout the summer.

The President however was not the only elected official to publicly discuss her nomination. Indeed, senators on both sides of the aisle participated in the confirmation debates. Throughout the process Democrats echoed the President's announcement, emphasizing Sotomayor's extraordinary journey and previous confirmations. Republican senators however were less willing to praise her journey from public housing to the Ivy League and more willing to exercise caution. Shortly after the announcement, for example, Senate Minority Leader Mitch McConnell (R-KY) issued the following statement:

Senate Republicans will treat Judge Sotomayor fairly. But we will thoroughly examine her record to ensure she understands that the role of a jurist in our democracy is to apply the law even-handedly, despite their own feelings or personal or political preferences.

Our Democratic colleagues have often remarked that the Senate is not a 'rubber stamp.' Accordingly, we trust they will ensure there

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<sup>2</sup>Praise for Sotomayor's Qualifications (<http://www.whitehouse.gov/the-press-office/what-theyre-saying-about-judge-sotomayor>, accessed 4 September 2013) and Letter of Support to Senators from Sotomayor's Law Clerks: (<http://www.whitehouse.gov/the-press-office/Letter-of-Support-to-Senators-from-Sotomayor-Law-Clerks/>, accessed 4 September 2013)

is adequate time to prepare for this nomination, and a full and fair opportunity to question the nominee and debate her qualifications.<sup>3</sup>

And Senator Orrin G. Hatch (R-UT) urged combing through her record, including “her speeches, articles, and written opinions, as well as the responses she will provide during the coming weeks” to determine her judicial philosophy.<sup>4</sup>

Caution best describes early Republican announcements concerning Judge Sotomayor’s nomination to the Supreme Court, but as her nomination proceeded Republicans replaced caution with opposition. By the beginning of summer, Republicans were actively campaigning against her nomination in the media, on the Internet, and on the Senate floor.

Although senators actively participate in the confirmation debates, existing research that examines the confirmation debates has questioned whether the Senate is capable of fulfilling its constitutional duties (Fein 1989; Carter 1995; Kagan 1995; Choi and Gulati 2004). For example, Fein (1989) writes, “The Senate, simply stated, is ill-suited intellectually, morally, and politically to pass on anything more substantive than a nominee’s professional fitness for the office of Supreme Court Justice” (p. 673). For the most part, critics argue senators exploit the limelight that accompanies the confirmation process to advance their political goals. For example, Choi and Gulati (2004) argue that senators use Supreme Court nominations to express their own political preferences, and Vaglicia (2012) argues that senators on the Senate Judiciary Committee use confirmation hearings to communicate with their constituents during the process, thereby shifting attention from nominees to their own political preferences. Additionally, senators are criticized

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<sup>3</sup> [http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id==a4b9c8a1-6810-46b4-b27e-b252660663d3&ContentType\\_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group\\_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f&MonthDisplay=5&YearDisplay=2009](http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id==a4b9c8a1-6810-46b4-b27e-b252660663d3&ContentType_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f&MonthDisplay=5&YearDisplay=2009), accessed 3 April 2012.

<sup>4</sup> <http://www.hatch.senate.gov/public/index.cfm/releases?ID=8270c01c-1b78-be3e-e092-0145cec87da4>, accessed 7 March 2012.

for announcing their positions on Supreme Court nominations prior to the opening gavel of the confirmation hearings (Davis 2005). While critics of the appointment process have identified the evils that potentially accompany Supreme Court nominations, they do not fully investigate what factors influence senators to participate in the confirmation debates.

To investigate the factors that influence senatorial deliberation I build on previous research that describes confirmation votes as opportunities for position taking (Cameron, Cover and Segal 1990; Segal, Cameron and Cover 1992; Kastellec, Lax and Phillips 2010) and formally models the selection stage (Moraski and Shipan 1999; Johnson and Roberts 2005). Position taking is consistently recognized as an important form of legislative behavior designed to help legislators secure reelection (Mayhew 1974) and serves as the foundation for understanding confirmation votes (Cameron, Cover and Segal 1990). However, there are other ways for senators to take positions throughout the confirmation process. For example, senators can write newspaper editorials,<sup>5</sup> post press releases on their personal websites,<sup>6</sup> and participate in the floor debates (Vining, Steigerwalt and Trochesset 2012; Krog and Unah 2012). Additionally, judiciary committee members can actively participate in the hearings (Farganis and Wedeking 2014).

Supreme Court nominations provide senators ample opportunities to position take because they are important events in American politics.<sup>7</sup> However,

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<sup>5</sup>For example, Senator John McCain (R-AZ) wrote an editorial on why he was opposing Elena Kagan's nomination: [http://usatoday30.usatoday.com/news/opinion/forum/2010-07-08-column08\\_ST2\\_N.htm](http://usatoday30.usatoday.com/news/opinion/forum/2010-07-08-column08_ST2_N.htm)

<sup>6</sup>Since the nomination of John G. Roberts, senators a sizable portion of senators have posted press releases on their personal websites.

<sup>7</sup>Senator Ted Kaufman (D-DE) described confirmation votes as the second most important votes senators cast: "Short of voting to go to war, a Senator's constitutional obligation to 'advise and consent' on Supreme Court nominees is probably his or her most important responsibility" (28 June 2010). Senator Kaufman's comment is not unique. In fact, senators regularly say Supreme Court confirmation votes are one of the most important votes they cast because confirmed nominees become life-time serving justices who have the opportunity to make policy decisions that will affect millions of Americans. For instance, Justice William O. Douglas served on the Court for more than thirty years after President Franklin D. Roosevelt died in office.

the opportunities to position take are not constant across nominations. In fact, previous research examining presidential participation after the announcement (Maltese 1995*b*; Johnson and Roberts 2004), interest group mobilization (Maltese 1995*a*; Cameron and Park 2011; Vining 2011), media coverage (Evans and Pearson-Merkowitz 2012), and citizen interest (Gimpel and Wolpert 1995, 1996; Wolpert and Gimpel 1997) suggests the attention accompanying Supreme Court nominations fluctuates. Since the attention devoted to nominations fluctuates, it is reasonable to expect senators to be more willing to participate in the floor debates of nominations that generate more publicity.

Although research formally modeling the selection stage focuses on predicting when confirmations will occur, it also presents a framework for understanding when nominations are likely to attract the attention of the media, interest groups, and American citizens. That is, this research provides a framework for understanding when Supreme Court nominations are likely to be engulfed in controversy, which I argue provides supporters and opponents incentives to actively participate throughout the confirmation process. This attention devoted to constrained nominations provides senators who support or oppose nominees ample opportunities not only to take positions and increase their visibility but also to define the debate surrounding nominees. Supporters will use the attention devoted to these controversial nominations to help nominees secure confirmation, while opponents will use it to block nominees from securing nomination. Ultimately, both supporters and opponents will want to participate early in the confirmation process in order to define the debate surrounding Supreme Court nominations, because if they abstain from deliberating, they risk letting their opponents define the nomination.

In addition, I examine how the characteristics of senators and nominees influ-

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During his thirty-four year career on the Court, Justice Douglas participated in a number of major cases, including *Brown v. Board of Education* (1954), *Miranda v. Arizona* (1966), *Roe v. Wade* (1973), and *United States v. Nixon* (1974).

ences senatorial deliberation on the floor and in the hearings. Previous research finds the ideology and qualifications of nominees influence senatorial behavior at the confirmation stage (Cameron, Cover and Segal 1990; Segal, Cameron and Cover 1992; Kastellec, Lax and Phillips 2010). Taken as a whole, research on confirmation votes provides tremendous insight into why senators vote for (against) nominees. However, it is not always clear how these factors will affect senatorial deliberation, because confirmation votes differ from deliberation. Below, I discuss when these variables are likely influence senatorial deliberation.

## **Outline of the Dissertation**

In Chapter 2, I investigate the factors affecting senatorial deliberation by borrowing from research that formally models the selection stage (see e.g., Moraski and Shipan 1999; Johnson and Roberts 2005). Specifically, I examine how the institutional context surrounding nominations influences senatorial deliberation from Harold Burton (1945) to Elena Kagan (2010). This framework I argue helps illuminate why senators participate in the confirmation debates. Additionally, I contribute to a growing body of research that applies nomination regimes beyond the selection stage of Supreme Court nominations (see e.g., Hitt 2013). I find senators are more likely to participate on the floor when the preferences of the president and Senate are on opposite sides the Supreme Court. My results also demonstrate other factors are important for understanding who is likely to deliberate. That is, I find committee membership, ideology, and qualifications affect the likelihood senators participate in the floor debates. Additionally, I find senators are more likely to participate in the floor deliberations since the nomination of Bork. These results suggest senators are strategically participating in the Supreme Court confirmation debates.

In Chapter 3, I directly address whether senators announce their positions on Supreme Court nominations prior to the opening gavel of the confirmation hearings. Despite the threat pre-hearing positions pose to the role senators play in the confirmation debates, there has been no empirical research examining whether this is something that occurs regularly or what factors influence senatorial announcements prior to the hearings. In this study, I directly investigate whether and why senators state announce position prior to the hearings. First, I examine whether senators publicize their positions before committee members question nominees. Overall, I find pre-hearing announcements are rare across Supreme Court nominations from John Harlan (1955) to Elena Kagan (2010). However, when focusing on Senate Judiciary Committee members, I find a substantial portion announce support for (opposition to) nominees. Second, I examine the factors that influence senatorial behavior before the hearings commence. To help understand senators pre-hearing announcements, I build on existing research that analyzes the selection stage with formal models (Moraski and Shipan 1999; Johnson and Roberts 2005). By doing so, I present a framework for understanding why senators announce pre-hearing positions. I find the institutional context surrounding nominees affects senatorial deliberation. Specifically, I find when presidents are more constrained, senators are more likely to declare support (opposition).

In Chapter 4, I analyze the most visible feature of the Supreme Court appointment process – the confirmation hearings. Existing research focuses on how the changing nature of the hearings has deteriorated the quality of deliberation and threatened the integrity of the confirmation process as a whole. However, much of this work is based on anecdotal evidence of the most controversial nominations, thereby leaving explanations for the individual behavior of senators underdeveloped. Examining confirmation hearings from Sandra Day O'Connor to Sonia Sotomayor, I find strong support for the hypothesis that senators strategically en-

engage nominees in discussions about Supreme Court precedents. More specifically, I find political, electoral, and institutional considerations affect the the willingness of senators to engage nominees in discussions about precedent before the Senate Judiciary Committee.

## Chapter 2

# Nomination Regimes and Senatorial Participation in Supreme Court Confirmation Debates

### Introduction

The Supreme Court confirmation debates extend beyond the hearings. In fact, senators regularly discuss nominations on the Senate floor. Moreover, they champion the importance of these debates. For example, on 22 October 1987, Senator William Proxmire (D-WI) addressed the Senate to discuss the nomination of Robert Bork: “Unlike most Senators I am undecided. *I will stay undecided until the debate has resolved my doubts*” (my emphasis, *Cong. Rec.*, p. 28844). Remarkably, his speech came the day before the Senate was scheduled to vote on Bork’s nomination, a nomination that garnered considerable interest group participation (Caldeira and Wright 1998; Caldeira, Hojnacki and Wright 2000),

presidential involvement (Maltese 1995*b*; Johnson and Roberts 2004; Cameron and Park 2011), and public attention (Gimpel and Wolpert 1995, 1996). Since neither the extensive confirmation hearings nor the intensive public fight had persuaded him to support or oppose Bork, Senator Proxmire’s speech indicated the forthcoming debate would. Ultimately, the senator voted against Bork, but his speech provides anecdotal evidence that confirmation debates have the power to influence votes.

Senator Proxmire is not the only senator to discuss the importance of floor debates. Other senators have also admitted that they reflect on, or will take into consideration, what transpires during floor debates before deciding whether to confirm or reject Supreme Court nominations. For example, Senator Jennings Randolph’s (D-WV) decision to support the nomination of Clement Haynsworth Jr. was based on “an earnest consideration of the issues brought into focus during the hearings and *further discussed in th[e] Chamber*” (my emphasis, *Cong. Rec.*, p. 35139). Senator Randolph’s statement reveals he considered the floor debates even after the confirmation hearings had concluded. And more recently, Senator Mark Begich (D-AK) released a press statement shortly after meeting with Sonia Sotomayor, stating he intended to mull over the senatorial debates before deciding how to vote: “I look forward to hearings in the Senate next month and *our debate on the floor* before making a final decision on my vote for Judge Sotomayor” (my emphasis, 24 June 2009).<sup>1</sup> In a second press statement released the day the Senate was scheduled to vote on her nomination,<sup>2</sup> Senator Begich explained how he had reached the decision to confirm her nomination:

I arrived at my decision carefully. I had a long meeting with Judge

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<sup>1</sup><http://www.begich.senate.gov/public/index.cfm/pressreleases?ID=21d8e164-18e9-4e00-97b1-1d3b3c4b36e9>, accessed 1 June 2014.

<sup>2</sup>Senator Begich did not participate in the Senate floor debate, but he published two press releases on his Senate website.

Sotomayor and I thoroughly examined her extensive record after 17 years of judicial service. I listened to the *Senate debate* on her nomination and I heard from hundreds of Alaskans (my emphasis, 6 August 2009).<sup>3</sup>

Viewed by itself, this press release ambiguously mentions the Senate debate, but when viewed along with Senator Begich's first press release, the two statements provide evidence the senator took the floor debates into consideration before deciding to confirm Sotomayor. Clearly, Senators Randolph and Begich discussed other avenues they used to help them make their voting decision, but the broader point still remains: confirmation debates matter because they help senators decide whether to confirm (reject) Supreme Court nominations. While senators recognize the importance of the floor debates, it is not completely clear why they participate.

Scholars interested in the appointment process have devoted considerable effort to analyzing the Supreme Court confirmation debates. Although scholars devote a great deal of attention to analyzing the confirmation hearings (Ringhand and Collins 2011; Collins and Ringhand 2013; Farganis and Wedeking 2011, 2014), a burgeoning body of research has begun analyzing the confirmation debates on the Senate floor. Studying the nominations of Samuel Alito, Sonia Sotomayor, and Elena Kagan, Vining, Steigerwalt and Trochesset (2012) find the characteristics of nominees and senators influence senatorial deliberation. Specifically, they find party leaders announce their positions early during the appointment process, but Senate Judiciary Committee members and ideologically distant senators delay announcing their positions. In contrast, Krog and Unah (2012), who study nominations from Sandra Day O'Connor (1981) to John G. Roberts (2005), find committee members and ideologically distant senators announce their positions

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<sup>3</sup><http://www.begich.senate.gov/public/index.cfm/pressreleases?ID=38185c69-0f95-4995-adcc-0d5a6792af29>, accessed 1 June 2014.

early and often. Although the conclusions of Vining, Steigerwalt and Trochesset (2012) differ from Krog and Unah (2012), both studies contribute by developing a more complete description of how senators participate throughout the confirmation process and suffer from a similar limitation. That is, neither study includes nominees before O'Connor, which precludes both from analyzing how the institutional context surrounding the nominations influences senatorial deliberation.

In this study, I develop a richer portrait of the factors affecting senatorial deliberation by borrowing from research that formally models the selection stage (see e.g., Moraski and Shipan 1999; Johnson and Roberts 2005). Specifically, I examine how the institutional context surrounding nominations influences senatorial deliberation from Harold Burton (1945) to Elena Kagan (2010).<sup>4</sup> By doing so, I develop a framework for understanding when senators are likely to participate in the confirmation debates. Additionally, I contribute to a growing body of research that applies nomination regimes beyond the selection stage of Supreme Court nominations (see e.g., Hitt 2013). I find senators are more likely to participate on the floor when the preferences of the president and Senate are on opposite sides the Supreme Court. My results also demonstrate other factors are important for understanding who is likely to deliberate. That is, I find committee membership, ideology, and qualifications affect the likelihood senators participate in the floor debates. Additionally, I find senators are more likely to participate in the floor deliberations since the nomination of Bork. These results suggest senators are strategically participating in the Supreme Court confirmation debates.

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<sup>4</sup>I exclude nominations before Burton because prior to his nomination estimates for the ideological preferences for all justices remaining on the Court do not exist, which makes it hard to estimate the median of the Court.

# Senatorial Deliberation during Supreme Court Nominations

## Nominations Regimes

Floor speeches help senators define Supreme Court nominations and increase their visibility among colleagues and constituents (Mayhew 1974; Rocca 2007; Pearson and Dancey 2010). For example, shortly after President Reagan announced he was nominating Robert Bork to replace Justice Lewis Powell Jr., Senator Ted Kennedy (D-MA) described Bork's America on the Senate floor as follows:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy (*Congressional Record*, vol 133, p. 18519).

Senator Kennedy's speech countered President Reagan's narrative that Judge Bork is "well prepared, evenhanded, and openminded"<sup>5</sup> by painting the judge as a radical conservative out of touch with and dangerous to the values Americans treasure. Ultimately, his speech garnered extensive attention from his colleagues, the media, and became the battle cry for interest groups opposing Bork (Watson

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<sup>5</sup>"Remarks Announcing the Nomination of Robert H. Bork To Be an Associate Justice of the Supreme Court of the United States," <http://www.presidency.ucsb.edu/ws/print.php?pid=34503>, accessed 14 June 2014.

and Stookey 1995; Bell 2002).

The attention devoted to Bork's nomination from interest groups (Maltese 1995*a*; Caldeira and Wright 1998), the media (Evans and Pearson-Merkowitz 2012), and the American public (Gimpel and Wolpert 1995, 1996; Wolpert and Gimpel 1997) helped Senator Kennedy increase his visibility among colleagues and constituents. However, Bork's nomination is unique<sup>6</sup> and suggests senators strategically participate in the floor debates. The Senate rejected Robert Bork, but Supreme Court nominations are normally confirmed. In fact, since 1900, presidents have made sixty-eight Supreme Court nominations,<sup>7</sup> and of these nominations, the Senate confirmed fifty-nine (87%). Nominations to the Court are normally confirmed because presidents "pick nominees with an eye toward the entire process, including their chance of confirmation and impact on the court" (Segal, Cameron and Cover 1992, p. 114). Before a president selects a nominee, presidents regularly solicit recommendations from senators and interest groups and subject potential nominees to background checks in order to reduce the uncertainty of confirmation (Maltese 1995*a*; Yalof 1999; Nemacheck 2007).

While most nominees are confirmed, this is no indication they sail smoothly through the Senate. As Shipan and Shannon point out, "behind this usual outcome lies a great deal of variance in the amount of time it takes for the Senate to confirm a nominee" (2003, 654). There is also a great deal of variance in the percentage of senators who vote in favor of confirmation (Basinger and Mak 2012), presidential participation after the announcement (Maltese 1995*b*; Johnson and Roberts 2004),

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<sup>6</sup>Scholars interested in Supreme Court nominations regularly describe Bork's nomination as a watershed appointment (see e.g., Maltese 1995*a*; Caldeira and Wright 1998; Epstein, Lindstädt, Segal and Westerland 2006; Shipan 2008).

