QUESTIONING JUSTICES: AN EXAMINATION OF SUPREME COURT CONFIRMATION HEARINGS FROM 1955-2005

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ABSTRACT

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The United States Supreme Court is the final constitutional authority in the United States, whose decisions have wide ranging implications for the entire nation. The Justices who sit on the Supreme Court are appointed to their posts for life, and outside of Congressional limits on jurisdiction and impeachment, the Supreme Court exists largely on the outside of the system of Checks and Balances set up by the Constitution. One check on the Supreme Court that is available to the other two branches of government, and the American people, is the confirmation process. This process includes public hearings that have the nominees face questions from the Senate Judiciary Committee on their qualifications and views.

The purpose of this study is to analyze the questions senators ask of the nominees to the Supreme Court during the public hearing portion of their confirmation hearings. To do this the transcripts for all confirmation hearings starting with John Marshall Harlan II’s hearing in 1955 up to Samuel Alito’s hearing in 2005 is coded by exchanges between the senator and the nominee. These exchanges were coded as either a question on views or question on facts. The results show that certain factors, especially party polarization, greatly affect the number of questions of views a nominee is likely to face. With party polarization increasing over the past three decades, future nominees to the Supreme Court can expect to face a barrage of questions on their views compared to their predecessors.
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INTRODUCTION

Since 1955, nominees to the Supreme Court have appeared in person in front of the Senate Judiciary Committee to answer questions concerning their personal background, education, family life, and views on Constitutional issues, among other topics (Farganis & Wedeking 2011). During that time even a casual observer would notice that these confirmation hearings have become increasingly important politically. Presidents now take great pains to nominate someone who could be confirmed relatively easily. A defeat in the nomination process can be seen as a sign of presidential weakness, and is something that presidents take great care to avoid. Meanwhile, the senators sitting on the Judiciary Committee take the opportunity to serve as a check on judicial power and the president. Of course, the confirmation process has also become a forum for special interest groups to voice their approval or disapproval of the President’s pick for the Supreme Court. It is this increased political atmosphere that the confirmation process has evolved into what it is today (Maltese 1995).

There has been much commentary and research on the confirmation process itself (see Carter 1994; Kagan 1995; Comiskey 2006; Ruckman 1993; Rutkus 2005; Shipan & Shannon 2003), on the Senate’s behavior concerning nominations (see Comiskey 1993; Epstein et al 2006; Gimpel & Wolpert 1995; Guliuzza et al 1994; Ruckman 1993; Rutkus 2005; Rutkus 2005; Segal 1987; Sulfridge 1980; Vieira & Gross 1998; Watson & Stookey 1988), and on the President’s behavior in the process (see Yalof 1999; Stephenson 1999; Rutkus 2005; McMahon 2007; Maltese 1995; Hulbary & Walker 1980). To date, however, there has been little focus on the question asked of the nominees by members of the Senate Judiciary Committee. This is a troubling oversight because senators are the public’s most direct connection to potential Supreme Court justices, and because the confirmation process is a very important part of democracy that is too often overlooked as merely going through the Constitutional motions.
Farganis and Wedeking (2011) have done the most, so far, on this topic and this study is an extension of their work. The dataset used for this study is a subset of the dataset they compiled and on which I worked as a coder. The dependent variables used in this thesis were developed from the Farganis and Wedeking study. This study should be seen as an extension of Farganis and Wedeking’s study.

What determines the questions asked of the nominees to the Supreme Court? Are Senators influenced by the political climate? Does the senators’ own political interests and ideology play a role? Does this account for any changes in the types of questions being asked of the nominees? Or, are there other factors, such as increased ideological polarization, that account for the change? By answering these questions, researchers can find out if these senators are fulfilling their Constitutional duty to the people by ensuring nominees to the Supreme Court are properly vetted and would make decisions that will positively affect the lives of those who live in the United States of America.

This thesis attempts to build a workable model to determine which factors influence the types of questions asked during the confirmation hearings. The organization of this thesis is as follows. Chapter one will describe the evolution of the confirmation process while also analyzing some of the critiques that have been articulated about the process. Chapter two will start to develop the theoretical background by analyzing in detail the literature that forms the current understanding of the confirmation process. In this way, I can apply the conventional wisdom and established theories concerning the confirmation process to the study of the role the Senate plays in the confirmation process.

In chapter three, following the establishment, of the theoretical basis of the study, I lay out the methodological approach used to study Senate questions. My hypotheses are developed in this chapter and I describe the data collection and measurement issues. I further describe and defend my dependent and independent variables while operationalizing them for the statistical analysis to follow.
In chapter four I report the results of my empirical analysis. I also discuss the implications of my findings for the confirmation process. Ultimately, I find that the members of the Senate Judiciary Committee are influenced by outside factors that influence the types of questions they ask of the nominees to the Supreme Court.
CHAPTER ONE: BACKGROUND OF THE CONFIRMATION PROCESS
The History of the Confirmation Process

The Constitution created a system of checks and balances that provide the architecture for judicial power in the United States. Article II, Section II of the US Constitution indicates that the president: “shall have Power, by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court.” Article III creates the Supreme Court itself as the only constitutionally required federal court. Article III and Article I gives Congress the jurisdiction to determine the size of the Court as well as the authority to establish inferior Courts, now known as District and Circuit Courts, as they see fit. The Constitution also provides the manner for which vacancies are filled on the Supreme Court. The process of placing someone on the Supreme Court consists of the President nominating a person to fill the vacancy, with Senate approval, before they can take their seat on the Court.