<sup>7</sup>Technically, presidents have made seventy Supreme Court nominations, but the nomination of Douglas Ginsburg and John G. Roberts Jr. are not counted. Douglas Ginsburg's nomination was never officially sent in writing by President Ronald Reagan to the Senate for confirmation, and Roberts's associate justice nomination was withdrawn by President George W. Bush. President Bush withdrew the nomination after Chief Justice William H. Rehnquist's death and renominated Roberts to replace the Chief Justice.

interest group mobilization (Maltese 1995 *a*; Cameron and Park 2011; Vining 2011), media coverage (Evans and Pearson-Merkowitz 2012), and nomination regimes (Moraski and Shipan 1999; Johnson and Roberts 2005). Taken as a whole, these studies reveal the attention accompanying Supreme Court nominations fluctuates. Since the attention devoted to nominations fluctuates, it is reasonable to expect senators to be more willing to participate in the floor debates of nominations that generate more publicity.

To develop a framework for understanding why senators deliver floor speeches about Supreme Court nominations I borrow from the insights of research that formally models the selection stage (Moraski and Shipan 1999; Johnson and Roberts 2005). The prominent factor in this literature is the institutional configuration of the president, Senate, and Supreme Court. More specifically, how the preferences of these political actors are configured determines whether nominations may occur.

Both Moraski and Shipan (1999) and Johnson and Roberts (2005) present formal models for understanding when Supreme Court nominations are likely to occur. However, they emphasize different aspects of the Senate in their models.<sup>8</sup> The models describe nominations by their institutional configurations. In the unconstrained regime the president's ideological preference is located between the preferences of the Senate and Court. Given this configuration, presidents can expect that if they nominate individuals who share their preferences, then their nominees will be confirmed. Unconstrained presidents can expect their nominees to be confirmed because they know the Senate prefers to shift the ideological balance of the Court in the same direction. While both agree the ideological direction of the Court needs to be shifted, the president prefers a more moderate

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<sup>8</sup>Moraski and Shipan (1999) use the Senate median to represent the Senate and Johnson and Roberts (2005) use the filibuster pivot.

nominee than the Senate.

In the semi-constrained regime the Senate's ideological preference is located between the preferences of the president and Court. While the president and Senate agree on the direction to move the Court, the Senate prefers a nominee that is more moderate than the president prefers. Although semi-constrained presidents prefer to move the Court farther than the Senate prefers, they know the Senate will reject ideologically extreme nominees. Hence, these presidents will compromise and appoint moderate nominees because they do not want to suffer the humiliation that accompanies unsuccessful nominations.

Finally, in the fully constrained regime the preferences of the president and Senate are on opposite sides of the Court. That is, the Court's preferences are located between the two. Because the president and Senate cannot agree on which direction to move the Court, the president is constrained. By attempting to shift the Court towards their own preferences and away from the Senate, fully constrained presidents can expect their nominations will be rejected. Hence, fully constrained presidents should be expected to appoint nominees who will not shift the balance of the Court.

Although the regime literature focuses primarily on who is likely to be selected and provides predictions for when confirmations will occur, it also presents a framework for thinking about senatorial participation. Within each regime senators know the ideological preferences they can expect from Supreme Court nominees. Additionally, they have a rough sense of the confirmation prospects for nominees of unconstrained, semi-constrained, and fully constrained presidents. For example, when presidents are unconstrained, senators can reasonably expect the preferences of nominees to reflect the preferences of appointing presidents and expect these nominees to easily secure confirmation. Similarly, when semi-constrained presidents strategically compromise by submitting nominees that reflect the Senate's

preference, senators know these nominees will be confirmed. In these nomination regimes, senators expect little controversy to arise. In contrast, when presidents are fully constrained, senators know nominees can alter the ideological balance of the Court and must overcome larger confirmation obstacles. Moreover, senators expect these nominations to receive extensive attention from the media and interest groups. Indeed, research on Supreme Court nominations and media coverage suggests the institutional configuration of the president, Senate, and Court may influence the amount of coverage nominations receive (Evans and Pearson-Merkowitz 2012). Although Evans and Pearson-Merkowitz do not specifically address whether nomination regimes influence coverage, the patterns of media coverage for nominations since Sandra Day O'Connor suggest the nominations of fully constrained presidents receive more coverage than the nominations of semi-constrained presidents.<sup>9</sup> Furthermore, anecdotal accounts suggest the nominees of constrained presidents receive more attention (see e.g., Carter 1995; Davis 2005). Given that constrained presidents can shift the balance of the Court away from the Senate, I expect these nominations to garner more attention, and I expect senators to be more likely to actively participate in these confirmation debates.

*Constrained Regime Hypothesis.* Senators will be more likely to participate in the confirmation debates when appointing presidents are fully constrained.

## Member Characteristics

In addition, a senator's decision to participate in the Senate floor debates may well be strategic because costs accompany deliberation. Deliberating on the Senate floor is not a costless activity, and senators have to expend valuable resources to

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<sup>9</sup>See Evans and Pearson-Merkowitz (2012) Appendix A, p. 1053.

learn about and participate in the floor debates about Supreme Court nominees. For example, Senator Patrick Leahy (D-VT) discussed the personal sacrifice that was required of him to become thoroughly informed about the policy preferences of Robert Bork:

I asked my staff, “Would you please bring me the materials that Judge Bork has written so I can read them?” The 3,000 or so pages that they presented to me changed my recess plans quite a bit. I have already called my wife and said: take that shelf full of books in our farmhouse in Vermont – you know that history of World War I that I keep saying that I am going to read – and clear them out because we have got something that takes up a lot more room and something I am going to have to read.... Because what I read there will determine to a great deal how I am going to vote on this nomination (*Congressional Record* vol 133, p. 22830, 6 August 1987).

While the cost of becoming informed about Bork came at the expense of pleasure reading for Senator Leahy, the broader point still remains: Time devoted to learning about nominees is time diverted from other activities, such as legislating, campaigning, or fundraising. Hence, it is reasonable to expect senators better positioned to handle the costs of becoming familiar with Supreme Court nominees will be more likely to discuss nominations in the floor debates.

As previously mentioned, participation in the confirmation debates is not a costless activity. As the passage from Senator Leahy indicates, time devoted to deliberation, to the collection and consumption of information on Supreme Court nominees, is time diverted from other activities.<sup>10</sup> However, the costs accompa-

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<sup>10</sup>These costs are similar to the information and traction costs discussed by (Hall 1996): “... *transaction costs* refers to the time and effort required for the enterprise to acquire, assimilate, and apply issue specific policy information... *transaction costs*, in turn, include the time and effort required to communicate with other actors...” (p. 87).

nying participation are not constant across senators. Some senators, especially committee members, are better positioned to defray the costs of deliberation. Committee members are thought to possess more knowledge and expertise about the issue areas within the jurisdiction of their committee. This also holds for the Senate Judiciary Committee.

Previous research demonstrates the institutional structure of the legislating process provides committees opportunities to specialize in policy or issue areas (Krehbiel 1991). One reason committee members are thought to have opportunities to specialize is because of interest groups. Interest groups have been found to lobby the committee members on the committee of jurisdiction Hall and Grofman (1990); Hall and Deardorff (2006). By being involved with these groups more often, committee members have occasions to procure information from a diverse set of interests, which helps minimize the uncertainty accompanying potential legislation. Similarly, this also holds for Supreme Court nominations. Like other committees in the legislative process, the Senate Judiciary Committee, during the confirmation process, is frequently in contact with interest groups. Indeed, the analysis of Caldeira and Wright (1998) clearly shows that interest groups are more likely to lobby committee members. Judiciary committee members also have the opportunity to question interest groups during the confirmation hearings. Besides having access to more information, judiciary members may feel they have a duty to participate in the debates. After all, non-members commonly express the view that they will follow the activities of the judiciary committee, its hearings and recommendations, because they want to hear what it has to say about Supreme Court nominees. However, the hearings and committee votes are not the only way for members to communicate with non-members. Another way for members to discuss nominations is on the Senate floor. Hence, I expect the following:

*Senate Judiciary Committee Hypothesis.* Senators who are members of the Senate Judiciary Committee will be more likely to participate in debates on the Senate floor.

## Nominee Characteristics

Existing literature on the confirmation stage for Supreme Court nominations serves as the foundation for understanding senatorial behavior throughout the process. This literature finds that ideology and qualifications are prominent influences on confirmation votes (Cameron, Cover and Segal 1990). Indeed, the impact of these variables is consistently found to affect confirmation votes, even after controlling for a host of factors including a senator's home state demographics (Overby, Henschen, Walsh and Strauss 1992), public opinion (Kastellec, Lax and Phillips 2010), and partisan polarization (Shipan 2008; Basinger and Mak 2012).

Senators vote against ideologically distant nominees because they would become worse off if the nominees become justices. Because senators care about policy and justices make policies based on their own ideological preferences (Segal and Spaeth 1993, 2002; Epstein and Knight 1998), senators consider the preferences of nominees when casting confirmation votes. For example, Senator Chuck Grassley (R-IA) explained why he opposed Sonia's Sotomayor's nomination stating, "I cannot support her nomination because I'm not persuaded that she has the right judicial philosophy for the Supreme Court" (*Congressional Record* vol. 155, p. S8922, 6 August 2009). That is, Senator Grassley's opposition to Sotomayor's Supreme Court nomination was based on philosophical (*viz.*, ideological) considerations. In terms of confirmation votes, it is reasonable to expect senators will be more likely to confirm nominees with similar ideological preferences. Although

this situation does not completely describe senatorial deliberation, it presents a way for understanding why senators deliberate. Clearly, ideologically distant senators who oppose Supreme Court nominations have incentives to address their colleagues. They do it to define nominations and mobilize opposition. In contrast, those senators who are ideologically distant but are supportive of the nominees may be more likely to discuss the nomination in order to explain why they have chosen to vote to confirm or raise support for nominees. Ideological distant senators who are uncertain about the policy consequences accompanying nominees may become involved to express their uncertainty or discuss the issue areas they are intend to consider when deciding how to cast their confirmation votes. All of these possibilities suggests the following:

*Ideological Distance Hypothesis.* Senators will be more likely to participate in the confirmation debates for ideologically distant nominees.

As for qualifications, previous research clearly indicates senators are more likely to vote for highly qualified and less likely for poorly qualified nominees (Cameron, Cover and Segal 1990; Epstein et al. 2006). In terms of senatorial deliberation, I expect senators to be more likely to debate the nomination of poorly qualified nominees. They will be more likely for two reasons: First, they will be uncertain whether the nominees meet the minimum standards necessary for becoming justices and will seek to find out whether nominees possess the qualifications. Second, they will participate on the Senate floor to try and defeat poorly qualified nominees. Either way, I expect the following:

*Qualifications Hypothesis.* Senators will be more likely to participate in the confirmation debates when presidents nominate poorly qualified nominees.

## Data and Methods

To evaluate the influence of political and institutional factors on confirmation debates, I analyze senators' speeches on Supreme Court nominations from Harold Burton (1945) to Elena Kagan (2010).<sup>11</sup> The data set consists of all speeches on each of the forty-three nominations. The unit of analysis is the individual senator, and there is an entry for each senator in the data set for each nomination, for a total of 3,187 observations. To identify each senatorial speech about a Supreme Court nominee, I searched the *Congressional Record* for speeches on the Senate floor from the day a nomination was submitted to the Senate to the day the Senate confirmed (rejected) a nominee. For the purposes of this paper, a speech indicates whether senators participated in the confirmation debates. Although some senators delivered more than one speech about a nominee, I am primarily interested in analyzing whether senators participated in the floor debates. In total, 1,026 senators participated across thirty-four Supreme Court nominations.

Figure 2.1 displays the percentage of senators who delivered floor speeches on Supreme Court nominations from Harold Burton (1945) to Elena Kagan (2010). The vertical axis is the percentage of senators who participated in these debates, the horizontal axis displays the nominations chronologically,<sup>12</sup> and the dashed gray line demarcates the fifty percent threshold. The figure clearly shows that the percentage of senators discussing nominations on the Senate floor has increased. There are more senators participating in Kagan's confirmation debates than in Burton's.

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<sup>11</sup>I begin with Justice Burton because ideological estimates exist for all justices on the Court at the time of his nomination. Prior to Burton's nomination Cover Segal scores (Segal and Cover 1989) do not exist for all justices leaving the Court. This makes it difficult to estimate the Court's median.

<sup>12</sup>The nominations of Homer Thornberry, Douglas Ginsburg, and Harriet Miers have been excluded. In addition, Douglas Ginsburg's *nomination* has been excluded. Although President Ronald Reagan announced he was nominating Ginsburg to replace Justice Lewis F. Powell, the President never officially nominated him to replace the retiring justice.

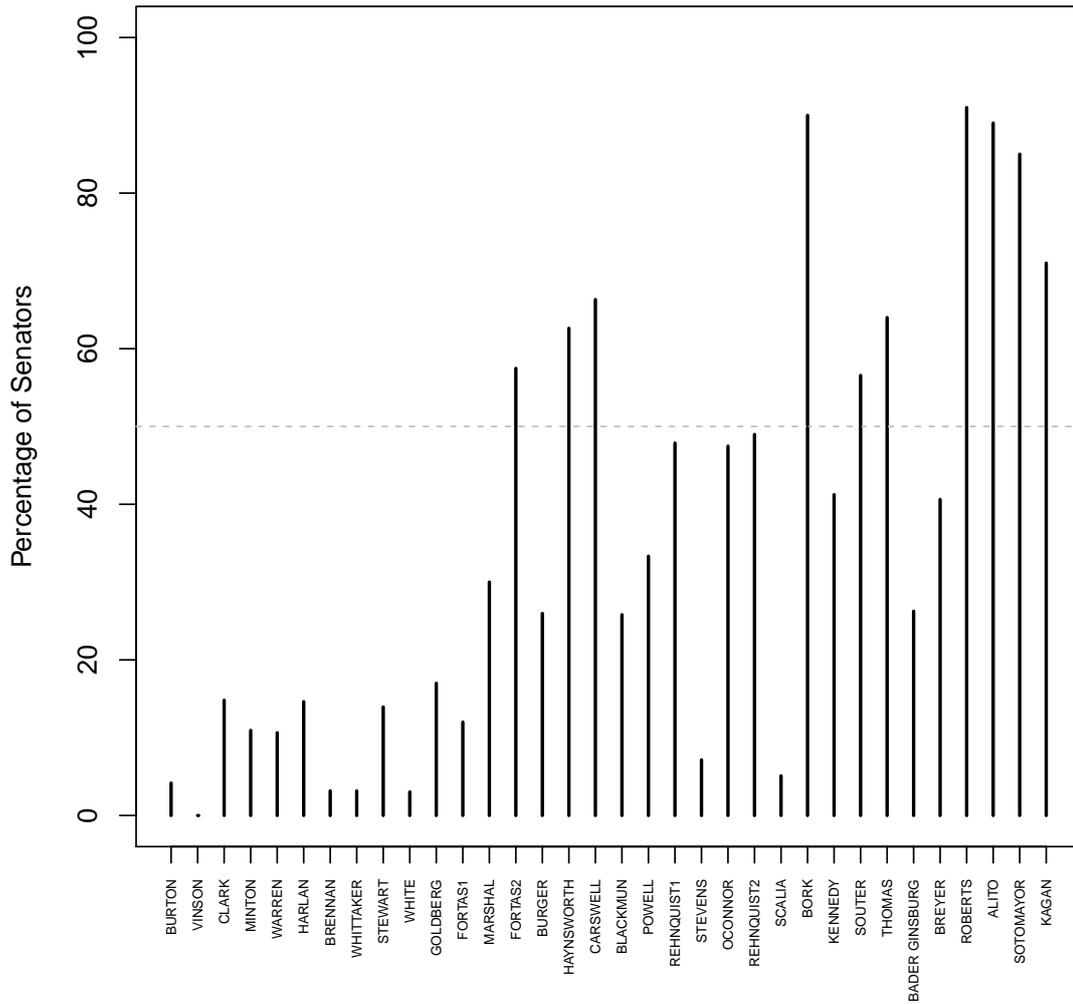


Figure 2.1: Percentage of Senators who Discuss Supreme Court Nominations in Senate Floor Speeches, 1945-2010. The graph displays the percentage of senators who made a speech on the Senate floor all but two Supreme Court nominations.

The grey-dashed line marks the fifty percent line. The nominations of Homer Thornberry, Douglas Ginsburg, and Harriet Miers have not been included.

Figure 2.1 also shows sharp increases in the percentage of senators delivering floor speeches. The first increase accompanied Thurgood Marshall's nomination. The percentage of senators debating Marshall more than doubled those debating previous nominees. Indeed, prior to Marshall, Figure 2.1 shows the percentage of senators participating in deliberations never exceeded twenty percent. Moreover, in five of the previous nominations the percentage of senators speaking on the floor is below ten percent.<sup>13</sup>

Less than a year after Marshall's confirmation, the percentage of senators participating in Abe Fortas's confirmation debates exceeds fifty percent, and two of the next three nominations received more deliberation than Fortas. Focusing on nominations from Fortas (Chief Justice nomination) to Antonin Scalia, Figure 2.1 shows the nominations of Justice John Paul Stevens and Antonin Scalia received little discussion from senators, and with good reason. President Gerald Ford nominated Stevens approximately a year after pardoning Richard Nixon and less than a year before the 1976 presidential election. Needless to say, President Ford was looking to avoid a confirmation fight and looking for a nominee that would quickly win confirmation. As for Scalia, his nomination was contingent on the promotion of Justice William H. Rehnquist to replace Chief Justice Warren Burger. Ultimately, senators, especially Democrats, focused on Rehnquist.<sup>14</sup> Overall, there are more senators discussing nominations from Fortas to Scalia than were prior to Marshall.

The third increase in the percentage of senators discussing nominees occurs with Robert Bork. This indicates conventional wisdom about Bork being a watershed appointment is partly correct. Indeed, more than eighty percent of senators participated in the Bork confirmation debates. Since Bork, more than half of the Senate discussed six of the nine nominations. The three nominations that

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<sup>13</sup>The nominees include Harold Burton, Fred Vinson, William Brennan, Charles Whittaker, and Byron White.