The checks and balances system was established as a result of the compromises that took place among the delegates at the Constitutional Convention. The delegates were largely separated into two camps: congressionalists, who favored a stronger national legislature, and presidentialists, who favored a stronger executive (Maltese 1995). As a result of this divide, many compromises were developed between these two camps as the delegates decided to create a system of shared powers between the institutions.

The compromise that affected the appointment and confirmation process for federal judges, of which the Supreme Court is a part, is a result of this divide. The “New Jersey Plan” was the first plan concerning judicial appointments and provided for appointments by an executive who was elected by the legislature. Another plan would have allowed the Senate to have the sole discretion on appointing federal judges. James Madison developed a plan that allowed for the appointment to be made by the executive barring disapproval by two-thirds of the Senate. Eventually, a compromise was reached in
which the president selects the nominee while giving discretion to the Senate in the form of the Advice
and Consent clause which is included in the Constitution today. The compromise ensured that neither
the Executive or Legislative branch can make the claim that one institution has more power in this
important matter over the other (Yalof 1999, 8).

Even with this compromise, there were fears amongst the early American statesmen that the
arrangement might prove to give the Senate a form of legislative veto, which would give the Senate the
most power in the appointment process (Yalof 1999, 8). These fears were addressed in the famous
Federalist Papers. Alexander Hamilton, one of the leading presidentialists, wrote in the “Federalist # 76”
that this system of Presidential appointment, with Senate approval, allows for the checking of “a spirit of
favoritism in the President” while also ensuring that only the best candidates are confirmed (Hamilton,
Federalist #76). Even with this reassurance, the fears of the critics appeared to come to fruition when,
during the years 1789-1900, nearly a quarter of the president’s nominees were rejected, postponed, or
no action at all was taken on their nomination (Yalof 1999, 9).

The ambiguousness of the Advice and Consent clause has led to vigorous debate in the two
centuries since the ratification of the Constitution as to the proper role of the Senate in the confirmation
process. Some have argued that the Senate should be active in the appointment process itself, by giving
the President advice on who to appoint. Likewise, there is debate over what grounds the Constitution
gives the Senate in rejecting candidates, whether they could reject candidates over ideology or just on
personal qualifications (Maltese 1995, 20). The debate over the proper role of the Senate in the
confirmation process was caused by the vagueness of the Constitution, yet one thing is clear: politics
have always played a role in the confirmation process.
Changes in the Confirmation Process

The confirmation process has evolved considerably since the early days of the Republic. The earliest change in the process was the formation of the Judiciary Committee in 1816. Before this development, the nominees were debated and voted upon in the whole Senate without a hearing before the committee, who would then vet the candidate. Now the first Senate action on a nomination comes from the committee who, debate and investigate the nominee to determine if they are suited for a seat on the Supreme Court. They could either act upon the nomination, vote to move the nomination out of committee and send it to the Senate floor, or they could not act upon the nomination and effectively kill the nomination. ¹

Even with witnesses and an expanded role in the confirmation process for Judiciary Committee, the proceedings of their hearings were not public until Louis Brandeis’ hearing in 1916, and even then it was conducted by a subcommittee. Following Brandies’ nomination, the next fully public hearing was not held until 1930, again conducted by a subcommittee. The practice of holding select public hearings in front of a subcommittee as opposed to the full committee continued until 1941. The full Judiciary Committee started to hold full public hearings on all nominations in 1949. Early public hearings were

¹ Records of the hearings that took place during the first forty years of the committee’s existence are incomplete; complete records of the proceedings are available only since the mid-1800s. The trend of missing records continued even into the twentieth century, with records missing from the years 1900-1922, with the exception being Louis Brandeis’ hearing in 1916. It is unclear as a result of these lost records when witnesses were first called to confirmation hearings for Supreme Court nominees, but it appears that the first instance of witnesses testifying before the committee was in 1873 for the nomination of George H. Williams for Chief Justice (Maltese 1995, 88).
much different from today’s media and political spectacles, which often last for days. For instance, William O. Douglas’ hearing in 1939 lasted a full five minutes and one of the most contentious nominations of the first half of the twentieth century, John J. Parker’s in 1930, lasted three hours (Maltese 1995, 88-89).

It is also interesting to note that during the early hearings the nominees often did not testify at their own hearings. In fact, during the first century of Supreme Court appointments most nominees remained absolutely silent during the confirmation process in front of both the Senate and the press (Maltese 1995, 97). The first instance of a nominee testifying at his own hearing was in 1925, when Harlan Fiske Stone made himself available for questioning before a subcommittee (Maltese 1995, 88). No other nominees appeared before the Judiciary Committee, or one of its subcommittees, until 1955 when John Marshall Harlan II started the current trend of every subsequent nominee to the Supreme Court appearing before the full Judiciary Committee for a public hearing (Farganis and Wedeking 2011). This trend has evolved into a highly political spectacle, including days of witnesses testifying for or against a nominee’s fitness for a seat on the Supreme Court, and the nominees dancing around the questions asked by the members of Judiciary Committee.

Since Sandra Day O’Connor’s confirmation hearings in 1981, the proceedings have been televised. This development has added a new consideration for the president when making his nominations to the Supreme Court, as he now needs to find a candidate who can face a barrage of questions from the Senate while looking good doing it for the television cameras (Yalof 1999, 15). Considering their importance to our constitutional republic, these televised hearings are usually seen by a relatively small audience, which is usually the case for any televised government action. Yet the hearings still provide senators and special interest groups a forum for political grandstanding, while also giving the public an opportunity to see the process first hand. The one noticeable exception to low
ratings occurred during Clarence Thomas’ 1991 confirmation hearing, when shocking allegations of sexual harassment were made public by Anita Hill’s testimony to the committee (Maltese 1995, 92). Other than this one instance, the televised hearings are generally little seen by the public even though this development has brought about greater transparency to the confirmation process.

Influence of Politics in the Confirmation Process

The confirmation process has been influenced by politics from the very beginning of the Republic. Even though the first six Justices to the Supreme Court were confirmed unanimously by the Senate, with little to no debate, the first defeated nomination occurred just six years later. Following the resignation of Chief Justice John Jay in 1795, President George Washington nominated Associate Justice John Rutledge to the Chief Justice post. However, after reports of his speech against the recently ratified Jay Treaty, which resolved some lingering disputes between the new republic and Great Britain, his candidacy became contentious. The Federalists, who controlled the Senate, came out against the nominee and lobbied for his defeat. His nomination was defeated in the Senate by a vote of 14 to 10 (Maltese 1995, 30). A trend started with Rutledge’s defeat, which saw party and politics having more influence over the confirmation process. The trend only intensified during the 19th century.

As a result of the growing influence of politics in the confirmation process, presidents and senators established a series of unwritten rules known as political considerations. Political considerations have manifested themselves in many ways throughout the history of the Republic. These political considerations take root in the “advice” portion of the Advice and Consent Clause, and are often based on the goal of gaining Senate approval of a nominee before the formal confirmation process beings. Since the president can suffer a major political defeat if his nominee is rejected by the Senate, they would seriously consider partisan factors in order to avoid a political defeat (Abraham 1999).
One such consideration is called senatorial courtesy. Senatorial courtesy refers to the president asking his potential nominee’s home-state senators opinion on the nominee. If these senators disapprove of the nominee, it is likely that the nomination will be withdrawn because it is unlikely for the nominee to be confirmed. In some circumstances, a senator of the opposite party of the president can also be influential in the decision making process if they have substantial political capital (Abraham 1999, 19). Courtesy is also advanced toward the leaders of the president’s party in the Senate as a way to ensure party unity in the confirmation process. This process first occurred during the Washington Administration when the nomination of Benjamin Fishbourn of Georgia was withdrawn following opposition from the two Senators from Georgia. It was assumed in Washington’s time that the whole Senate would unite against a candidate that was an affront to one or more of their colleagues (Abraham 1999, 19). The practice still plays a role in Supreme Court nominations today.

Recently, another political consideration has came to light that is not as explicit as senatorial courtesy. This is the influence that former and sitting members of the judiciary offering their advice on potential nominees to the federal court. Members of the current bench are consulted about their potential future colleagues or offer their advice on whom to nominated unsolicited. The practice does not have a formal name but will be referred to as bench vetting in this thesis. William Howard Taft, the only person to serve as the President of the United States and Chief Justice of the Supreme Court of the United States, is a good example of bench vetting. During his time as chief justice, he personally engaged President Warren G. Harding and his successor Calvin Coolidge on nominees to the Court. Taft is not the only Justice to engage in this activity but he is considered by far the most effective (Abraham 1999, 22).