<sup>14</sup>For discussion of both nominations see Abraham (2008) and Watson and Stookey (1995).

did not exceed fifty percent include Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer. Kennedy was nominated because Bork's nomination failed. Bader Ginsburg and Breyer were President Bill Clinton's nominees, and the President worked hard behind the scenes to secure confirmation for Bader Ginsburg and Breyer (Johnson and Roberts 2004). Since John G. Robert's nomination, the percentage of senators exceeds fifty percent. In fact, the percentage of senators debating the nominations of Roberts, Alito, and Sotomayor exceeds eighty percent. Elena Kagan's nomination also draws a good deal of discussion from senators. Overall, Figure 2.1 shows the nomination environment started changing during the 1960s but then accelerated after Robert Bork's nomination (see e.g., Epstein et al. 2006).

## Independent Variables

To investigate the factors that influence senators to participate in the confirmation debates, I build on research that formally models the selection stage and research that models confirmation votes as a function of the ideological distance between a senator and a nominee, a nominee's qualifications, presidential strength, and partisanship (see e.g., Cameron, Cover and Segal 1990; Segal, Cameron and Cover 1992; Epstein et al. 2006).

*Regimes.* To investigate the relationship between institutional context and senatorial deliberation I use Judicial Common Space scores (Epstein, Martin, Segal and Westerland 2007) to represent the preferences of the Senate, president, and Supreme Court. The Senate's ideal point is the median member. The Supreme Court's ideology is defined as the median of the Court after a vacancy occurs. Although other measures have been used to construct the nomination regimes, I use Judicial Common Space scores because it was designed to place the preferences

of all three into a single dimension policy space.

Additionally it is worth discussing why I use the median instead of the filibuster pivot to demarcate the Senate. I use the Senate median for two reasons. First, I use the median because it is commonly used to represent the Senate in research analyzing the selection stage (see e.g., Hammond and Hill 1993; Moraski and Shipan 1999; Nokken and Sala 2000; Shipan and Shannon 2003; Krehbiel 2007; Hitt 2013). Second, it is not exactly clear why the filibuster pivot should be preferred when examining Supreme Court nominations. Although Johnson and Roberts (2005) note the nomination of Justice Abe Fortas to replace Chief Justice Earl Warren was filibustered and ultimately defeated, it is unclear whether ideology was the primary reason Fortas was defeated. During the confirmation debates, on the floor and in the hearings, senators were concerned about Fortas's objectivity as a justice. More specifically, senators were concerned about his relationship as a consultant to President Johnson and his speaking engagements at American University, for which he was paid an annual stipend of \$20,000 from the family foundation of Louis E. Wolfson, who was serving time in prison for fraudulent financial dealings (Abraham 2008). In addition, when President Johnson announced the nomination, he was a lame duck president – a president in the final year of his term. Moreover, when President Johnson nominated Fortas in 1968, the President had already announced he would not seek reelection in the fall. For these reasons, I used the Senate median instead of the filibuster pivot.<sup>15</sup>

*Ideological distance.* To assess the effect of ideological distance on the likelihood senators will take a position on the Senate floor, I calculate the ideological distance between senators and nominees for every Supreme Court nomination from Harold Burton (1945) to Elena Kagan (2010). Specifically, I calculate the ideological distance between senators and nominees by squaring the difference between their

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<sup>15</sup>Using the filibuster pivot does not change the substantive findings presented below.

Judicial Common Space scores.<sup>16</sup> These scores, originally created by Epstein et al. (2006), place presidents, senators, and justices in a unidimensional policy space. That is, Epstein et al. use a bridging technique to create comparable estimates for the preferences of all three that are based on Common Space scores (Poole and Rosenthal 1997) and Segal Cover scores (Segal and Cover 1989). Higher values indicate greater ideological distance between senators and nominees.

Judicial Common Space scores are not the only estimates that place presidents, senators, and nominees in a unidimensional policy space. However, I use them for two reasons. First, the Judicial Common Space is commonly used in research not examining the Supreme Court appointment process (see e.g., Clark 2009; Boyd, Epstein and Martin 2010; Segal, Westerland and Lindquist 2011). Second, the Judicial Common Space provides estimates for all nominees under investigation. This is not the case for other estimates commonly used by scholars. For example, Bailey (2007) develops estimates for the ideological preferences of political actors based on their votes and publicly expressed positions. Because these estimates are based on the votes and positions of sitting presidents, senators, and justices, Bailey's (2007) estimates do not provide estimates for Supreme Court nominees who were not confirmed. This means there is no estimate for Robert Bork, whose nomination is considered to be a watershed moment in American politics (Martinek, Kemper and Van Winkle 2002; Epstein et al. 2006).

*Lacks Qualifications.* To assess whether nominees lack the qualifications necessary to serve as Supreme Court justices, I use Segal Cover scores (Segal and Cover 1989). Segal and Cover estimate the qualifications of nominees by content analyzing newspaper editorials. The editorials came from a set of ideologically balanced newspapers,<sup>17</sup> and were written after the nomination was announced but before

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<sup>16</sup>Data for this variable as well as other variables normally included to model confirmation votes come from <http://epstein.usc.edu/research/Bork.html>.

<sup>17</sup>Originally, (Segal and Cover 1989) content analyzed newspaper editorials in the *New York*

the Senate voted to confirm (reject) the nomination. This variable ranges from 0 (most qualified) to 1 (least qualified).

*Committee Member.* Coded 1 if senators are members of the Senate Judiciary Committee, 0 otherwise.

In addition to these variables, I control for several other factors that are consistently included in examinations of the Supreme Court confirmation process.

*Bork.* Coded 1 if the nomination is the nomination of Bork or after, 0 otherwise.

*Same Party.* Coded 1 if senators and presidents are members of the same party, 0 otherwise.

*Strong President.* Coded 1 if the president is strong, 0 otherwise. A strong president is a president who is not in his fourth year of office and his party controls the Senate.

*Reelection.* To capture the proximity of reelection a dichotomous variable is included, coded 1 if a senator is up for reelection in the upcoming election, 0 otherwise.

*Years in Office.* The number of years served by senators is simply the difference between the year a nomination occurred and the first year a senator assumed office.

## Analysis

Before turning to the full regression results, I examine the basic relationship between nomination regimes and senatorial participation in the confirmation debates. Table 2.1 displays this relationship. The dependent variable, senatorial participation, consists of two values: senators did participate or did not participate in the floor debates. The independent variable, nomination regimes, consists

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*Times, Washington Post, Chicago Tribune, and Los Angeles Times.* Segal, Epstein, Cameron and Spaeth (1995) increased the number of newspapers by also content analyzing the *St. Louis Post-Dispatch* and *The Wall Street Journal*.

of three values: the president is unconstrained, semi-constrained, or fully constrained. Each column of Table 2.1 contains the percentage and raw frequencies (in parentheses) of cases falling into each category of senatorial participation. This table shows 1,026 of 3,187 (32%) senators participated in the confirmation debates and presents empirical support that the institutional regimes characterizing nominations is driving senatorial deliberation. Additionally, it shows that 22 of 199 (11%) of senators in the unconstrained regime, 439 of 1,565 (28%) of senators in the semi-constrained regime, and 565 of 1,423 (40%) of senators in the fully constrained regime participated on the Senate floor. Overall, the pattern displayed in Table 2.1 is consistent with the hypothesis that moving from unconstrained to semi-constrained the percentage of senators participating in the debates increases. Likewise, moving from the semi-constrained to the fully constrained regime increases the percentage of senators participating by approximately 12%. Again, this pattern of increasing participation in regimes where the appointing president has less freedom to appoint likeminded nominees supports the contention that senatorial participation is a strategic reaction to the institutional context surrounding Supreme Court nominations.

Turning to the multivariate analysis, Table 2.2 illuminates the forces that influence senatorial participation during Supreme Court nominations from Harold Burton (1945) to Elena Kagan (2010). The results presented in the table show the coefficients using logistic analysis (robust standard errors in parentheses). Continuous predictors have been standardized by subtracting the mean and dividing by 2 standard deviations.<sup>18</sup> Overall, the model performs reasonably well and provides empirical support for the notion that senatorial participation in the confirmation debates is shaped by institutional context surrounding Supreme Court nomina-

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<sup>18</sup>Continuous predictors are standardized to allow these coefficients to be comparable the coefficients attached to the dichotomous variables (Gelman and Hill 2007)

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Nomination Regimes				
Participated	Unconstrained	Semi-Constrained	Fully Constrained	Total
No	88.94% (177)	71.95% (1,126)	60.30% (858)	67.81% (2,161)
Yes	11.06% (22)	28.05% (439)	39.70% (565)	32.19% (1,026)
Total	100% (199)	100% (1,565)	100% (1,423)	100% (3,187)

Table 2.1: *Senatorial participation in Supreme Court confirmation debates, by Nomination Regimes from Harold Burton (1945) to Elena Kagan (2010) (cross-tabulation).*

tions.

The coefficient for *Regime* is significant and in the expected direction. This result demonstrates that the institutional context surrounding nominations affects senatorial deliberation. As presidents become more constrained, or are less free to appoint likeminded nominees, senators are more likely to participate in confirmation debates, even after controlling for other factors thought to affect senatorial deliberation. Moreover, this evidence is consistent with previous research that finds senators strategically participate in the confirmation hearings (Cameron, Cover and Segal 1990) and that disagreement between the president and the Senate results in a more vociferous confirmation process (Watson and Stookey 1995; Davis 2005; Eisgruber 2007).

Additionally, both the coefficients for ideological distance and qualifications are positive and statistically significant. The positive coefficient for the first indicates senators will be more likely to participate in the floor deliberations as the ideological distance increases between them and nominees, when qualifications is set to its mean value (0). As for qualifications, the positive coefficient for this vari-

	Coef. b/se
Regime	0.483*** (0.08)
Ideological Distance	0.615*** (0.09)
Lacks Qualifications	0.559*** (0.09)
Committee Member	1.012*** (0.11)
Post Bork	2.028*** (0.10)
Same Party as President	0.398*** (0.10)
Strong President	0.009 (0.09)
Senator Faces Reelection	-0.052 (0.09)
Years in Office	0.008 (0.00)
Ideology*Qualifications	0.727*** (0.15)
Constant	-3.089*** (0.22)
N	3187
AIC	3263.06

Table 2.2: *Predicting senatorial participation during the confirmation debates, Harold Burton (1945) to Elena Kagan (2010). The dependent variable is whether senators participated in the debates (1=participated, 0=otherwise). Continuous predictors have been standardized by subtracting the mean and dividing by 2 standard deviations. AIC = Akaike Information Criterion. \* $p < 0.1$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ .*

able demonstrates senators are more likely to deliberate as the quality of nominees decreases, when ideological distance is set to its mean value (0).<sup>19</sup> To facilitate the interpretation for the interaction of these two variables, I graph the predicted probabilities for senatorial deliberation as a function of the ideological distance between senators and nominees.

Figure 2.2 illustrates how the probability of participating across ideological distance for both the semi-constrained (top panel) and fully constrained (bottom panel) regimes. The solid black lines indicates point predictions for highly qualified nominees (value set at 3<sup>rd</sup> *quartile*), the dashed black lines indicates poorly qualified nominees (1<sup>st</sup> *quartile*). The dotted light gray lines show uncertainty surrounding the predictions using the estimated standard errors for these coefficients (95% confidence interval). While senators in fully constrained regimes are more likely than senators in semi-constrained regimes to participate in the floor debates, the two panels demonstrate similar patterns: When the ideological distance increases between poorly qualified nominees and senators, the probability of senators participating in the confirmation debates on the Senate floor increases. However, when the ideological distance increases between highly qualified nominees and senators, the probability of senators participating in the confirmation debates decreases slightly. These results suggest ideological distance plays a role in senatorial deliberation when nominees are poorly qualified, but is not as influential for highly qualified nominees.

The statistical results also demonstrate that committee membership affects senatorial deliberation. As expected, the coefficient for committee membership is positive and significant, indicating that committee members are more likely to participate in the confirmation debates than non-members. The odds for committee

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<sup>19</sup>This variable is recorded similar to how previous research records it: higher values indicate lower quality nominees and lower values indicate higher quality nominees.

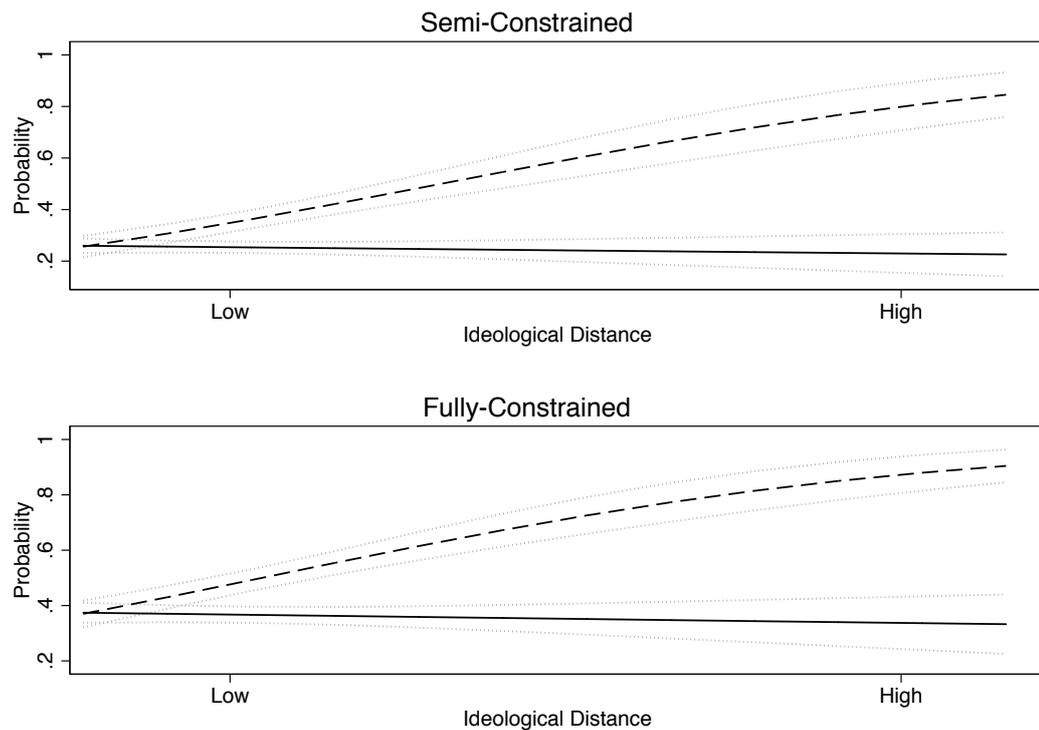


Figure 2.2: *Predicted probabilities of senators participating in floor debates as a function of ideological distance.* The y-axis displays the probability senators participated on the Senate floor during Supreme Court nominations, and the x-axis displays the ideological distance between nominees and senators from low (10<sup>th</sup> percentile) to high (90<sup>th</sup> percentile). The solid black line indicates point predictions for highly qualified nominees (value set at 3<sup>rd</sup> quartile), the dashed black line indicates poorly qualified nominees (1<sup>st</sup> quartile). The dotted light gray lines show uncertainty surrounding the predictions using the estimated standard errors for these coefficients (95%). Continuous and interval variables have been set to their mean values, and all other dichotomous variables are set to their modes.

members participating in the debates are two times higher than for non-members. Given that judiciary committee members have better information about nominees (Caldeira and Wright 1998; Bell 2002), this result suggests that committee members use their private information to shape the discourse surrounding Supreme Court nominations beyond the confirmation hearings.

Many of the control variables are significant. For example, the coefficient representing all nominations since Bork is positive and significant, which is consistent with previous research that suggests his nomination was watershed appointment (see e.g., Hendershot 2010). The variable for same party as the president suggests senators who are members of the appointing president's party are more likely to participate in the confirmation debates. Likewise, the coefficient for strong president is positive and significant. That is, when the appointing president is strong, senators are more likely to participate in the debates on the Senate floor. This finding potentially suggests that senators are participating to evince their support for nominees or to discuss those issue areas and precedents they intend to base their confirmation votes on. In addition, I control for how long senators have served in the Senate and whether they are running for reelection in the upcoming general election. The first, years in office, is positive and significant, suggesting that the longer senators have held office the more likely they are to deliberate. However, the substantive significance of this variable is minimal, moving years in office from its minimum (0) to its maximum (19) value increases the likelihood senators will participate in deliberations by approximately six percent. Finally, the results indicate the coefficient for reelection is negative but insignificant, which indicates that senators facing reelection are no more or less likely to participate in the floor debates than senators not running for reelection.

## Conclusion

Existing research on Supreme Court nominations has primarily focused on the selection stage and confirmation stage, emphasizing ideology, as well as other factors, for determining whom the president nominates and why senators vote to confirm (reject) nominees. This body of research has illuminated the confirmation process, but for the most part, it has left senatorial deliberation beyond the confirmation hearings underdeveloped. Specifically, it was unclear senators participate in the confirmation debates on the Senate floor.

The results presented above suggest the institutional context surrounding Supreme Court nominations affects senatorial participation in these important debates. Because senators expect the nominations of constrained presidents to receive more attention from the media and interest groups, senators are more likely to address these nominations in Senate floor speeches. That is, by participating in the debates senators recognize that these speeches may not only help them gain visibility among their colleagues and constituents but also influence confirmation outcomes.

Beyond the influence of the nomination regimes, I find other considerations influence senatorial participation in the confirmation debates. In particular, two factors demonstrate sizable influence on senatorial deliberation. Senators who serve on the Senate Judiciary Committee are more likely to participate in the floor debates than senators who are not committee members. Substantively, this suggests committee members are attempting to transmit their private information to non-committee members. Additionally, senators are more likely to participate in the floor deliberations since the nomination of Bork. Additionally, the two factors that serve as the cornerstones for research on confirmation votes – ideology and qualifications – influence senatorial deliberation. As expected, as the ideological distance between senators and nominees increases the likelihood senators will

deliver floor speeches increases as well. As for the qualifications of nominees, senators are more likely to discuss poorly qualified nominees, possibly to make sure these nominees meet the minimum qualifications necessary for becoming Supreme Court justices. Finally, I find electoral considerations and seniority do not influence senatorial participation. Senators who are running for reelection participate less on the Senate floor than senators not up for reelection.

My analyses focus on how many speeches senators made on the Senate floor during Supreme Court nominations, and does not address other aspects senatorial behavior during the confirmation process. However, it provides a first step in examining the other ways senators participate throughout confirmation process and provides a fuller picture of how senators actively engage Supreme Court nominations beyond casting confirmation votes. In addition, the research above contributes to the growing body of literature examining how the institutional context surrounding Supreme Court nominations affects senatorial participation in these important processes. While I do find support for traditional factors thought to influence senatorial behavior, I also find that senators are strategically participating in the Supreme Court confirmation debates. While critics of the confirmation debates may argue that by participating in the most contentious of nominations, senators threaten the integrity of the appointment process and Senate. However, this overlooks the fact that by deliberating senators are providing a voice to their constituents (Hall 1996; Collins and Ringhand 2013) and potentially lends legitimacy to the Court and its decisions.