Another new development in the nomination process is the recommendation by the Standing Committee on Federal Judiciary of the American Bar Association (ABA). The committee, established during the Truman Administration in 1945-46 acts as an independent judge of the President’s nominees
to the Supreme Court and the lower federal courts who rates the nominees’ qualifications. In the Supreme Court nomination process the committee recommends the nominees as either qualified or unqualified. This committee is made up of fifteen members, whose membership is comprised of the following: one each from the eleven numbered federal circuit appeals courts (two from the Ninth Circuit), one from the Federal Circuit, one from the District of Columbia Circuit Court, and chairperson who serves a three year term of office that is renewable once. When it comes to the Supreme Court, the committee considers the nomination once it is made public but before the start of the Judiciary Committee’s hearings. It is telling to note that three of the most contentious nominations of the past forty years, William Rehnquist in 1971, Robert Bork in 1987, and Clarence Thomas in 1991, received non-qualified votes by the committee (Abraham 1999, 27-28). Bork’s nomination failed while Rehnquist and Thomas were confirmed, but by narrower margins than those who received unanimously well qualified ratings. The ABA rating of the nominee is generally taken into consideration by Judiciary Committee members, with supporters proclaiming the nominee’s “well-qualified rating” and the opposition pointing out any “non-qualified” votes. Thus, the president takes the committee’s recommendations, or potential recommendation, very seriously in deciding who to nominate to the Supreme Court. (Abraham 1999, 25).

Senate Actions on Nominations

The three considerations discussed above help shape the nomination process on the part of the president, but there are little such factors on the part of the Senate. The Senate can be seen as using their responsibility to provide advice and consent on the president’s choice on who will sit on the Supreme Court as a way to keep the powers of the president in check, which is the very idea of checks and balances. Since the Senate’s action on the nominee requires the action of more than one person, it is uniquely situated compared to the president to act in a manner with little to no political
repercussions. Even so, there has been a confirmation rate of 80% for the nominees that have been forwarded to the Senate, which is an impressive rate of approval (Abraham 1999, 28). The Senate can either reject the nominee out right by voting down a nominee, or they can simply not act upon the nomination and stall it in committee. Rejections occurred more often in the 19th century, in which nearly one out of every three nominations were either voted down or simply not acted upon by the Senate. The twentieth century saw a significant drop in failed nominations, with only five nominees rejected outright by the Senate. As of 2010, the 21st century has not seen any rejections of nominees, with Harriet Meier’s withdrawing her nomination before Senatorial consideration being the only occurrence of a nominee not being confirmed. In much the same way that scholars have identified political considerations concerning nominations to the Supreme Court, several possible reasons exists as to why 20% of the nominations to the Supreme Court have been unsuccessful.

The first explanation commonly used to explain a failed nomination is opposition to the nominating president. This explanation presumes that opposition is not so much against the nominee but instead against the president that nominates them, with rejection seen as a way to score political points against the president. An example is the case of John Quincy Adam’s failed nomination in 1828 of John J. Crittenden, which was postponed on a strict party line vote in order to keep the vacancy open for president-elect Andrew Jackson to fill (Abraham 1999, 29). There appears to be empirical evidence that the weaker politically a president is the less likely that their nominees win confirmation by the Senate. McMahon (2007) developed a model that closely predicted whether or not a nominee would face a contentious hearing by gauging the political climate of the nomination, especially the political strength of the president. His model shows that if opposition toward a president is high than there is a likely

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2 Statistic reflects the three nominations/confirmations that have occurred from 1999-2009 (Roberts, Alito, and Sotomayor). Harriet Meiers is not included since her nomination was withdrawn before the Senate took any action on her nomination.
chance for the nomination to be contested in the Senate. The strength of a president could then affect the success or failure of his nominees to the Supreme Court.

The nominee’s position or advocacy on salient issues has also been cited as an indicator of potential political battles over Supreme Court nominations. John Rutledge’s aforementioned 1795 defeat came directly as a result on his stance against the Jay Treaty, as the majority party in the Senate at the time, the Federalists strongly disagreed with his public opposition to the treaty, leading to his defeat (Abraham 1999, 30). A more recent example is Abe Fortas’ failed bid to become chief justice of the Supreme Court following his four year service as an associate justice. During his time as an associate justice, Fortas wrote or supported many of the liberal Warren Court’s opinions on several contentious issues that were debated throughout the 1960s. As a result of his support of the Warren Court’s more activist rulings on issues ranging from obscenity to criminal justice, conservative members of the Senate used the opportunity afforded them to express their displeasure by filibustering the nomination. The nomination eventually failed due to an ethics scandal that forced Fortas to resign his seat on the Court (Abraham 1999, 31). These two examples provide evidence that a nominee’s position on controversial issues play a role in determining the success or failure of their nomination. Williams and Baum (2006) have noted a recent trend in questioning nominees about past decisions they wrote as lower federal or state judges over the last three decades. Some of these decisions were later appealed to the Supreme Court and focused on highly controversial issues. It is now conventional wisdom that a nominee will not let their views known on certain issues in order to avoid problems during their confirmation hearings.

Finally, a perceived lack of qualification to sit on the Supreme Court can lead to a contentious confirmation battle. Since a seat on the Supreme Court is a lifetime appointment that carries significant political implications, the Senate is not likely to confirm a person they perceive as unqualified for the post. This lack of qualifications is subjective, but nonetheless proves to be a very powerful force in
deciding whether or not the Senate would confirm a nominee (Abraham 1999, 33). Recent examples of nominees being criticized for not being adequately qualified for the post include Richard Nixon’s appointment of G. Harrold Carswell in 1970, who was defeated in the Senate, and Clarence Thomas in 1991, who was confirmed following a bitterly contested confirmation hearing and vote (Abraham 1999, 33-34; Gimpel & Wolpert 1995, 68). In 2005 George W. Bush nominated White House Counsel Harriet Meiers to the Supreme Court. Her nomination was withdrawn following complaints of her being unqualified before the Senate considered her nomination. The matter of qualifications was studied extensively by Gimpel and Wolpert (1995). They studied whether or not perceived qualifications affect public opinion on a nominee. They find that these arguments for or against a nominee based on their qualifications is largely meaningless, as in recent times it appears that partisanship plays a larger factor in determining support for a nominee. Regardless, the topic of qualifications is one that is brought up with relish by both opponents and supporters alike to make their respective claims.  

3 There is no set constitutional or legal qualification one must meet in order to sit on the Supreme Court. Article III of the Constitution only states that “The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior” which is hardly a definite definition of who is suited to sit on the Supreme Court. Currently, it is assumed that one is qualified to sit on the Supreme Court after they served as a judge on either the state or federal level.

Critiques of the Confirmation Process

Scholars, policymakers, and even Supreme Court justices has developed several strong critiques of the confirmation process since its inception. Criticisms have come from both the liberal and conservative side of the political spectrum. In recent times, the debate has centered on the proper scope of questioning of the nominees and whether or not the proceedings has become too politicized. The criticisms have their merits and some have even been accepted as part of the conventional wisdom concerning the process. Virtually all of these criticisms, however, could be narrowed down to the critique that the confirmation process is too politicized.
The most common criticism concerning the modern confirmation process is that it is highly politicized, especially in recent decades. Critics often point to the failed 1987 nomination of Robert Bork to the Supreme Court as the turning point for the hearings. They argue that before 1987, the hearings focused on the nominee’s qualifications, while hearings after this date focused on the ideology of the nominee. Other critics point to an earlier point of time for the change. Carter (1994), for instance, brings up the example of stern opposition by segregationist senators against Thurgood Marshall’s nomination as evidence of an overly political confirmation process. The defeat of John J. Parker in 1930 is pointed to as another example of politicization in earlier confirmation hearings (Maltese 1995). Even though observers may disagree over when this politicization started, there is high agreement that a certain level of politicization exists in the confirmation process.

Possibly the most widely known critic of the confirmation process is Stephen Carter. His book, The Confirmation Mess (1994), outlines what he believes as the main problem of the confirmation process, which is its over-politicization. He cites the asking of the nominees highly ideological questions concerning their views on constitutional issues as an example of this problem. Carter believes that this line of questioning unfairly pins down a nominee and creates a more hostile environment for the confirmation hearing. He pins the changing perception of the Court from the public, and by extension the senators who confirm the nominees to the Court. He argues for a return to a more qualification based confirmation criteria and to have the confirmation process focus on these measures instead of ideological measures. His commentary was written in response to the Bork hearings, as Bork is generally believed to have been highly qualified for the position, according to observers, but was not confirmed due to ideological measures. Carter also finds fault in the equally contentious hearings for Clarence Thomas in 1991, by arguing that the Senate is not a proper venue to explore the moral fitness of a nominee to the Court. The fact that the Senate is a political body whose members have political considerations to take into account when they act upon a nomination make this criticism appears valid.
on the surface. This criticism, it should be noted, loses some validity due to the fact that the framers could not have known that the Senate would include political parties, who influence the politicization of the confirmation process. This criticism is shared by both liberals and conservatives and has escalated in the wake of the Bork hearings on both sides of the political spectrum.

The trend toward greater politicization of the confirmation process has been noted by other scholars even if they do not agree fully with Carter’s assessments. Yalof (1999) agrees with the notion that the Bork nomination fundamentally altered the confirmation landscape as a result of Democratic senators’ constant attacks on Bork’s writings and judicial philosophy. Comiskey (1993) argues for a confirmation process that focuses less on ideology. He argues that confirmation hearings which focus on ideology only lead to hostility between the parties, which sully the process. He argues that questions on ideological issues forces the nominees to dodge questions during their confirmation hearing, robbing the American people of an honest hearing on who should sit on the Supreme Court. The main point of Comiskey’s criticisms is that the current confirmation process leads to undistinguished nominees to the Court, as it is in the president’s best interest to avoid controversial nominees even if they are best suited for the job. Schulz (2003) and Silverstein (1994) champion this view and it is their hypothesis, developed separately, that led to Comiskey (2006) tests in a later study.