## Chapter 3

# Pre-Hearing Position Taking

Senators regard confirmation hearings as significant features of Supreme Court nominations because they are occasions for them to interact meaningfully with nominees. Although senators and nominees interact beyond the hearings, both the written questionnaires and courtesy calls lack the opportunities that accompany the hearings. The written questionnaires<sup>1</sup> not only fall outside the public limelight but are intended to help senators “come to the hearings better prepared to ask more difficult questions of the nominees” (Farganis and Wedeking 2014, 26). As for courtesy calls,<sup>2</sup> these meetings occur shortly after presidents announce nominations. For example, two days after President Barack Obama announced he was nominating Elena Kagan to replace Justice John Paul Stevens, she visited “Capitol Hill to meet with key senators, including Judiciary Committee chairman Patrick Leahy, Jeff Sessions, and Majority Leader Harry Reid” (Christensen 2010). Likewise, Judge Sonya Sotomayor “made her first visit to Capitol Hill as

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<sup>1</sup>The written questionnaires require “detailed financial data, including a full listing of assets and liabilities, a five-year income report, a list of businesses or enterprises with which the candidate has been connected during the past decade or has a continuing financial interest in, a list of deferred compensation agreements and stock options the candidate has entered into, and a list of political contributions and contributions accepted” (Slotnick 1978, p. 506).

<sup>2</sup>“Only since the 1970s has it been the norm for Supreme Court nominees to pay courtesy calls on selected Senators, moving from office to office” (Rotunda 1995, p. 129).

a Supreme Court nominee” a week after the President announced her nomination (Herszenhorn and Hulse 2009). The quick turnaround between announcements and visits leaves senators little time to prepare for these meetings. Moreover, courtesy calls are not designed for senators to become familiar with the nominees but for presidents to build support for their Supreme Court nominees.

Since opportunities for senators to interact meaningfully with nominees are limited, it is no surprise that senators extol the confirmation hearings. For example, Senator Barbara Mikulski (D-MD) described Supreme Court confirmation hearings as follows: “The hearings are incredibly important, they provide the Senate and the American public with the opportunity to know more about where the nominee stands on core constitutional principles” (*Congressional Record* vol. 151, no. 113, p. S9908). Senator Mikulski’s statement not only indicates the hearings help senators and citizens learn about the preferences of nominees but also implies senators use the information produced by the hearings when deciding whether to confirm nominees.

Senator Mikulski is not the only senator to praise the confirmation hearings. In fact, senators regularly discuss the importance of the hearings and suggest these proceedings help them when deciding whether to confirm (reject) Supreme Court nominations. For example, Senator Bob Bennett (R-Utah) released the following press statement explaining how the hearings helped him come to a decision about Kagan’s nomination:

Bennett Statement Opposing Supreme Court Nominee Elena Kagan:  
Washington D.C. – After thoroughly reviewing her testimony at the Senate Judiciary Committee hearings this week, Senator Bob Bennett (R-Utah) issued the following statement today announcing his intent to vote against the nomination of Elena Kagan to serve on the United

States Supreme Court:

“I have great respect for Senator Hatch’s judgment. I am impressed by the thoroughness of his questioning during the hearing and have withheld my judgment until after the hearings were over. I agree that many of the things in Ms. Kagan’s background are troublesome and justify a negative vote.”<sup>3</sup>

In addition to reinforcing his decision to oppose Kagan’s nomination, Senator Bennett’s press release indicates the interaction between a single senator (in this case Senator Orin Hatch) and a nominee is sufficient enough to influence confirmation votes.

Despite the importance senators attach to the hearings, critics not only question whether these events illuminate where nominees stand on core constitutional principles but also blame nominees and senators for the deterioration of the hearings. Nominees are accused of evading senatorial questions, which undermines the educative purpose of the hearings (Kagan 1995), while senators are denounced for exploiting the limelight that accompanies the most visible feature of the confirmation process to advance their political goals (Fein 1989; Carter 1995; Choi and Gulati 2004; Wittes 2006; Eisgruber 2007; Vaglicia 2012). Additionally, senators are criticized for announcing their positions on Supreme Court nominations prior to the opening gavel of the confirmation hearings. This last criticism will be the focus of the following investigation because, if true, this criticism that senators declare positions on nominations before the Senate Judiciary Committee interviews nominees not only undermines the educative purpose of the hearings but also undermines the role senators play in the confirmation process (Davis 2005).

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<sup>3</sup>Press released was issued 2 July 2010, and was retrieved using the Internet Archive Wayback Machine: [https://web.archive.org/web/20100707102255/http://bennett.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=6d3aff66-a879-4f5a-b728-82882292bf99](https://web.archive.org/web/20100707102255/http://bennett.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=6d3aff66-a879-4f5a-b728-82882292bf99), accessed on 19 August 2012.

Discussing two of the most controversial Supreme Court nominations, Davis (2005) writes, “Most senators, many of whom had committed themselves prior to the hearings, used the sessions to defend or condemn the nominee even before hearing testimony” (p. 161). For Davis, early endorsements by committee members are followed by soft questions at the hearings, questions that are normally “unrelated to any specific legal issue and are more appropriate for a beauty pageant” (p. 162).<sup>4</sup> Thus, early opposition is followed by committee members transforming an opportunity to meaningfully interact with nominees into a political circus. Although Davis’s critique primarily applies to judiciary committee members, early endorsements and opposition from non-members prevents the the hearings from serving an educative purpose. When senators who are both well and badly informed announce their positions, they risk committing themselves, which prevents them from switching their positions if new information comes to light during the hearings. In addition, early announcements may encourage non-members to pay less attention to the hearings, potentially weakening the incentives of committees members to thoroughly investigate nominees. Ultimately, pre-hearings announcements potentially threaten the Senate’s role in the confirmation process because senators, especially those who are undecided, have fewer opportunities to learn about Supreme Court nominees and are forced to turn beyond the Senate. Davis’s critique highlights the problems accompanying pre-hearing announcements, but it is still unclear whether senators regularly declare their positions before the judiciary committee members question nominees.

Despite the threat pre-hearing positions pose to the role senators play in the

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<sup>4</sup> Davis (2005) makes the additional argument that committee members who endorse early are usually involved in the selection stage. By committing themselves prior to the hearings senators undermine their role in the Supreme Court confirmation process because they sacrifice their autonomy at the confirmation stage for the chance to participate at the selection stage. This he says is inconsistent with traditional interpretations of the Appointments Clause, which hold the president nominates, the Senate confirms.

confirmation debates, there has been no empirical research examining whether this is something that occurs regularly or what factors influence senatorial announcements prior to the hearings. In this study, I investigate whether and why senators state their positions concerning Supreme Court nominees before the confirmation hearings. First, I examine whether senators publicize their positions before committee members question nominees. Overall, I find pre-hearing announcements are rare across Supreme Court nominations from John Harlan (1955) to Elena Kagan (2010). However, when focusing on Senate Judiciary Committee members, I find a substantial portion announce support for (opposition to) nominees, which partially confirms critics' fears. Second, I examine the factors that influence senatorial behavior before the hearings commence. To help understand senators pre-hearing announcements, I build on existing research that analyzes the selection stage with formal models (Moraski and Shipan 1999; Johnson and Roberts 2005). By doing so, I present a framework for understanding why senators announce pre-hearing positions. I find the institutional context surrounding nominees affects senatorial deliberation. Specifically, I find when presidents are more constrained, they are more likely to declare support (opposition). In addition, my results show other factors are important for understanding pre-hearing deliberation. More specifically, committee membership and partisanship affect position taking announcements. I also find nominations since Bork have been accompanied by more senators declaring positions prior to the hearings.

## **Position Taking and the Confirmation Debates**

Position taking is an important form of legislative behavior designed to help legislators secure reelection (Mayhew 1974). When applied to Supreme Court nominations, scholars follow the lead of Segal, Cameron and Cover (1992), who

“see confirmation voting largely as an exercise in position taking” (p. 105). Positing votes as positions, these scholars find a number of factors affect senators’ confirmation votes including the characteristics of nominees (Cameron, Cover and Segal 1990; Segal, Cameron and Cover 1992; Epstein et al. 2006), interest group involvement (Caldeira and Wright 1998), constituent preferences (Overby et al. 1992; Kastellec, Lax and Phillips 2010), and partisanship (Shipan 2008; Basinger and Mak 2012). Although confirmation votes are positions, they are not the only form of position taking available to senators.

Another form of position taking senators regularly employ is floor speeches. In particular, floor speeches are thought to be an important form of position taking that legislators use to advance their individual goals (Mayhew 1974; Maltzman and Sigelman 1996; Morris 2001). Floor speeches provide legislators a forum to increase their public visibility thereby allowing institutionally disadvantaged legislators to participate in the policy-making process (Maltzman and Sigelman 1996; Rocca 2007; Pearson and Dancey 2010). In addition to advancing individual goals, scholars have also found that floor speeches serve partisan goals by helping parties develop party brand names or reputations (Harris 2005; Morris 2001).

Floor speeches are also an important form of position taking during Supreme Court nominations regularly used by senators to increase their visibility and influence confirmation outcomes. However, scholars interested in the Supreme Court confirmation debates have extensively explored the hearings (see e.g., Slotnick 1978; Guliuzza, Reagan and Varrett 1994; Ringhand and Collins 2011; Collins and Ringhand 2013; Farganis and Wedeking 2011, 2014). While this strand of research has demonstrated how the dynamic interaction between senators and nominees has evolved across nominations, it is confined to the debates occurring within the confirmation hearings and does not examine the debates beyond these important proceedings. This research is not designed to investigate whether sen-

ators commit themselves before the hearings begin.

Although most research examining the confirmation debates examines the hearings, a number of scholars have analyzed senatorial deliberation beyond the hearings. For example, Vining, Steigerwalt and Trochesset (2012), analyzing the three most recent nominees, study how senators behave strategically when announcing positions on Supreme Court nominees and find senatorial position taking is influenced by individual senator and nominee characteristics. More specifically, using a duration model to investigate senatorial participation, they find interest group involvement, ideological distance between senators and nominees, and committee membership influences senatorial position taking. Similarly, Krog and Unah (2012), who study Supreme Court nominations from Sandra Day O'Connor (1981) to John G. Roberts (2005), find institutional factors (i.e., committee membership) influence senatorial position taking. That is, they find committee members not only participate more frequently in the floor debates but also announce their positions earlier.

While Vining, Steigerwalt and Trochesset (2012) and Krog and Unah (2012) present a more dynamic portrait of senatorial behavior throughout the confirmation process, these studies are not ideally designed to examine whether senators announce their positions before the Senate Judiciary Committee has the chance to interview nominees. That is, by analyzing senatorial position taking with duration models, both studies examine the factors affecting how quickly senators announce their positions and whether these factors lead some senators to announce their positions earlier than their colleagues. Additionally, neither study is fully able to study the context surrounding the nominations. Since Vining, Steigerwalt and Trochesset (2012) focus on the nominations of Alito, Sotomayor, and Kagan, they do not include enough nominees to analyze whether the political context influence senatorial position taking.

As for Krog and Unah (2012), they study nominations from O'Connor to Roberts and use divided government as a proxy for political context. Unfortunately, divided government is not ideally suited to serve as a proxy for political context. Based on their argument, during divided government, senators should be more likely to participate more quickly and frequently in the confirmation debates, and during unified government, senators should be less likely to participate quickly and frequently in the debates. While intuitive, this argument does not fully account for the nominations of Roberts, Alito, Sotomayor, and Kagan. Although Krog and Unah (2012) include only Roberts, all four nominations occurred during periods of unified government and all four drew substantially more discussion from senators than nominations from other periods of unified government. A cursory examination of figures 3.1, 3.2, and 3.3, which display the percentage of senators announcing positions prior to the hearings, clearly shows the nominations of Roberts, Alito, Sotomayor, and Kagan received more declarations prior to the hearings than many other nominees.<sup>5</sup> This suggests divided government may not be the best proxy for capturing the political context surrounding Supreme Court nominations.

## Theory

### Nomination Regimes

Although formal models analyzing the selection stage focus on understanding how the institutional configuration of the president, Senate, and Supreme Court influence who is selected (Moraski and Shipan 1999; Johnson and Roberts 2005), this framework is flexible enough to illuminate other aspects of the appointment

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<sup>5</sup>The same patterns are found when plotting the average number of statements across nominations (results not displayed).

process and judicial decision making process (Hitt 2013). Specifically, I use this as the foundation for understanding senatorial deliberation prior to the confirmation hearings.

Formal models of the selection stage describe three types of nomination regimes that characterize Supreme Court nominations. First, in the unconstrained regime the preferences of presidents are located between the preferences of the Senate and Court. In this regime presidents and the Senate agree on the ideological direction the Court needs to be shifted, but the Senate prefers a nominee more ideologically extreme than presidents. Given this configuration, presidents can reasonably expect nominees who share their preferences will be confirmed by the Senate. Second, in the semi-constrained regime the ideological preference of the Senate is located between the preferences of presidents and the Court. Although presidents and Senate want to shift the Court in the same direction, presidents prefer nominees who are more ideologically extreme than the Senate prefers. However, because presidents do not want to suffer the “loss of political capital associated with putting forth a nominee who is rejected” (Moraski and Shipan 1999, p. 1072), they compromise by nominating individuals who are more palatable to the Senate. Third, in the fully constrained regime the preferences of the Court is located between the preferences of the president and Senate. In this regime, the president and Senate cannot agree on which direction to move the Court. Presidents who attempt to shift the Court towards their own preferences and away from the Senate can expect their nominations will be rejected. Hence, fully constrained presidents will compromise and should be expected to appoint nominees who will not shift the balance of the Court.

Beyond predicting the ideological preferences of nominees, the regime literature presents a framework for understanding the attention devoted to and the controversy surrounding Supreme Court nominations. Nominations that are char-

acterized by more constraint receive more attention. Indeed, research on interest group participation in and media coverage of Supreme Court nominations suggests the more constrained the presidents are the more attention nominations receive. For example, research by Cameron and Park (2011), examining the relationship between the bully pulpit and confirmation outcomes, indicates constrained nominations receive more newspaper coverage and more attention from interest groups that oppose the nominees. In terms of media coverage, a similar finding is found by Evans and Pearson-Merkowitz (2012). Although neither study explicitly investigates the relationship between nomination regimes and attention, both studies suggest constrained nominations attract more attention.

This attention devoted to constrained nominations provides senators who support or oppose nominees ample opportunities not only to take positions and increase their visibility but also to define the debate surrounding nominees. Supporters will use the attention devoted to these controversial nominations to help nominees secure confirmation, while opponents will use it to block nominees from securing nomination. Ultimately, both supporters and opponents will want to participate early in the confirmation process in order to define the debate surrounding Supreme Court nominations, because if they abstain from deliberating, they risk letting their opponents define the nomination. Hence, I expect the following:

*Constrained Regime Hypothesis.* Senators will be more likely to participate in the confirmation debates when appointing presidents are fully constrained.

## **Committee Membership**

Since participating in the confirmation debates is time diverted from other legislative activities, participation in the confirmation hearings is not a costless

activity. Some senators, however, are well positioned overcome the costs accompanying deliberation. In particular, committee members are well positioned to participate in the confirmation debates because they possess an informational advantage. Since they are more likely to be lobbied by interest groups, committee have access to more information (Hall and Grofman 1990; Hall and Deardorff 2006; Caldeira and Wright 1998). But interactions with interests groups are not the only reasons members are well positioned to participate in the debates. In addition to having access to more information, committee members have opportunities to participate during the selection stage (Davis 2005; Nemacheck 2007). Participating in the selection stage gives senators a rough idea of who is on the short-list and more time to become familiar with the judicial philosophy of nominees. Hence, I expect the following:

*Senate Judiciary Committee Hypothesis.* Senators who are members of the Senate Judiciary Committee will be more likely to participate in before the confirmation hearings commence.

## **Nominee Characteristics**

Previous research examining confirmation votes lays the foundation for understanding senatorial behavior throughout the Supreme Court confirmation process. Specifically, ideology and qualifications are consistently found to influence confirmation votes even after controlling for a senator's home state demographics (Overby et al. 1992), public opinion (Kastellec, Lax and Phillips 2010), and partisan polarization (Shipan 2008; Basinger and Mak 2012). In terms of confirmation votes, it is reasonable to expect senators will be more likely to confirm nominees with similar ideological preferences. Although this situation does not completely describe senatorial deliberation, it presents a way for understanding why senators

deliberate. Clearly, ideologically distant senators who oppose the nomination have incentives to address their colleagues. They do it to define the nominee and mobilize opposition. In contrast, those senators who are ideologically distant but are supportive of the nominees may be more likely to discuss the nomination in order to explain why they have chosen to vote to confirm or raise support. All of these possibilities suggests the following

*Ideological Distance Hypothesis.* Senators will be more likely to participate in the confirmation debates for ideologically distant nominees.

As for qualifications, previous research finds senators vote for highly qualified and against poorly qualified nominees (Cameron, Cover and Segal 1990; Epstein et al. 2006). However, it is not exactly clear how this applies here. On the one hand, I would expect senators to be more likely to take positions earlier when poorly qualified nominees are under consideration. On the other hand, I expect senators to delay taking positions on nominees because they may need more time to determine these poorly qualified nominees lack the qualifications necessary to serve as justices. Hence, I have no clear expectations about the relationship between pre-hearing positions and qualifications. However, I include it the empirical analysis below, because scholars continue to find the qualifications of nominees influences confirmation votes (see e.g., Cameron, Cover and Segal 1990; Epstein et al. 2006) and committee votes (Farganis and Wedeking 2014).

## Data

To evaluate the influence of institutional and political factors on confirmation debates, I analyze senators' floor speeches on Supreme Court nominations from John Harlan (1955) to Elena Kagan (2010). Because every nominee after John

Harlan has testified before the Senate Judiciary Committee,<sup>6</sup> I begin with Justice Harlan (Collins and Ringhand 2013; Farganis and Wedeking 2014). The unit of analysis is the individual senator and all senators for each nomination are included, for a total of 2,749 observations. To identify whether senators declared positions before the Judiciary Committee questioned nominees, I searched the *Congressional Record* for senator floor speeches from the day a nomination was submitted to the Senate to the first day of the confirmation hearings. Specifically, I read the speeches to see whether senators announced their positions before start of the confirmation hearings. In total, 122 senators announced their positions prior to the confirmation hearings across twenty-nine Supreme Court nominations.