Comiskey (2006) follows up his own criticism by employing an empirical study of Supreme Court nominees who were nominated in the 20th century, in which he seeks to find if recent nominees are as distinguished as those who served earlier in the Court’s history. Comiskey finds that none of the nominees nominated later than the 1960s rank in the survey’s highest category, that of excellent, which gives some validity to a commentator’s suggestion that the modern Supreme Court is a “Court of Mediocrity”. This time period correlates with heightened levels of party polarization, which is noted by several scholars (see Brewer 2005; Poole and Rosenthal 2007; Stoker and Jennings 2008; Jones 2001;
Hetherington 2001; Fleisher and Bond 2004). Comiskey’s study appears to validate the claims of critics that this increased politicization of the confirmation process has led to inferior justices sitting on the Supreme Court.

Not all scholars share cynicism of the confirmation process. Ringhand (2009) argues for the analysis of a nominee’s ideological views. The critics of ideologically based questioning claim that such questions will lead to a loss of judicial independence necessary for an effective Supreme Court justice. Proponents of ideologically based questioning argue that it is necessary for nominees to answer such questions so that the Senate, and by proxy the nation, will know for a fact which kind of justice will take a seat on the Supreme Court. Ringhand (2009) argues for an ideologically based confirmation hearing in order for the public to gain a better understanding of how the nominee will rule on certain issues. As the Supreme Court plays a major role in shaping the policy of the United States, the nominee’s ideology will play a role in shaping policy if they are confirmed. The criticism that Ringhand and other proponents of an ideologically based confirmation hearing have of the current confirmation process is that it restricts dialogue on this important issue. For instance, they argue that the dialogue is restricted to discussing if a nominee is an “umpire” or an “activist”; in other words, one who practices judicial restraint or one that takes a more active approach to constitutional decision making. The dialogue then does not consider the policy making role of the Supreme Court. By allowing ideologically based questioning of the nominees, Ringhand argues that a more honest and open process can emerge to the benefit of the nation.

The case of Robert Bork is an interesting one, as his nomination seemingly coincides with rising polarization in the senate. Fleisher and Bond (2004) find empirical support for the start of the polarization of the political parties occurring in the early to mid 1980s, or just before Bork’s nomination. Bork’s highly contentious hearing, and eventual defeat, could have been more of a symptom of this new political atmosphere rather than the cause of it as some critics, particularly Carter (1995), have claimed.
The fact that Reagan nominated someone who is considered an ideologue could be part of the blame for the treatment Bork received as well. With Democrats in power for the first time since 1981, and with three successful nominations to Reagan’s credit, it would be unlikely that the Democrats would easily confirm someone like Bork, who held highly controversial views on civil rights and privacy. Reagan could have avoided the political firestorm that resulted from Bork’s nomination by nominating a more moderate candidate, such as his subsequent nominee Anthony Kennedy. The subsequent hearings have all experienced various levels of partisanship that seemingly increased since the Bork hearings, but may have their origins much earlier than the mid-1980s. Epstein et al. (2006) research further muddied the waters by showing that ideologically based hearings had their start earlier than the Bork hearings. They also found that the hearings have increased substantially since the time of the Bork hearings.

The notion of the Supreme Court as a policy maker has driven much of the debate over the role of the Supreme Court, and the confirmation process, since at least the days of the Warren Court. During this time, it is widely acknowledged that the Supreme Court took more of an activist role in its Constitutional duty by developing previously unheard of jurisprudence concerning areas as diverse as privacy and criminal procedure. This riled up anger amongst conservatives, who thought that the Supreme Court was overreaching its authority in many of these decisions. As a result, new vacancies on the Supreme Court became more and more politicized as subsequent presidents attempted to put on the Supreme Court justices who shared their ideology in an attempt to shape the direction of the Supreme Court. The Bork hearings is often pointed to as a prime example, as Bork is a conservative legal scholar whose appointment would shift the balance of power on the Supreme Court toward the conservatives, a prospect feared by liberals and Democrats. Vieira and Gross (1998) agree that the Bork hearings was the catalyst of such politicization. They argue that this feared shift away from a Court that routinely made activist decisions to one that is more restrained is what drove liberal opposition to Bork.
They are also highly critical of the overwhelming focus of the hearings, that of Bork’s ideology, while claiming that the process ignored Bork’s professional qualification.

The main criticism of the modern confirmation process for Supreme Court justices, that it is highly politicized, has sparked vigorous debate over the years with no sign of letting up. With evidence of a growing gap between the two main political parties ideologically, it appears that the confirmation process will remain a highly politicized process for the foreseeable future. Even though the confirmation hearings for the most recent nominees, Sonia Sotomayor and Elena Kagan, were not as contentious as those that came before, they were still noted for being greatly concerned with the ideology of the nominees. Unless reforms are made to the process, the critiques surrounding the confirmation process will still exist.
CHAPTER TWO: LITERATURE REVIEW

The focus of this thesis is to develop a workable model to predict the types of questions faced by nominees to the Supreme Court by members of the Senate Judiciary Committee. Only recently have scholars focused on this important question (Farganis and Wedeking 2011; Ringhand and Collings 2010). Even with this gap in the literature, however, existing studies can help explain the behavior of the members of the Senate Judiciary Committee. By analyzing the existing literature concerning the confirmation process, senatorial behavior and political context a series of hypotheses can be developed and tested in an effort to explain the types of questions asked of the nominees to the Supreme Court during their confirmation hearings.