## Independent Variables

*Regimes.* I investigate the relationship between institutional context and pre-hearing position taking using Judicial Common Space scores (Epstein et al. 2007) for the preferences of the Senate, president, and Supreme Court. The Senate's ideal point is the median member. The Supreme Court's ideology is defined as the median of the Court after a vacancy occurs. Although other measures have been used to construct the nomination regimes, I use Judicial Common Space scores because it was designed to place all the preferences of all three into a single dimension policy space.<sup>7</sup>

*Ideological distance.* I calculate the ideological distance between senators and

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<sup>6</sup>The nominations of Homer Thornberry, Douglas Ginsburg, and Harriet Miers are excluded. Thornberry's nomination required the Senate to first confirm the promotion of Associate Justice to Abe Fortas to Chief Justice, but Fortas's nomination was rejected. Ginsburg's nomination was withdrawn before President Reagan had the chance to officially make the nomination. Miers's nomination was withdrawn less than two weeks before her confirmation hearings.

<sup>7</sup>I use the Senate median for the primary reasons. First, the median because it is commonly used to represent the Senate in research analyzing the selection stage (see e.g., Hammond and Hill 1993; Moraski and Shipan 1999; Nokken and Sala 2000; Shipan and Shannon 2003; Krehbiel 2007; Hitt 2013). Second, it is not exactly clear why the filibuster pivot should be preferred when examining Supreme Court nominations as discussed in the previous chapter.

nominees by squaring the difference between their Judicial Common Space scores.<sup>8</sup> These scores were created to place presidents, senators, and justices in a unidimensional policy space (Epstein et al. 2006). Since their creation, these scores are the primary estimates used to investigate the Supreme Court appointment process,<sup>9</sup> and higher scores represent greater ideological distance between senators and nominees.

*Lacks Qualifications.* I use Segal Cover scores (Segal and Cover 1989) to assess whether nominees lack the qualifications necessary to serve as Supreme Court justices. These scores were created by content analyzing newspaper editorials. The editorials came from a set of ideologically balanced newspapers, and were written after the nomination was announced but before the Senate voted to confirm (reject) the nomination. This variable ranges from 0 (most qualified) to 1 (least qualified).

*Committee Member.* Coded 1 if senators are members of the Senate Judiciary Committee, 0 otherwise.

In addition to these variables, I control several other factors that are consistently included in examinations of the Supreme Court confirmation process.

*Bork.* Coded 1 if the nomination is the nomination of Bork or after.

*Same Party.* Coded 1 if senators and presidents are members of the same party, 0 otherwise.

*Strong President.* Coded 1 if the president is strong, 0 otherwise. A strong president is a president who is not in his fourth year of office and his party controls the Senate.

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<sup>8</sup>Data for this variable as well as other variables normally included to model confirmation votes come from <http://epstein.usc.edu/research/Bork.html>.

<sup>9</sup>Bailey scores, which are based on the votes and positions of sitting presidents, senators, and justices, do not provide estimates for nominees who were withdrawn or rejected. By using sitting justices, Bailey scores do not provide estimates for Robert Bork, whose nomination is considered to be a watershed moment in American politics (Martinek, Kemper and Van Winkle 2002; Epstein et al. 2006).

*Reelection.* To capture the proximity of reelection a dichotomous variable is included, coded 1 if a senator is up for reelection in the upcoming election, 0 otherwise.

*Years in Office.* The number of years served by senators is simply the difference between the year a nomination occurred and the first year a senator assumed office.

## Pre-Hearing Positions

I begin by examining in Table 3.1 the percentage of senators who take positions on Supreme Court nominations before the confirmation hearings commence. Each column of Table 3.1 contains the percentage and raw frequencies (in parentheses) of observations falling into each category of senatorial position taking. Assuming the critics are correct, one would expect a substantial portion of senators to declare how they intend to vote before committee members have the opportunity to question nominees. However, Table 3.1 clearly demonstrates this is not the case. In fact, among the 2,749 senators, more than ninety percent (94%) did not declare positions for or against nominees before the hearings got underway. Additionally, the table reports that 2,221 of 2,300 (97%) non-committee members and 374 of 449 (83%) committee members declared no positions on Supreme Court nominations before the opening gavel of the confirmation hearings. Overall, the results displayed in Table 3.1 indicate slightly more than five percent of senators announce their confirmation votes leading up to the hearings. In addition, Table 3.1 shows the percentage of committee members (17%) that declare positions is approximately fourteen percentage points higher than the percentage of non-committee members (3%). Although the cross tabulation presented in Table 3.1 suggests few senators take positions on Supreme Court nominees prior to the hearings, it potentially masks the variation of position taking across nominations.

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Is senator a <u>committee member?</u>			
Take Position	No	Yes	Total
No	96.57% (2,221)	83.3% (374)	94.4% (2,595)
Yes	3.43% (79)	16.7% (75)	5.6% (154)
Total	100% (2,300)	100% (449)	100% (2,749)

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Table 3.1: *Senatorial position taking before the Supreme Court confirmation hearings commence, from John Harlan (1955) to Elena Kagan (2010).*

To examine whether the percentage of senators taking positions on Supreme Court nominees prior to the confirmation hearings is a recent phenomenon, Figure 3.1 displays senatorial position takings for nominations from John Harlan (1955) to Elena Kagan (2010). The vertical axis is the percentage of senators announcing pre-hearing positions and the horizontal axis displays the nominations chronologically. What is prominent in Figure 3.1 is that senatorial position taking remains low across Supreme Court nominations. In fact, the percentage of senators announcing pre-hearing positions on nominees is less than ten percent in twenty-three of the twenty-nine nominations under investigation.<sup>10</sup> Moreover, senatorial position taking never exceeds the fifty percent threshold and it exceeds twenty percent in only during Sotomayor’s nomination.

While Figure 3.1 reveals that position taking remains low across nominations,

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<sup>10</sup>The percentage of senators declaring support for or opposition to nominees surpasses ten percent for the following Supreme Court nominations: Thurgood Marshall, Abe Fortas (Chief Justice), Robert Bork, John Roberts, Sonya Sotomayor, and Elena Kagan.

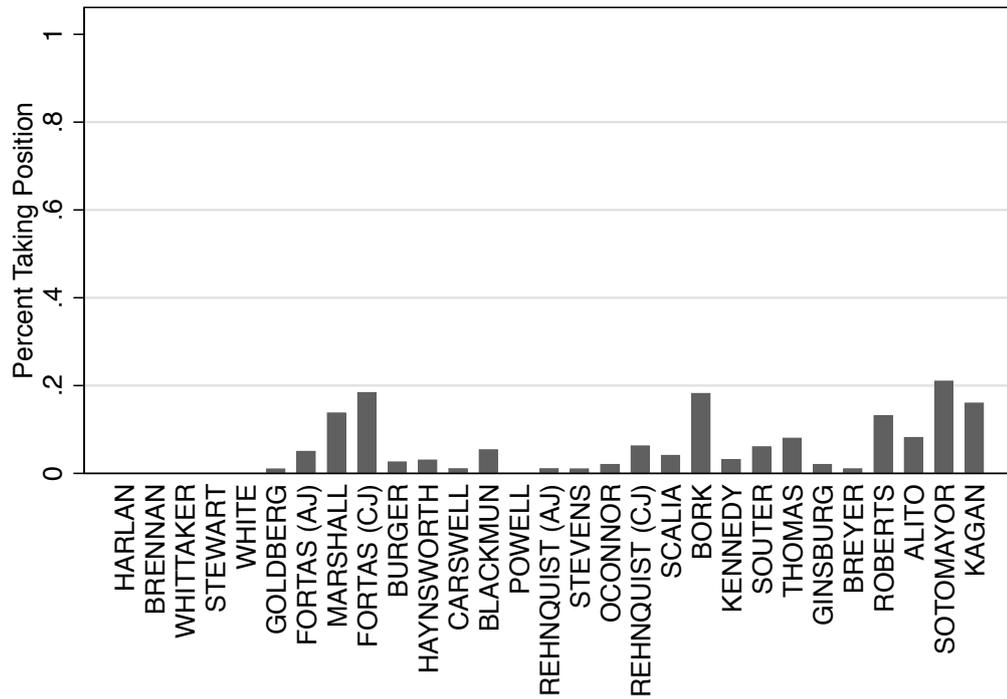


Figure 3.1: Percentage of Senators taking positions on Supreme Court nominees prior to the confirmation hearings, from John Harlan (1955) to Elena Kagan (2010). The graph displays the percentage of senators taking positions on Supreme Court nominees during Senate floor speeches. The nominations of Homer Thornberry, Douglas Ginsburg, and Harriet Miers have not been included.

it shows the proportion of senators declaring positions has not remained constant. Prior to the nomination of Arthur Goldberg, no senators announced their positions before the hearings, but after his nomination, the percentage of senators announcing positions increases during the next three nominations. However, following Fortas's Chief Justice nomination, there is a decline in pre-hearing position taking with nominations from Burger to Scalia remaining below ten percent. Then comes Bork, and the percentage of senators taking positions before the judiciary has the opportunity to question him almost reaches ten percent. While not a the percentage of After Bork, Figure 3.1 shows another decline followed by an increase, beginning with Roberts and continuing to Kagan.

The trends portrayed in Figure 3.1 are also found in Figure 3.2, which displays senatorial position takings on Supreme Court nominees for senators who do not serve on the Senate Judiciary Committee, from 1955 to 2010. However, there are two primary differences between the figures. First, in Figure 3.1 pre-hearing positions reach their peak during Sotomayor's nomination, and in Figure 3.2 Fortas's Chief Justice nomination. Second, the percentage of senators declaring positions prior to the hearings is slightly in Figure 3.1 than in Figure 3.2, because the former includes judiciary committee members and the latter does not.

Again, the prominent feature of Figure 3.2 is that senatorial position taking remains low across Supreme Court nominations. This suggests senators who do not serve on the judiciary committee think the hearings are important and consider what transpires during the hearings when deciding whether to confirm nominees. Additionally, while pre-hearing positions are rare, Figure 3.2 suggest the nominations of Marshall and Fortas are significantly different from previous nominations. In fact, the percentage of non-committee announcing their positions is higher during Marshall's and Fortas's (CJ) nominations than Bork's. This indicates that scholars who argue Marshall and Fortas signify a change in the Supreme Court

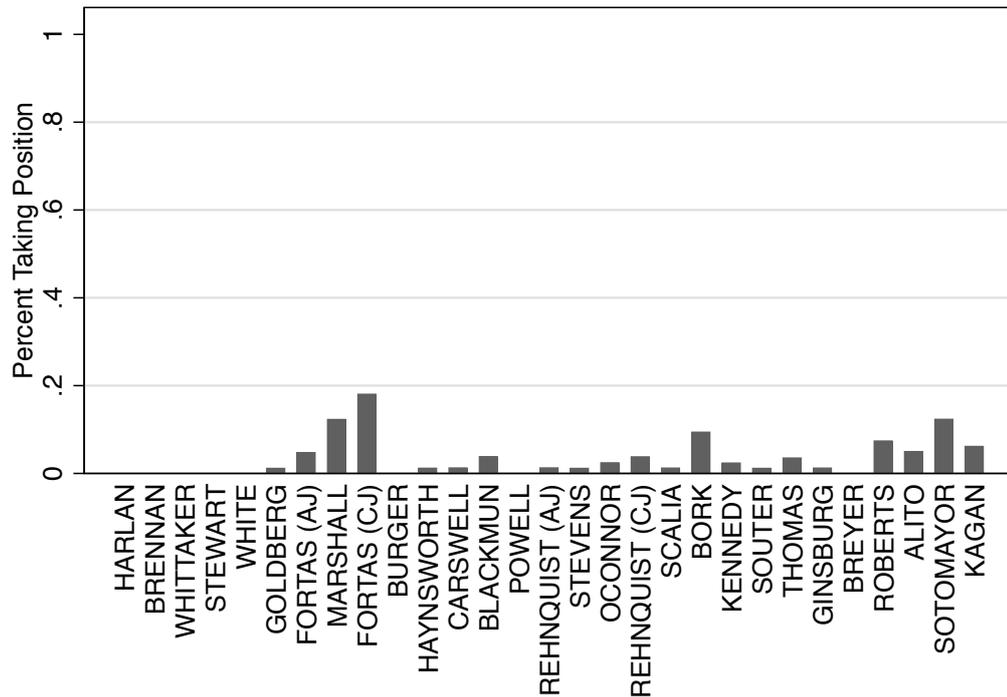


Figure 3.2: Percentage of senators not on the Senate Judiciary Committee who take positions on Supreme Court nominees prior to the hearings, 1954-2010. The graph displays the percentage of senators taking positions on Supreme Court nominees during Senate floor speeches. The nominations of Homer Thornberry, Douglas Ginsburg, and Harriet Miers have not been included.

appointment process are partly correct (Epstein et al. 2006). Interestingly, the figure potentially suggests Bork's nomination does not usher in a significantly different appointment process for senators not serving on the judiciary committee. In fact, the percentage of non-committee announcing their positions is higher during Marshall's and Fortas's (CJ) nominations than Bork's.

Overall, the striking feature of both figures is the scarcity of pre-hearing positions across nominations. But when compared side by side, they suggest Senate Judiciary Committee members may be responsible for changes in the appointment process. Indeed, Figure 3.3 displays the percentage of pre-hearing positions coming from judiciary committee members and demonstrates some striking features.

First, the percentage of committee members taking positions is higher across nominations than in the previous figures. Second, a substantial percentage of committee members (71%) declared support for or opposition to Bork prior to his hearings. This finding supports the contention that a large portion of committee members made known their support for (opposition to) Bork (Davis 2005). However, less than forty percent of committee members stated a position prior to Thomas's first round of hearings.<sup>11</sup> Third, besides Bork, two other nominations – Sotomayor (58%) and Kagan (58%) – exceeded the fifty percent threshold and six others exceeded twenty. Interestingly, the nominations of Powell, Rehnquist (AJ), Stevens, and O'Connor do not receive positions but this pattern is similar to that depicted in Figure 3.2

Before turning to the full regression results, I examine the basic relationship between nomination regimes and senatorial position taking prior to the confirmation hearings. Table 3.2 displays this relationship. The dependent variable, senatorial position taking, consists of two values: senators did announce or did not announce pre-hearing positions. The independent variable, nomination regimes, consists of three values: the president is unconstrained, semi-constrained, or fully constrained. Each column of Table 3.2 contains the percentage and raw frequencies (in parentheses) of cases falling into each category of senatorial participation. Additionally, it shows that 8 of 199 (4%) of senators in the unconstrained regime, 35 of 1,212 (3%) of senators in the semi-constrained regime, and 111 of 1,338 (40%) of senators in the fully constrained regime participated on the Senate floor. Overall, the pattern displayed in Table 3.2 shows pre-hearing positions are rare across regimes. Additionally, the table reports the percentage of senators announcing positions in unconstrained regimes is slightly higher than the percentage in semi-constrained

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<sup>11</sup>After the allegations of sexual harassment raised by Professor Anita Hill became public, the Senate Judiciary Committee held a second round of hearings. For this paper, pre-hearing positions for Thomas's nomination occur before the opening gavel of the first hearing.

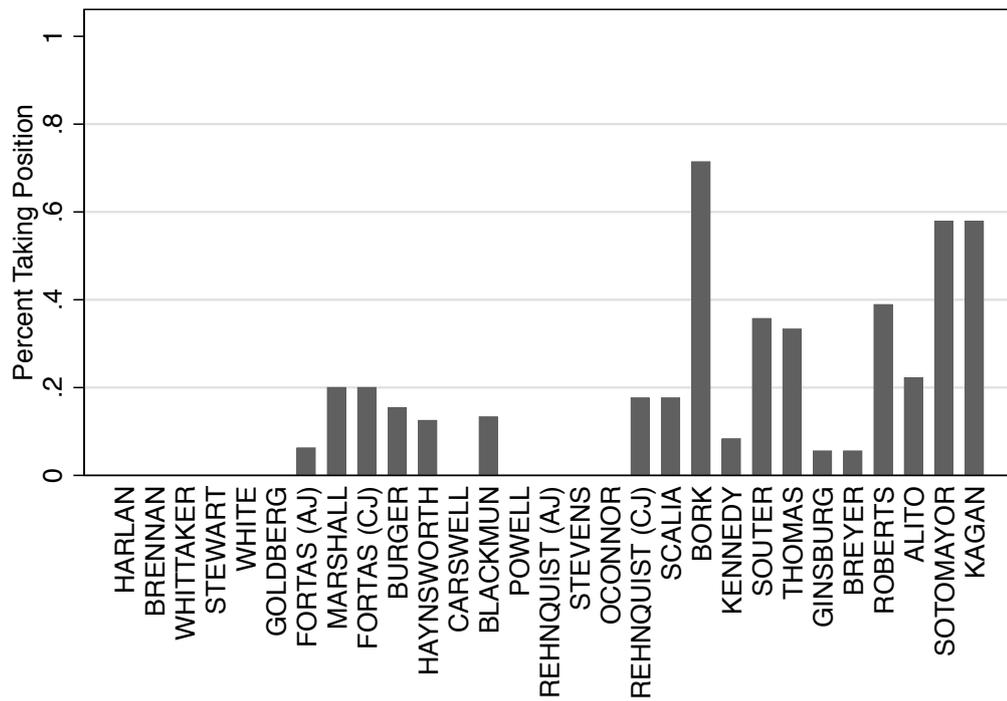


Figure 3.3: Percentage of Senate Judiciary Committee members who take positions on Supreme Court nominees prior to the hearings, 1954-2010. The graph displays the percentage of senators taking positions on Supreme Court nominees during Senate floor speeches. The nominations of Homer Thornberry, Douglas Ginsburg, and Harriet Miers have not been included.

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Nomination Regimes				
Participated	Unconstrained	Semi-Constrained	Fully Constrained	Total
No	95.98% (191)	97.11% (1,177)	91.7% (1,227)	94.4% (2,595)
Yes	4.02% (8)	2.89% (35)	8.3% (111)	5.6% (154)
Total	100% (199)	100% (1,212)	100% (1,338)	100% (2,749)

Table 3.2: *Position Taking before the start of the Confirmation Hearings, by Nomination Regimes from John Harlan (1955) to Elena Kagan (2010) (cross-tabulation).*

regimes, but it is an insignificant difference. The percentage of senators stating their attentions early in the confirmation process during constrained regimes is higher than in the other two regimes. But again, the pre-hearing positions are rare across regimes.

Turning to the multivariate analysis, Table 3.3 presents results from a logistic regression model (robust standard errors in parentheses) that estimates the effects of the independent variables discussed above on pre-hearing position taking.<sup>12</sup> Continuous predictors have been standardized by subtracting the mean and dividing by 2 standard deviations.<sup>13</sup> Overall, the model performs reasonably well and provides empirical support for the notion that senatorial deliberation is shaped by the institutional context surrounding Supreme Court nominations.

The *Regime* variable indicates that senators do consider the confirmation environment when'd deciding whether to announce their positions prior to the hear-

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<sup>12</sup>I also ran a rare events logit (King and Zeng 2001), substantive results remained the same.

<sup>13</sup>Gelman and Hill (2007) suggest standardizing continuous to allow their coefficients to be compared to the coefficients of dichotomous variables.

	Coef. b/se
Senator takes position before hearing	
Regime	0.839*** (0.20)
Committee Member	1.729*** (0.17)
Ideological Distance	0.039 (0.20)
Lacks Qualifications	0.083 (0.18)
Ideology*Qualifications	-0.702** (0.34)
Same Party as President	0.601*** (0.18)
Strong President	0.231 (0.17)
Post Bork	0.621*** (0.18)
Senator Faces Reelection	-0.239 (0.19)
Years in Office	0.030*** (0.01)
Constant	-6.479*** (0.59)
N	2749
AIC	1037.21

Table 3.3: *Predicting senatorial pre-hearing announcements, John Harlan (1955) to Elena Kagan (2010). The dependent variable is whether senators participated in the debates (1=participated, 0=otherwise). Continuous predictors have been standardized by subtracting the mean and dividing by 2 standard deviations. AIC = Akaike Information Criterion. \* $p < 0.1$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ .*

ings. As Table 3.3 shows, the coefficient for *Regime* is significant and in the expected direction. When presidents are constrained, or less free to appoint like-minded nominees, senators are more likely to commit themselves prior to the hearings, even after controlling for other factors thought to affect senatorial behavior at the confirmation stage. Moreover, this finding comports with previous research that expects controversial nominees to draw clamorous confirmation debates.

In addition, the statistical results hold that committee membership affects pre-hearing deliberation. As expected, the coefficient for committee membership is positive and significant, indicating that committee members are more likely to take positions on Supreme Court nominees before the confirmation hearings than non-members. Given that judiciary committee members have better information about nominees (Caldeira and Wright 1998; Bell 2002) and are more likely to participate during the selection stage (Davis 2005; Nemacheck 2007), this result suggests that committee members are not only better positioned to shape the discourse surrounding Supreme Court nominations but also use their private information to sway confirmation votes, which was also suggested by Senator Bennett's press release.

Interestingly, the coefficients for ideological distance and qualifications are positive but statistically insignificant. The insignificant coefficient for ideological distance suggests for average nominees the distance between senators and nominees does not affect senatorial deliberation. This may come as a surprise to critics of the Senate, but it suggests ideology may not be the driving force of senatorial behavior during all facets of the appointment process. As for qualifications, when ideology is set its mean value (0), senators are neither more nor less likely to declare their support (opposition). Turning to the interaction between these variables, the coefficient for it is negative and statistically significant. However, its substantive impact is minute.

Several of the control variables are significant. For example, the Bork variable is positive and significant, which indicates nominees following him were accompanied by more pre-hearing announcements. Additionally, this finding comports with previous research that suggests his nomination intensified the appointment process (see e.g., Epstein et al. 2006). Likewise, the coefficient representing same party as the president is positive and significant, suggests senators who are members of the appointing president's party are more likely to declare positions. As for the remaining variables, they are insignificant. That is, when appointing presidents are strong, senators are neither more nor less likely to make their positions known. In addition, I control for the how long senators have served in the Senate and whether they are must run for reelection in the upcoming general election. The first, years in office, is positive and significant, suggesting that the longer senators have held office the more likely they are to deliberate. However, the substantive significance of this variable is minimal, moving years in office from its minimum (0) to its maximum (19) value increases the likelihood senators will participate in deliberations by approximately ten percent. Finally, the results indicate the coefficient for reelection is negative but insignificant, which indicates that senators facing reelection are no more or less likely to participate in the floor debates than senators not running for reelection.

## Conclusion

Existing research on Supreme Court nomination has primarily focused on the selection stage and confirmation stage, emphasizing ideology, as well as other factors, for determining whom the president nominates and why senators vote to confirm (reject) a nominee. In this study, I set out to investigate whether pre-hearing announcement are a regular party of the Supreme Court appointment

process. I find that position announcements are rare for most senators. The percentage of senators making position announcement never exceeds fifty percent and exceeds twenty percent only once. However, when focusing exclusively on judiciary committee members, I find substantial portions of them do take positions earlier than the hearings. In fact, the percentage of committee members taking positions surpasses fifty percent in three nominations – Bork, Sotomayor, and Kagan. While Davis (2005) also suggests members come to the hearings not to investigate nominees but to politicize nominations, the analysis presented above does not and cannot address this concern.

Ultimately, the results presented above suggest the institutional context surrounding Supreme Court nominations affects senatorial participation before the start of the hearings. Because the nominations of constrained presidents are expected to receive more attention of the media and interest groups, senators are more likely to declare support for (opposition to) Supreme Court nominees. That is, by participating early in the confirmation debates senators recognize that floor speeches may not only help them gain visibility among their colleagues and constituents but also influence the confirmation outcome.

Beyond the influence of the nomination regimes, I find other considerations influence pre-hearing deliberation. In particular, two factors exercise substantial influence on senatorial deliberation. Senators who serve on the Senate Judiciary Committee participate are more likely to declare their positions before the hearings than non-committee members. Substantively, this suggests committee members are attempting to transmit their private information to non-committee members. Additionally, senators are more likely to announce positions since the nomination of Bork. Additionally, I find senators in the presidents' party are more likely to announce positions earlier, which comports with Davis's argument that supporters are more likely to announce their positions.

Interestingly, the two factors that serve as the cornerstones for research on confirmation votes – ideology and qualifications – do not influence pre-hearing senatorial deliberation. This suggests that senators may be more concerned with maximizing their visibility than waging ideological battles through the appointment process across nominations. As for senators contemplating poorly qualified nominees potentially are waiting for the hearing to commence in order to obtain information about whether these nominees lack the sufficient qualifications necessary for serving as Supreme Court justices. Finally, I find electoral considerations and seniority do not significantly influence senatorial participation.

Overall, my analyses focus on whether senators announce positions before the Senate Judiciary Committee questions Supreme Court nominees. By doing so, I provide the first empirical analysis of pre-hearing position taking and contribute to growing body of research that endeavors to present a more dynamic portrait of senatorial behavior throughout the confirmation process. Additionally, the research above contributes to the growing body of literature examining how the institutional context surrounding Supreme Court nominations. Specifically, I find accounting for the context surrounding nominations provides a window for understanding senatorial participation in these important processes. Ultimately, I find that as senators are strategically participating in the Supreme Court confirmation debates.

## Chapter 4

# Discussing Precedent at the Confirmation Hearings

The confirmation hearings are now the most visible feature of the Supreme Court appointment process. The increased attention devoted to the hearings has coincided with two important developments in the process. First, confirmation hearings have increasingly attracted the attention of interest groups, which provide the Senate Judiciary Committee oral and written testimony for or against Supreme Court nominations (Caldeira and Wright 1998; Flemming, MaLeod and Talbert 1998; Bell 2002; Collins and Ringhand 2013). For instance, more than two hundred interest groups provided testimony about Justice Sonia Sotomayor.<sup>1</sup> Second, since the nomination of Justice Sandra Day O'Connor, the confirmation hearings have unfolded before television cameras, which has provided American citizens opportunities to follow constitutional discussions between senators and

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<sup>1</sup>Among the 218 groups providing testimony about Justice Sotomayor, more than ninety-five percent (96.3%) supported her nomination, including Americans for Democratic Action and Latino Justice PRLDEF, while less than five percent (3.7%) opposed her nomination, including Americans United for Life and The Club for Growth. Data comes from the Confirmation Hearings on the Nomination of Sonya Sotomayor to be an Associate Justice of the United States and the U.S. Supreme Court Justices Database: <http://epstein.usc.edu/research/justicesdata.html>.

nominees. For example, the hearings for Robert H. Bork and Clarence Thomas were broadcast on network television (Gimpel and Wolpert 1995; Caldeira and Smith 1996) and were closely followed media events (Frankovic and Gelb 1992; Davis 2005; Johnson and Roberts 2005). In national polls, more than fifty percent (57%) of respondents reported seeing or following Bork's hearings,<sup>2</sup> and more than fifty percent (59%) of respondents reported following Thomas's first set of hearings.<sup>3</sup> Today, cable news networks broadcast the confirmation hearings and they are streamed live online (Stone 2010), and more than fifty percent of respondents reported following the hearings for John G. Roberts Jr. (59%),<sup>4</sup> Samuel Alito Jr. (53%),<sup>5</sup> and Sonia Sotomayor (52%).<sup>6</sup> Combined, the attention accompanying

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<sup>2</sup>“As you know, the Senate is holding hearings on whether or not to confirm President Reagan's nomination of Judge Robert Bork to be a Justice on the U.S. Supreme Court. Have you seen or followed any of the hearings on T.V. (television) and in the newspapers, or not?” The survey was conducted by Louis Harris & Associates, September 17-September 23, 1987, and based on telephone interviews with a national adult sample of 1,249 [USHARRIS.092887.R1]. Data provided by The Roper Center for Public Opinion Research, University of Connecticut.

<sup>3</sup>“How closely have you followed news coverage of the Senate hearings on the nomination of Clarence Thomas to the Supreme Court? Would you say very closely, somewhat closely or not closely?” The survey was conducted by Gallup Organization September 13-September 15, 1991, and based on telephone interviews with a national adult sample of 1,216 [USGALLUP.0991W2.R04]. Additionally, it is worth noting, more than seventy-five (77%) percent of respondents reported following his second set of hearings, which occurred after the allegations of sexual harassment raised by Professor Anita Hill became public. Survey was conducted by Gallup Organization October 10-October 13, 1991, and based on telephone interviews with a national adult sample of 1,000 [USGALLUP.1091W2.R15]. Both datasets provided by The Roper Center for Public Opinion Research, University of Connecticut.

<sup>4</sup>“How closely do you plan to follow the Senate confirmation hearings for John Roberts (nominated to serve on the Supreme Court), which are scheduled to begin in September (2005)–very closely, somewhat closely, not too closely, or not at all closely?” Survey conducted by Gallup Organization August 28-August 30, 2005, and based on telephone interviews with a national adult sample of 1,007 [USGALLUP.05AGST28.R32]. Data provided by The Roper Center for Public Opinion Research, University of Connecticut.

<sup>5</sup> “How closely do you plan to follow the Senate confirmation hearings for Samuel Alito (the Supreme Court nominee), which are scheduled to begin on Monday (January 9,2006)–very closely, somewhat closely, not too closely, or not at all?” Survey conducted by Gallup Organization January 6 - January 8, 2006, and based on 1,003 telephone interviews [USGALLUP.06JAN06.R25]. Data provided by The Roper Center for Public Opinion Research, University of Connecticut.

<sup>6</sup>“(As I read a list of some stories covered by news organizations this past week, please tell me if you happened to follow each news story very closely, fairly closely, not too closely, or not at all closely.)...The confirmation hearings for Supreme Court nominee Sonia Sotomayor...(If Necessary, ask:) Did you follow...the confirmation hearings for Supreme Court nominee Sonia Sotomayor very closely, fairly closely, not too closely or not at all closely?” Survey by Opinion

Supreme Court confirmation hearings has provided senators with opportunities to publicly engage nominees before attentive audiences in discussions about constitutional precedents.

Scholars and journalists have criticized and celebrated the attention and opportunity associated with the limelight confirmation hearings enjoy. Critics accuse Senate Judiciary committee members of exploiting the public attention for political gain. Purportedly, committee members have transformed what was once an effective and apolitical feature of the appointment process into a political circus that sensationalizes ideological and partisan conflict (Fein 1989; Carter 1995; Davis 2005; Eisgruber 2007; Vaglicia 2012). In contrast, advocates celebrate the limelight because it allows and encourages American citizens to participate meaningfully in discussions about Supreme Court precedents and the Constitution of the United States (Totenberg 1988; Ringhand and Collins 2011; Collins and Ringhand 2013). For example, while interacting with Sotomayor, Senator Orin Hatch (R-UT) stated,

Now, Judge, I am going to be very easy on you now because I invited constituents in Utah to submit questions and got an overwhelming response. Many of them submitted questions about the Second Amendment and other issues that have already been discussed.

One constituent asked whether you see the courts, especially the Supreme Court as an institution for resolving perceived social injustices and equities and disadvantages.<sup>7</sup>

Senator Hatch then asked Sotomayor whether the majority and dissenting opinions for *District of Columbia v. Heller*<sup>8</sup> were “faithful to the text and history of

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Research Corporation, July 17 - July 20, 2009 and based on 1,002 telephone interviews.

<sup>7</sup>Nomination of Judge Sonya Sotomayor to be Associate Justice of the Supreme Court of the United States, p. 454

<sup>8</sup>554 U.S. 570 (2008)

the Second Amendment” (p. 454), but he is not the only senator to acknowledge the role constituents play in these proceedings. While disagreement exists over the utility and propriety of constitutional discussions between senators and nominees, both critics and advocates recognize that judiciary committee members actively and strategically participate in the hearings. However, this recognition has not culminated in a full examination of the factors that influence the likelihood committee members will actively participate in Supreme Court confirmation hearings. Lacking a complete examination, neither critics nor advocates can fully assess whether the quality of deliberation during these proceedings has deteriorated.

This study helps present a fuller picture of Supreme Court confirmation hearings by focusing on the factors that influence individual senatorial behavior during these important proceedings. Specifically, it focuses on the political, constituent, and institutional considerations that influence the likelihood committee members will engage nominees in discussions about Supreme Court precedents. By doing so, it is the first study to develop and test a political framework for understanding individual behavior of senators during these important proceedings. Additionally, it contributes to the growing body of research that goes beyond confirmation votes to examine how senators participate in the confirmation process. But more importantly, it investigates what motivates senators to actively participate in deliberations about Supreme Court precedents during these “democratic forum[s] for the discussion and ratification of constitutional change” (Collins and Ringhand 2013, p. 2). That is, an examination of the factors that motivate individual committee members to engage nominees in discussions about precedents helps scholars better assess whether these proceedings are deteriorating or are serving as democratic forums for constitutional change.

The framework I present builds on previous research and assumes that participation in the hearings can be advantageous or disadvantageous for senators

on the Senate Judiciary Committee. Specifically, I find empirical support for the hypothesis that senators participate strategically in discussions about Supreme Court precedents at the confirmation hearings. Committee members who anticipate confirmation will further their goals will be less likely to engage nominees in discussions about constitutional precedents, because Supreme Court nominations are expected to be confirmed. Since the “presumption of confirmation” accompanies nominations (Sulfridge 1980; Gerhardt 2000), committee members who support the nomination need not use the hearings as soapboxes to raise support for the nominee. In contrast, committee members who anticipate the nomination will hinder their goals will be more likely to engage a nominee in discussions about constitutional precedents. That is, senators who oppose a nomination “seek to portray a nominee in a negative light and try to expand the scope of conflict, both internally through committee hearings and externally through high media exposure” (Krutz, Fleisher and Bond 1998, p. 873).

## Previous Research on Confirmation Hearings

Previous research investigates confirmation hearings with case studies or empirical analyses in the aggregate. These studies provide a fuller picture of how senators participate at the confirmation hearings of Supreme Court nominees, but their findings are not necessarily ideal for determining what factors influence the behavior of individual senators during these proceedings.

With one notable exception (Totenberg 1988), descriptive and anecdotal accounts of Supreme Court confirmation hearings collectively express concern about the deliberative and educative purpose of these hearings because senators purportedly use them to express their own political preferences (Choi and Gulati 2004), to communicate with constituents and interest groups (Davis 2005; Vaglicia 2012),

and to obtain commitments from nominees about how they will, if confirmed, decide future cases (Fein 1989; Carter 1995; Wittes 2006). These studies emphasize the role senators have played in the politicization and ultimate deterioration of the hearings.

In contrast, Kagan (1995) argues the reticence of nominees before the Senate Judiciary Committee explains why confirmation hearings “serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government” (Kagan 1995, p. 941). Although scholars and Court watchers alike disagree about who is to blame, these studies agree the confirmation hearings have devolved into a “mess” (Carter 1995), a “kabuki dance” (Wittes 2006), and an “electoral campaign” (Davis 2005). Moreover, scholars have argued that these supposedly “abysmal” (Choi and Gulati 2004) and “vapid and hollow” (Kagan 1995) charades need a makeover.

A number of suggestions have been proposed for fixing Supreme Court confirmation hearings, including having only one senator speak for all the other senators (Vaglicia 2012), having the president choose a nominee from a list composed of the ten most qualified federal appellate court judges (Choi and Gulati 2004), having voters elect Supreme Court justices (Davis 2005), and abolishing public hearings all together (Kentridge 2003). The conclusions drawn from these studies are not based on empirical examinations but on case studies of the most controversial and unusual Supreme Court nominations: Robert Bork and Clarence Thomas. Bork’s nomination was atypical because of the amount of attention it received from interest groups (Maltese 1995*a*; Caldeira and Wright 1998), journalists (Carter 1995), and American citizens (Bell 2002). Thomas’s nomination was atypical because of the attention it received before and after the allegations of sexual harassment raised by Professor Anita Hill became public (Overby et al. 1992; Caldeira and Smith 1996; Hutchings 2001; Abraham 2008). Although research based on case

studies of two of the most controversial nominations clearly demonstrates the evils that potentially accompany confirmation hearings, these conclusions about the quality of debate at these proceedings do not necessarily apply to all nominations and do not provide testable hypotheses for the behavior of senators at the individual level during Supreme Court confirmation hearings.

Existing empirical analyses of the confirmation hearings concentrate on the candor of nominees before the Senate Judiciary Committee and on the continuity of questions senators ask Supreme Court nominees. Scholars disagree about whether the candor of nominees has decreased or remained constant (Czarnezki, Ford and Ringhand 2007; Ringhand and Collins 2011; Farganis and Wedeking 2011) across nominations; however, these studies are interested primarily in the behavior of nominees rather than of senators.