Previous Empirical Studies on the Confirmation Process

The confirmation process has been a topic of study by scholars for decades. As the process has evolved into a public forum on the direction of the Supreme Court as opposed to a largely closed process of inter-branch politics between the president and the Senate, it has caught the attention of numerous scholars who have attempted to explain the behavior of the main actors in the process. Some focus on confirmation success of nominees, while others have studied the candor of the nominees during their confirmation hearing. The studies have provided a wealth of knowledge on the inner workings of the confirmation process, which provide a strong basis for this study. Even with these studies, a gap remains in our understanding of the confirmation process concerning senatorial questions of the nominees. The following is a brief review of the existing literature on the confirmation process which provides the empirical basis for this study.

A review of the literature on confirmation hearings reveals broad categories in which to categorize the areas of interest for researchers. The candor of Supreme Court nominees has been the subject of several studies over the past few decades. The issue of candor is of special interest to
Supreme Court researchers as the confirmation hearings provide the Senate, and by proxy the public, the only opportunity to vet nominees to the Supreme Court before they take their lifetime seats. Accordingly, it is important for these nominees to be as candid as possible so that the people know what kind of person is going to the Supreme Court. The studies have been done using several methods. The methods include examining the actions taken by the nominees after they took their seats on the Supreme Court and comparing those actions to their testimony before the Judiciary Committee. Other methods include coding the transcripts of the hearings themselves by looking at the responses the nominees gave to questions asked by the senators. As a result, previous studies have added greatly to the knowledge of the confirmation process.

Farganis and Wedeking (2011) find that the nominees to the Supreme Court have for decades been less than candid in their confirmation hearings by invoking the principle of judicial independence to avoid answering questions posed to them. They found this by conducting a content analysis of transcripts of all Supreme Court confirmation hearings from 1955-2010 to determine the level of candor of the nominees following an exchange with a senator. Their dataset forms the basis for the current study. The finding contradicts conventional wisdom developed over the past two decades by critics of the process, which held that nominees have become less candid following the highly contentious Bork hearings of 1987. Ringhand (2008) came to a differing conclusion when she found that the members of the final Rehnquist court, who made up the Supreme Court from 1994-2005, generally gave their opinions on past Supreme Court cases and other controversial issues during their confirmation hearings. The main difference between the two studies on candor is that Farganis and Wedeking’s study covered all nominees since 1955 while Ringhand covered the members of the Supreme Court from a smaller sample, which is the nominees that made up the final Rehnquist Court (Rehnquist, Scalia, Thomas, Breyer, Kennedy, Souter, Ginsburg, O’Connor, Stevens). Both studies focused on the behavior of the nominees, however, and not on the actions of the senators who question the nominees.
Other scholars have studied the types of questioning conducted by the Judiciary Committee, but in a very limited scope. Since the senators on the Judiciary Committee serve as a proxy for the American people in the confirmation process, the actions of the senators is of great interest to see how they behave in this vitally important process. The types of questions asked by the senators on the Judiciary Committee could fulfill the senators’ role of ensuring that checks and balances also exist for the Supreme Court.

For instance, Ward (2008) studied the evasiveness of Samuel Alito during his 2005 confirmation hearings on the issue of executive power. Ward employed a content analysis of the questions asked during Alito’s hearing to see if executive authority was asked about as much or more than other substantive issues like abortion and privacy. He finds that senators engage in strategic and partisan behavior during the confirmation process, such as Democrats asking more questions on executive power compared to their Republican colleagues, and doing so in ways that are more critical than the Republicans. But since his study only focuses on one confirmation hearing it cannot be used to generalize about the confirmation process. Likewise, Williams and Baum (2006) focus their article on the questioning of nominees to the Supreme Court about their past decisions as judges in lower federal courts or state courts. Since all of the people who have been nominated to serve on the Supreme Court since William Rehnquist in 1971 except two served as judges in either the federal court system or the state courts, the more recent nominees produced a large body of past decisions to draw on for questioning during their confirmation hearing. The researchers found that the type of questioning increased markedly between 1955 and 1994, with questions that were coded as negative, meaning senators expressing disapproval with the nominee’s position in that case, increasing the most. The factors explaining such an increase include such variables as ideological differences and increased polarization, with senators of the same party of the president expressing a more favorable view toward the nominee’s judicial record, providing a foundation for my thesis.
Another group of literature focused on the action of the Senate as a whole in voting for Supreme Court nominees. Sulfridge (1980) looked at the role ideology plays in predicting the opposition toward a Supreme Court nominee and found that it played a role in determining Senate opposition to a candidate. With senators becoming increasingly distant from each other in recent times ideologically, it seems that this factor will end up playing a bigger role in the confirmation process. Sulfridge’s study, as mentioned, focuses on Senate behavior during the final vote on the nominee and not on the actions of the Judiciary Committee during the confirmation hearings, which is the focus of my study. Segal (1987) finds that institutional and partisan politics plays a role in determining the success or failure of Supreme Court nominees by employing a model that accurately predicts the support a nominee would receive in the Senate. Again, the model applies to the Senate as a whole and not to the confirmation hearing. Even though only fourteen nominees stalled in committee, the focus of this thesis is the behavior of those on the Judiciary Committee as opposed to the voting behavior of the entire Senate. Epstein, Lindstadt, Segal, and Westerland (2006) find that there is a changing dynamic in Senate voting on Supreme Court nominees. By using a time series analysis, from the nomination of Hugo Black in 1937 to John Roberts in 2005, they find that the conventional wisdom, that the confirmation process has became more ideological since 1987, holds true but that the trend started back in the 1950s at the advent of public hearings for Supreme Court nominees. Even so they also conclude that professional qualifications play an equal, if not more important, role in gauging success in the Senate. Once again, their study employs a study focusing on the voting behavior of the Senate on the nominee instead of the confirmation hearing, with the actions of the senators on the Judiciary Committee not studied. The studies seem to confirm, however, that there is a wider trend that appears to show the confirmation process evolving into a highly politicized and ideological process.