Scholars interested in the participation of senators at the confirmation hearings have analyzed the questions asked by members of the Senate Judiciary Committee. Most generally, previous research demonstrates the number of questions senators ask at the confirmation hearings has increased over time (Williams and Baum 2006; Batta, Collings, Miles and Ringhand 2012). In addition, scholars have explored the types of questions senators ask at the hearings. For example, Guliuzza, Reagan and Varrett (1994) organize questions into three categories intended to probe the character, competency, and constitutionalism<sup>9</sup> of nominees. They find no obvious or fundamental change in the types of questions senators have asked nominees before or after the Supreme Court nomination of Robert Bork. In contrast, Ogundele and Keith (1999), who employ multivariate analyses to expand on Guliuzza, Reagan and Varrett (1994), find Bork's nomination ushered in a fundamental change in the confirmation hearings. Specifically, Ogundele and Keith

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<sup>9</sup>By constitutionalism, or constitutional commentary, Guliuzza, Reagan and Varrett (1994) "mean comments of a sentence or more, apart from actual questions, that senators offer regarding issues and the nominee's constitutional theory" (782).

show that the attention devoted to the constitutional views of nominees significantly increased after the confirmation hearings for Bork's nomination. Most importantly for this study, these earlier examinations of Supreme Court confirmation hearings provide evidence that senators' questions are influenced by political considerations. In other words, both the ideological preferences and judicial qualifications of nominees play a significant role in the Senate Judiciary Committee's willingness to inquire into the constitutional views of Supreme Court nominees.

In their landmark study on the issues and precedents discussed at Supreme Court confirmation hearings, Collins and Ringhand (2013) analyze the questions nominees are asked to discuss by members of the Senate Judiciary Committee at the aggregate level. Their findings indicate that the legal issues the committee asks nominees to discuss are influenced by the political environment surrounding the nomination. Collectively, members of the committee devote more attention to the issue areas the American public identifies as salient. That is, as the salience of an issue area increases, the attention the judiciary committee devotes to that area also increases. Importantly, their findings continue to demonstrate strong support for the hypothesis that political considerations influence the behavior of committee members when questioning nominees.

Overall, existing empirical analyses demonstrate political considerations influence the behavior of senators during the confirmation hearings. However, the results of these studies may not be used to make inferences about the factors that influence the individual behavior of committee members because these studies examine the behavior of members in the aggregate. Using aggregated data to make inferences about individual behavior is an *ecological fallacy* (King 1997; Snijders and Bosker 1999). Since aggregated cannot be used to make inferences about individual behavior, I examine the individual behavior of judiciary members when questioning nominees during these important proceedings. By investigating how

senators interact with nominees I not only develop a fuller picture of how senators participate in the confirmation process but also present new possibilities for thinking about the behavior of senators during the confirmation process that extends beyond confirmation votes. More importantly, studying committee members at the individual level provides another avenue for assessing whether the quality or integrity of the hearings has deteriorated as many scholars and journalists claim.

## **A Framework for Understanding Senatorial Engagement at the Hearings**

Before examining the factors that potentially influence the willingness of senators to engage Supreme Court nominees in discussions about constitutional precedents, it is necessary to describe how senators may use discussions about precedents to advance their political goals. First, senators consider discussions about constitutional precedents as opportunities to obtain valuable information about the preferences and qualifications of nominees. For example, shortly after President Barack Obama announced the Supreme Court nomination of Elena Kagan, Senator Lindsey Graham (R-SC), a member of the Senate Judiciary Committee, released the following statement:

... As a member of the Senate Judiciary Committee, I intend to be fair and firm in my questioning of the nominee. The hearings can be a valuable public service as they give us a window into the nominee's judicial philosophy and disposition. I hope we will have a meaningful opportunity to explore the qualifications, judicial temperament and judicial philosophy of Ms. Kagan.<sup>10</sup>

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<sup>10</sup>“Graham on Kagan Nomination,” 10 May 2010. [http://www.lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=831144BC-802A-23AD-](http://www.lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=831144BC-802A-23AD-)

Senator Graham's statement is not a rare occurrence, and senators who do not serve on the Senate Judiciary Committee have expressed interest in the confirmation hearings as well: "I will be thoroughly reviewing Judge Sotomayor's record and will follow the upcoming committee hearings for a detailed look at her record and opinions before making a final decision" (Senator Mike Johanns (R-NE)).<sup>11</sup> In short, senators are interested in the confirmation hearings because these proceedings help all senators reduce the uncertainty surrounding nominations and learn about the preferences and qualifications of nominees.

Second, senators consider discussions about constitutional precedents as opportunities to advertise and take positions, which were originally identified by Mayhew (1974) as two of the three primary forms of behavior legislators engage in to secure reelection. He defined advertising as "any effort to disseminate one's name among constituents in a way that creates a favorable image" (p. 49), and position taking as "the public enunciation of a judgmental statement on anything likely to be of interest to political actors" (p. 61). Since the confirmation hearings are highly visible, closely watched affairs, they are perfectly tailored opportunities for advertising and position taking (Collins and Ringhand 2013). Committee members can use the free publicity to not only disseminate their name among constituents but to also take positions on the issues about which their constituents care. That is, committee members can use the hearings to create a favorable image of themselves for their constituents. However, when judiciary committee members exploit the publicity that accompanies the confirmation hearings to take positions, they are using their microphones not to learn about the nominees but to publicize their own positions (Carter 1995; Vaglicia 2012).

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4CF2-F2E21C66E0BC&CFID=105704888&CFTOKEN=25124413, accessed 8 February 2014.

<sup>11</sup> "Johanns Statement On Supreme Court Nominee," 26 May 2009. [http://www.johanns.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=4f035144-c82c-4149-be1d-6bb3644737f8&ContentType\\_id=bc82adff-27b4-4832-8fd6-aecbe3e7d8e3](http://www.johanns.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=4f035144-c82c-4149-be1d-6bb3644737f8&ContentType_id=bc82adff-27b4-4832-8fd6-aecbe3e7d8e3), accessed 12 February 2014.

While there is no denying that advertising and position taking accompanies confirmation hearings, senators can also use questions about Supreme Court precedents to influence confirmation votes. Committee members can use discussions about precedents to influence votes, because senators who are not on the judiciary committee follow the hearings and take what has transpired at the hearings into consideration when deciding to confirm (reject) a nominee. For example, Senator Jennings Randolph's (D-WV) decision to support the nomination of Clement Haynsworth Jr. was based on "an earnest consideration of the issues brought into focus *during the hearings* and further discussed in th[e] Chamber" (my emphasis, *Cong. Rec.*, p. 35139). Although discussions about constitutional precedents help senators advance their goals, the attention devoted to the hearings makes these discussions a double edged sword.

Indeed, interactions between senators and nominees are monitored by attentive audiences, and these audiences may hold senators accountable for their behavior at the hearings. For example, Senator Arlen Specter's (R-PA) behavior and questions during the confirmation hearings for Thomas became the centerpiece for the electoral campaign of his challenger. His challenger, Lynn Yeakel, featured his interrogation of Anita Hill in a television advertisement, which almost cost him the election (Smith 1993). Although Thomas's hearings were unusual, and Specter won reelection, it is not uncommon for attentive audiences to monitor how judiciary committee members address nominees during the confirmation hearings. More recently, the Hispanic National Bar Association, U.S. Hispanic Chamber of Commerce, and Mexican American Legal Defense and Education Fund informed the Senate Judiciary Committee that they would closely follow confirmation hearings for Sonya Sotomayor: They watched for any signs that she was mistreated or that her views were mischaracterized and promised to use elections to hold committee members accountable for their behavior (Hurtado 2009). As these two

examples make clear, the behavior and questions of senators at the confirmation hearings are closely monitored by attentive audiences, who have the power to punish senators.

Since attentive audiences monitor the confirmation hearings, it is not unreasonable for senators to believe the precedents they discuss with nominees are closely analyzed and may come back to haunt them. That is, active participation in the hearings can be advantageous or disadvantageous for senators, so I expect senators will participate in the confirmation hearings strategically. Senators who support the nomination will be less motivated than senators who oppose the nomination to engage nominees in discussions about Supreme Court precedents. Because Supreme Court nominations are confirmed more often than not, senators in favor of the nomination need not discuss precedents with nominees to help nominees secure confirmation.<sup>12</sup> In fact, senators who support the nominations have more to lose than to gain by actively discussing precedents with nominees. By actively engaging nominees in discussions about constitutional precedents, senators risk being viewed by attentive audiences as potentially opposing or thwarting the nomination and risk exposing the shortcomings of nominees. Hence, these supportive senators will be less interested in discussing precedents with nominees.

In contrast, senators who oppose the nomination will actively engage Supreme Court nominees in discussion about precedents. They will do so because “senators opposed to the nomination must bear the organizational costs of mobilizing a majority of their colleagues against the nomination and sustaining that majority when confronted with a new nominee” (Whittington 2006, 407). That is, they will use questions about precedents to paint nominees as unqualified, out-of-touch, or dangerous in order to extend the scope of the debate and arouse opposition against

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<sup>12</sup>There have been 32 nominations to the Supreme Court since 1954, when nominees regularly began attending confirmation hearings, and 26 of these nominations were confirmed by the Senate.

nominations (Schattschneider 1960; Krutz, Fleisher and Bond 1998). Given that the incentives of senators who support confirmation are different from the incentives of senators who oppose the nominations, the behavior of judiciary committee members at the confirmation hearings should demonstrate distinct patterns based on whether the nominations advance or threaten the goals of members. That is, the willingness of senators to become actively involved in the confirmation hearings will be influenced by whether they expect the nomination to advance or threaten their policy and electoral goals.

## Political Considerations

An extensive literature demonstrates senators endeavor to further their goals during Supreme Court nominations. In their seminal study on confirmation votes, Cameron, Cover and Segal (1990) posit and find senators cast confirmation votes to advance their policy and electoral goals. Their primary results demonstrate senators are more likely to vote for highly qualified nominees, and ideologically similar nominees. These results continue to find empirical support in the literature (see e.g., Segal, Cameron and Cover 1992; Epstein et al. 2006; Cameron, Kastellec and Park 2013). More important for my argument, previous research demonstrates ideological considerations influence senatorial behavior during the confirmation process. Similarly, I expect ideological considerations to influence the likelihood of senators to become actively involved in the confirmation hearings. Senators who are ideologically similar to nominees will be less likely to discuss constitutional precedents at the hearings. They will be less willing to discuss precedents, because they can reasonably expect the nomination to be confirmed and do not want to risk exposing the the nominees' shortcomings. This leads to the following hypothesis.

- *Ideological Distance Hypothesis*: Committee members who are ideologically

distant from the nominee will attempt to engage nominees in discussions about more Supreme Court precedents.

While ideological considerations have been found to influence senatorial behavior during the confirmation process, a burgeoning literature analyzes the influence of partisanship on the process. Supreme Court nominations have become highly contested affairs between the parties (Fein 1989; Carter 1995; Watson and Stookey 1995; Davis 2005). For instance, Watson and Stookey (1995) refer to the Supreme Court “appointment process [a]s a political process not only in a broad sense but in a narrower sense of partisan politics” (p. 18). Moreover, examinations of confirmation votes also show that partisanship influences confirmation votes (Shipan 2008; Basinger and Mak 2012). Supreme Court nominations have become partisan affairs, because “the party contingents in Congress have become more internally homogeneous and more divergent, and the policies made in Supreme Court decisions have become central elements in partisan conflict” (Rohde and Shepsle 2007, p. 666). That is, parties have policy preferences, and those senators who are members of the appointing president’s party should reasonably expect the nominee to have similar policy preferences. Since judiciary committee members of the president’s party can expect the nominee to have similar policy preferences, they will be less willing to discuss constitutional precedents with Supreme Court nominees at the confirmation hearings. In contrast, committee members who are not members of the president’s party will actively discuss constitutional precedents with nominees, because they would like to place the shortcomings of nominees on public display. This leads to my second hypothesis.

- *Not Same Party as the President Hypothesis*: Committee members who are not members of the appointing president’s party will attempt to engage nominees in discussions about more Supreme Court precedents.

## Constituent Considerations

In addition to ideological and partisan considerations, scholars examine how constituent considerations shape the behavior of senators during Supreme Court nominations. Specifically, scholars following the lead of Cameron, Cover and Segal (1990) and “imagine senators asking themselves, “Can I use my actions during the confirmation process to gain electoral advantage? Or if I am forced to account for my votes, can they be used against me? What is the most electorally expedient action for me to have taken (p. 527)?” Senators contemplate the repercussions that may follow confirmation votes because incorrect votes may cost senators reelection. And although Cameron, Cover and Segal originally did not examine the connection between constituent considerations and confirmation votes directly, other scholars have done so. For example, Overby et al. (1992), in their analysis of confirmation votes on Thomas, find senators from states with larger percentages of African Americans were more likely to vote to confirm. More recently, Kastellec, Lax and Phillips (2010) find senators are more likely to vote to confirm nominees who enjoy public support. That senators contemplate the electoral consequences of their confirmation votes should come as no surprise, because their constituents hold them accountable for their confirmation votes (Smith 1993; Gimpel and Wolpert 1995, 1996; Wolpert and Gimpel 1997).

Similarly, I expect constituent considerations to affect senatorial behavior during the confirmation hearings, because attentive audiences monitor the hearings, as previously discussed. I expect senators whose constituents support the nomination to be less willing to actively participate in discussion about constitutional precedents with Supreme Court nominees. They will be less willing to participate, because they do not want to risk exposing the limitations or deficiencies of nominees that their home-state constituents support. In contrast, senators whose

constituents do not support the nominee will be more willing to participate actively in discussions about constitutional precedents with nominees. Senators from states that do not support the nominations will do this because these senators will want to demonstrate to their constituents their willingness to fight for the issues their constituents believe are important and extend the scope of the debate in order to defeat policies (nominations) that threaten the values and goals of their home state constituents.

- *Public Support Hypothesis*: Judiciary committee members whose constituents are less supportive of the nominees will be more likely to discuss Supreme Court precedents with nominees.

## **Institutional Considerations**

Beyond ideological, partisan, and electoral considerations, institutional factors may also affect the willingness of senators to engage nominees in debates about Supreme Court precedent. Specifically, the order in which senators address nominees potentially affects the number of precedents senators ask nominees to address at hearings. Traditionally, the chair of the judiciary committee questions nominees first followed by the ranking member of the minority party. After the chair and ranking member question nominees, the hearings proceed by “alternating back and forth between the parties and following rank within each party” (Watson and Stookey 1995, p. 147). Because confirmation hearings proceed normally in order of seniority, senior senators have the first opportunities to set the terms of debate surrounding Court precedents. For example, Arlen Specter, then Chairman of the Senate Judiciary Committee, commenced John G. Robert’s Supreme Court confirmation hearing by delving into *Roe v. Wade*:<sup>13</sup>

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<sup>13</sup>410 U.S. 113 (1973)

**Chairman SPECTER.** It is 9:30. The confirmation hearing of Judge Roberts will now proceed. Welcome again, Judge Roberts.

**Judge ROBERTS.** Thank you, Mr. Chairman.

**Chairman SPECTER.** We begin the first round of questioning in order of seniority, with 30 minutes allotted to each Senator. Judge Roberts, there are many subjects of enormous importance that you will be asked about in this confirmation hearing, but I start with the central issue which perhaps concerns most Americans, and that is the issue of the woman's right to choose and *Roe v. Wade*.<sup>14</sup>

After announcing senators would proceed in order of seniority, Chairman Specter's first question was about *Roe* and his second question dealt with *Planned Parenthood v. Casey*.<sup>15</sup> Being the first senator to question Roberts, Senator Specter had the opportunity to define the debate surrounding one of the most contentious issues in American politics.

This is not so for less senior senators. Less senior senators have fewer opportunities to ask questions about precedent that have not been discussed, because the "good questions may have been taken by the time the last three or four questioners are reached" (Watson and Stookey 1995, p. 147). Senators towards the end of the queue have explicitly admitted to the problems of coming near the end. For example, Senator James T. Broyhill (R-NC), who was the last senator to question Justice William H. Rehnquist, stated as much when he said, "As usual, when you get down to this end of the committee, all the questions have been exhausted."<sup>16</sup>

Given this, I expect the following:

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<sup>14</sup> Confirmation Hearings on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, p. 141.

<sup>15</sup> 505 U.S. 833 (1992)

<sup>16</sup> Confirmation Hearings on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, p. 126.

- *Question Order Hypothesis*: Committee members who speak early in the proceedings will be more willing to engage nominees in discussions about more Supreme Court precedents.

## Data and Methods

To test the above hypotheses, I analyze every exchange between senators and nominees at the Supreme Court confirmation hearings, with the exception of Antonin Scalia (discussed below), from Sandra Day O'Connor (1981) to Sonia Sotomayor (2009). Justice O'Connor's nomination serves as a natural cut point for three reasons. First, her nomination has been identified as a watershed nomination, especially in terms of the hearings (Farganis and Wedeking 2011). Second, her confirmation hearings were the first to be televised (Abraham 2008). That is, her hearings were the first time committee members had an opportunity to publicly interact with nominees. Third, prior to her nomination reliable public opinion scores do not exist for each nominee across all fifty states (Kastellec, Lax and Phillips 2010). More specifically, I examine the number of Supreme Court precedents senators discuss at these proceedings. Although senators will discuss a precedent repeatedly with nominees, precedents are counted only once.

An example will better illustrate how precedents are counted. In the following exchange between Senator Patrick Leahy (D-VT) and Clarence Thomas, the senator repeatedly asked the judge about *Roe v. Wade*:

**Senator LEAHY.** Judge, you were in law school at the time *Roe v. Wade* was decided. That was 17 or 18 years ago. You would accept, would you not, that in the last generation, *Roe v. Wade* is certainly one of the more important cases to be decided by the U.S. Supreme Court?

**Judge THOMAS.** I would accept that it has certainly been one of the more important, as well as one that has been one of the more highly publicized and debated cases.

**Senator LEAHY.** SO, it would be safe to assume that when that decision came down—you were in law school, where recent case law is oft discussed—that *Roe v. Wade* would have been discussed in the law school while you were there?<sup>17</sup>

Although Senator Leahy asked about *Roe* twice in this snippet, *Roe* is not counted for each time the senator asked about it. By treating multiple discussions about a precedent as a single discussion I follow the lead of Williams and Baum (2006), who argue the following:

“[T]he use of multiple questions was some-times 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” (p. 75, fn. 13).

Ultimately, the dataset identifies every case discussed at the hearings for each nomination. The dependent variable<sup>18</sup> is a count of the total number of distinct Supreme Court cases discussed by senators. The number of precedents discussed varies from 0 to 92, with a mean value of 13.7 and a standard deviation of 15.1 (Table 4.1 presents descriptive statistics for the dependent and independent variables). Because my dependent variable is discrete, I cannot use ordinary least

<sup>17</sup>Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States, p. 222.

<sup>18</sup>Data for the dependent variable come from The U.S. Supreme Court Confirmation Hearings Database, <http://www.psci.unt.edu/~pmcollins/SCCHCC.htm>, accessed 14 March 2014.

Variable	Mean	Std. Dev.	Min	Max
Precedents	13.17	15.07	0	92
Ideological Distance	.24	.29	.00	1.13
Lacks Qualifications	.24	.21	0	.6
Same Party	.53	.50	0	1
Strong President	.75	.44	0	1
Senator Faces Reelection	.33	.47	0	1
Public Support	70.71	11.97	41.43	91.37
Order	8.90	4.95	1	18

Table 4.1: *Descriptive Statistics for Dependent and Independent Variables.*

squares regression to model what influences senatorial behavior at the hearings. When applied to discrete dependent variables, OLS regression can result in estimates that are biased, inconsistent, and inefficient (King 1998; Greene 2008). As a more appropriate modeling strategy, I use negative binomial regression to investigate what factors influence senatorial behavior at the hearings, because over-dispersion characterizes the spread of my dependent variable.

## Independent Variables

I code the following independent variables for each nomination under examination.

**PUBLIC SUPPORT.** To examine how electoral consideration affects senatorial behavior during confirmation hearings I use the public opinion scores developed by Kastellec, Lax and Phillips (2010).<sup>19</sup> These scores measure the percentage of individuals who hold an opinion about the nomination and were created using a multilevel poststratification technique that estimates statewide public opinion support for each nominee, with the exception of Scalia, from O'Connor to Sotomayor.

<sup>19</sup>Data for this variable come from [http://www.princeton.edu/~jkastell/sc\\_noms\\_replication.html](http://www.princeton.edu/~jkastell/sc_noms_replication.html), accessed 14 March 2014.

REELECTION. To capture the proximity of reelection a dichotomous variable is included, coded 1 if a senator is up for reelection in the following election, 0 otherwise.

IDEOLOGICAL DISTANCE. I calculate the ideological distance between senators and nominees by squaring the difference between their Judicial Common Space scores. These scores, originally created by Epstein et al. (2006),<sup>20</sup> employ a bridging technique between Common Space scores (Poole and Rosenthal 1997) and Segal Cover scores (Segal and Cover 1989) to “create comparable estimates of the preferences of political actors of interest” (Epstein et al., p. 299). Although the Judicial Common Space scores are not the only estimates that place presidents, senators, and nominees in a unidimensional policy, I use this measure because it provides estimates for all nominees since the nomination of Justice O’Connor.

LACK OF QUALIFICATIONS. The degree to which nominees are unqualified to serve as Supreme Court justices. These measures estimating the qualifications of nominees are based on the content analysis of newspaper editorials (Segal and Cover 1989). The editorials come from a set of ideologically balanced newspapers and were written after the nomination was announced but before the Senate voted to confirm (reject) the nomination. This variable ranges from 0 (most qualified) to 1 (least qualified).

STRONG PRESIDENT. Coded 1 if the president is not in his fourth year of office and his party controls the Senate, 0 otherwise.

SAME PARTY AS PRESIDENT. Coded 1 if senators and presidents are members of the same party, 0 otherwise. Senators who are not members of the appointing president’s party are expected to ask about for nominees.

ORDER. A count variable denoting the order senators question the nominee

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<sup>20</sup>Data for this variable as well as other variables normally included to model confirmation votes come from <http://epstein.usc.edu/research/Bork.html>.

in. Lower values indicate committee members are towards the front of the procession, higher values indicate committee members are towards the end.

## Results

Table 4.2 displays estimates for negative binomial regressions estimating the effect of political, electoral, and institutional factors on the number of precedents discussed by senators at the hearings. The first model includes the covariates used by Cameron, Cover and Segal (1990) to examine confirmation votes. The second model includes all covariates discussed in the previous section. The third model also includes the covariates discussed in the previous section, but as a robustness check, it excludes observations that are outliers. Overall, the results are consistent across the models in Table 4.2 and show the influence all three factors have on the number of precedents discussed by senators.

In line with the *Ideological Distance Hypothesis*, the results show senators are significantly more likely to discuss precedents with ideologically distant nominees. All else equal, an increase in the ideological distance between senators and nominees by one standard deviation increases the predicted number of precedents discussed by thirty-four percent. To further illustrate, Figure 4.1 displays the expected number of Supreme Court precedents discussed at these proceedings as ideological distance increases from its minimum to its maximum, holding the values of the continuous covariates at their means and the dichotomous variables at their modes.<sup>21</sup> The expected number of precedents discussed by a senator with an ideologically proximate nominee is approximately eight. In contrast, when a senator questions an ideologically distant nominee, the predicted number of precedents is more than fourteen. Overall, these results comport with previous research that

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<sup>21</sup>The expected number of precedents presented in Figure 4.1 are based on the parameter estimates reported in Model 3.

	Model 1	Model 2	Model 3
	b/se	b/se	b/se
Public Support		-0.021**	-0.015*
		(0.01)	(0.01)
Ideological Distance	1.601**	1.041*	0.917**
	(0.64)	(0.55)	(0.45)
Lack of Qualifications	-0.672	-0.929**	-0.747*
	(0.53)	(0.45)	(0.45)
Same Party	0.192	0.117	0.113
	(0.21)	(0.16)	(0.17)
Strong President	-0.720***	-0.586***	-0.401*
	(0.18)	(0.19)	(0.21)
Senator Faces Reelection		-0.167	-0.249
		(0.20)	(0.19)
Order		-0.046***	-0.030*
		(0.02)	(0.02)
Ideology * Qualification	-1.629	-1.532	-1.423
	(1.01)	(1.11)	(1.41)
Constant	2.809***	4.815***	3.981***
	(0.41)	(0.51)	(0.60)
$\alpha$	-0.032	-0.133	-0.284
	(0.21)	(0.20)	(0.24)
N	166	166	155
AIC	1186.816	1175.496	1036.279

Table 4.2: *Explaining Senatorial Questions about Supreme Court Precedents at the Confirmation Hearings from Sandra Day O'Connor to Sonia Sotomayor.*

Negative binomial regression estimates for the number of cases discussed by senators during Supreme Court confirmation hearings. The first model includes the covariates used by Cameron, Cover and Segal (1990) to examine confirmation votes. The second model includes all covariates discussed in the previous section. The third model also includes the covariates discussed in the previous section, but it excludes observations that are outliers. AIC = Akaike Information Criterion. \* $p < 0.1$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ .

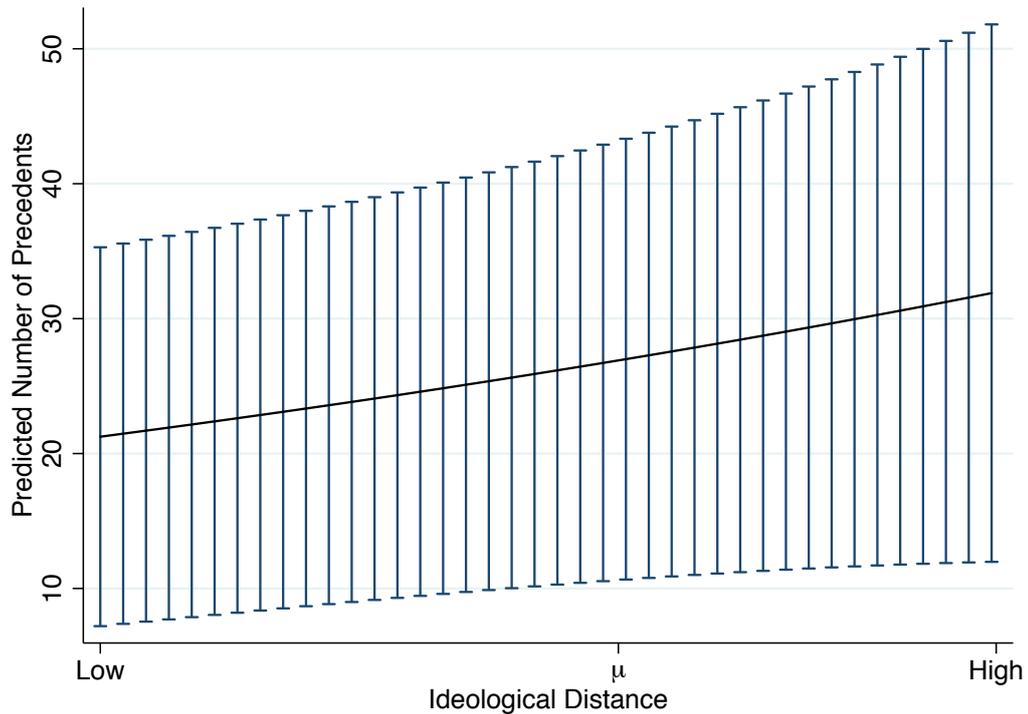


Figure 4.1: *The Effect of Ideological Distance on the Predicted Number of Precedents discussed by Senators at the Confirmation Hearings.* Y-axis displays the number of precedents discussed, and the x-axis displays the ideological distance between nominees and senators. On the x-axis, low marks the lower quartile, high marks the upper quartile, and  $\mu$  marks the average ideological distance between senators and nominees.

posits senators who oppose a nomination will attempt to extend the scope of the debate and arouse opposition against nominations (Schattschneider 1960; Krutz, Fleisher and Bond 1998).

Additionally, and as expected by the *Public Support Hypothesis*, senators are less likely to discuss Supreme Court precedents with nominees who enjoy public support. Figure 4.2 displays the expected number of Supreme Court precedents discussed at the hearings as public support for a nominee increases from its minimum to its maximum, holding the values of the continuous covariates at their means and the dichotomous variables at their modes.<sup>22</sup> The figure demonstrates

<sup>22</sup>The expected number of precedents presented in Figure 4.2 are based on the parameter

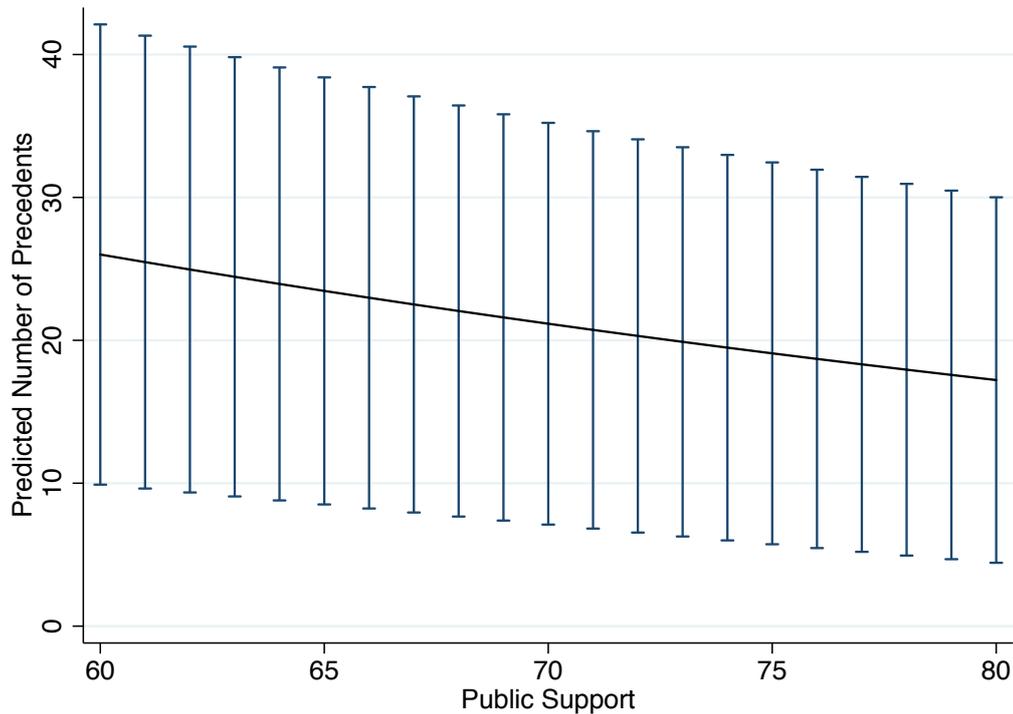


Figure 4.2: *The Effect of Public Opinion on the Predicted Number of Precedents discussed by Senators at the Confirmation Hearings.* Y-axis displays the number of precedents discussed, and the x-axis displays the percentage of constituents supporting the nomination.

a clear decrease in the number of precedents discussed. The expected number of precedents discussed by a senator whose constituents display low levels of support for the nominee is approximately sixteen precedents. In contrast, when a senator questions nominee who enjoys public support, the predicted number of precedents is slightly less than eight. These results suggest senators are asking more questions to determine the preferences of nominees, to advertise and take positions on Supreme Court cases their constituents care about, or to extend the scope of debate and arouse opposition against the nominees.<sup>23</sup>

In addition to ideological and electoral factors, Table 4.2 shows institutional estimates reported in Model 3.

<sup>23</sup>Unfortunately, the data are not well suited for determining which of these reasons best explains why senators engage nominees in discussions about precedents.

factors also influence the number of Supreme Court precedents discussed. Senators who have opportunities to question nominees early on in the proceedings are more likely to discuss precedents with nominees, while senators towards the end of the queue are less likely to discuss precedents. Figure 4.3 graphs the expected number of precedents in order senators proceed during these hearings, holding the values of the continuous covariates at their means and the dichotomous variables at their modes.<sup>24</sup> The figure demonstrates a clear decrease in the number of precedents discussed by senators towards the end of the queue. Senators toward the beginning of the queue discuss approximately fourteen precedents, while senators toward the end discuss approximately eight precedents. Ultimately, these results comport with the anecdotal evidence previously discussed that senators toward the end of the procession have fewer opportunities to engage nominees in meaningful discussions about Supreme Court precedents because all the questions have been exhausted.

Beyond the factors discussed so far, Table 4.2 shows senators are significantly less likely to discuss precedents with nominees appointed by strong presidents, which suggests senators are less likely to challenge strong presidents during the appointment process because these nominees will most likely be confirmed. Turning attention to the other covariates, the only variable to significantly influence discussions about Supreme Court precedents is *Lacks Qualifications*. Interestingly, this result indicates that senators are less likely to discuss precedents with ideologically proximate nominees who are poorly qualified. Although this suggests senators who support the nomination prefer not risk exposing the shortcomings of nominees, but it significantly influences the likelihood senators will engage nominees in discussions about precedents in Model 2 only. The other variables included

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<sup>24</sup>The expected number of precedents presented in Figure 4.3 are based on the parameter estimates reported in Model 3.

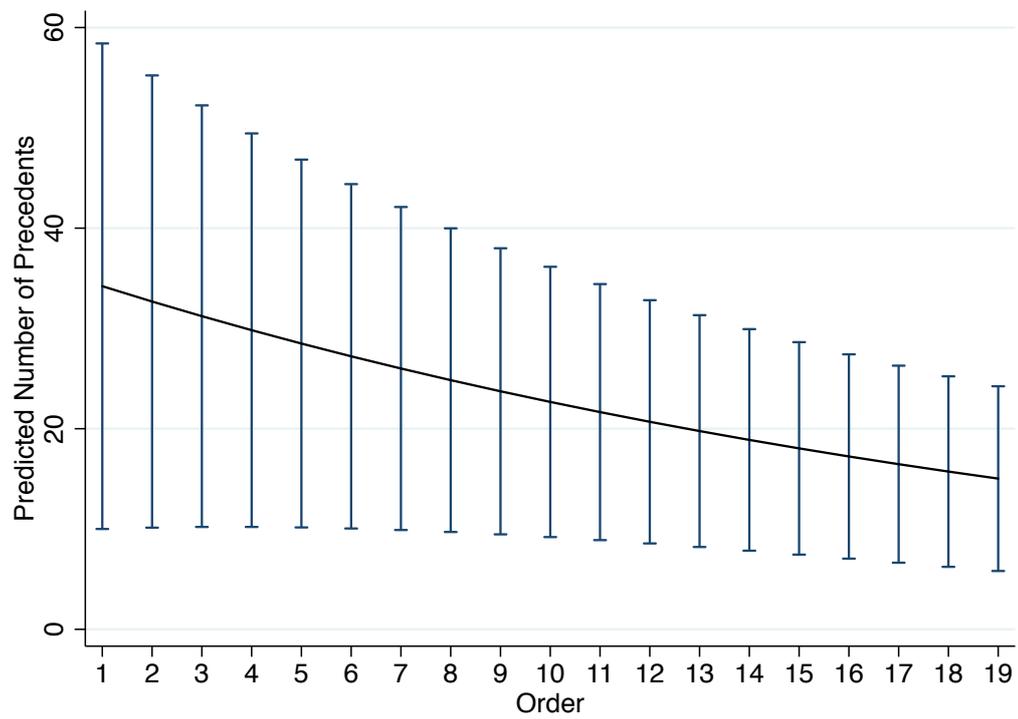


Figure 4.3: *The Effect of Committee Order on the Predicted Number of Precedents discussed by Senators at the Confirmation Hearings.* Y-axis displays the number of precedents discussed, and the x-axis displays the order senators questioned nominees.

in the models demonstrate no significant effect on the deliberations during the hearings. Overall, the results for these count models show the effect of political, electoral, and institutional factors on the number of precedents discussed by senators at the hearings and suggest senators strategically engage these public and important proceedings.

## Conclusion

By investigating the factors that influence the individual behavior of senators when discussing Supreme Court precedents with nominees, this project contributes to a growing literature that goes beyond confirmation votes to examine senatorial participation during the appointment process. More importantly, this project presents another angle for considering senatorial deliberation. In order to determine whether the hearings need a makeover, it is necessary to understand what motivates committee members to actively participate in these important proceedings.

My findings demonstrate constituent, ideological, and institutional factors influence the likelihood senators will actively engage nominees in discussions about Supreme Court precedents. Senators whose constituents support the nominee, who are ideologically proximate with the nominee, and who are towards the end of the queue ask fewer questions about Supreme Court precedents. While my findings suggest politics influences the behavior of senators at these important proceedings, they do not definitively address whether the quality of debate has deteriorated. To determine whether the debates have deteriorated requires additional hearings and additional research. However, this would naturally change the focus of examination from the individual behavior of senators to the aggregate behavior of the committee, because it would be easier to examine whether the quality at the

aggregate level has deteriorated across hearings. Additionally, my findings do not examine whether constituent, ideological, and institutional factors influence the behavior of judiciary members prior to 1981. Although there is reason to believe these factors would influence behavior at prior hearings, the hearings before and after O'Connor are fundamentally different. Since O'Connor, senators have had more opportunities and incentives to discuss precedents with nominees.

Most importantly, the findings here support claims that the hearings allow and encourage American citizens to participate meaningfully in discussions about Supreme Court precedents and the Constitution of the United States (Totenberg 1988; Ringhand and Collins 2011; Collins and Ringhand 2013). By inviting their constituents to submit and then asking nominees about these issues senators encourage citizens to participate in these important proceedings. This is important for judicial scholars as well as for scholars who study legislative behavior and representation. Indeed, my findings suggest that Supreme Court confirmation hearings provide opportunities for senators to discuss the concerns and preferences of their constituents with nominees. That is, the hearings help senators better represent their constituents and enable senators to inform nominees on the issues about which their constituents care.

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