Another group of studies is prescriptive in nature and seeks to provide commentary on how to improve the confirmation process. Ringhand (2009) defends the use of ideology in the confirmation
process by arguing that it can allow for alternative constitutional narratives to keep up with the changing political climate. Comiskey (1993) takes a similar approach, but asks the simple question of “Can the Senate examine the constitutional philosophy of Supreme Court nominees?” In short his answer is yes, as it allows for a more honest approach to how a nominee would decide controversial cases. Carter (1995) is especially harsh on the confirmation process and how it has became increasingly polarized. He calls for an opposite approach from Ringhand and Comiskey by arguing for a confirmation process that deals exclusively with questions of facts, such as those on professional qualifications. The most recent nominee to the Supreme Court, Elena Kagan, also waded into the debate surrounding the proper use of the confirmation process. Kagan (1995), in response to Carter’s criticisms, called the confirmation process a “vapid, hollow process” while arguing that the process is not as mean spirited and partisan as Carter makes it out to be. She, instead, criticizes the process as lacking in substance, which unfairly robs the American people of the opportunity to properly assess the nominees to the Supreme Court.

A gap in our understanding in how the confirmation process works appears as a result of this literature review. While the behavior of the Senate as a whole has been analyzed and studied for decades, the questioning of the nominees during the confirmation hearings have not been as extensively studied. The studies that focus on the questions involving the nominees during the confirmation hearings have done so in a very limited capacity, either by studying one individual question topic or nominee, instead of a comprehensive review of the confirmation process. The failure to study the broader trends in the types of questions being asked of the nominees to the Supreme Court reveals a wide gap in the knowledge of the Judicial Branch of the Federal government. As the confirmation hearing is the one opportunity the people of the United States, by way of the Senate’s Judiciary Committee, to question the nominees to the Supreme Court on how they would serve, it is important to note any trends in the types of questions asked of the nominees. Any outside factors that plays a role in
changing this process, such as increased polarization or divided government, needs to be discovered in order for the process to be improved if it is indeed, as Carter (1995) puts it, a mess.

Literature on Senatorial Behavior

The first set of possible answers concerns itself with explaining senatorial behavior. There is a wealth of research concerning senatorial behavior which lends itself well to this study. Perhaps the most widely accepted view of senatorial behavior, at least in the minds of the public at large, comes from Mayhew’s (1972) assertion that members of Congress “are single-minded seekers of reelection” (17). Using this goal in mind, Mayhew paints a portrait of Congress as being an institution that is shaped by the goal of reelection, which explains the behavior of those who serve in Congress. For example, a senator would change their views on an issue to suit their changing electorate, or make grand standing speeches that serve little other purpose than to get publicity. This explanation can be applied to the members of the Senate Judiciary Committee and their questioning of Supreme Court nominees. If the members of Congress have a single minded goal of being reelected, then it can be reasoned that they will use their role on the Senate Judiciary Committee to further this goal by attempting to achieve political victories in their support or opposition of a nominee as evident through their questioning. Watson and Stookey (1988) developed a model of certain roles senators adopt while serving on the Judiciary Committee. These roles range from an evaluator using the confirmation process in order to get a sense of the nominee, to the partisan who already made up their mind on the nominee. The roles Watson and Stookey find seem to agree with Mayhew’s description of the single minded Congress members seeking to fulfill personal goals, which include electoral goals.

Increasingly, Senatorial behavior has been explained by scholars and members of Congress alike as being heavily influenced by rising partisanship in the electorate as well as in the Senate. Work by Brewer (2005), Epstein et al. (2006), Fleisher and Bond (2004), Hetherington (2001), Jones (2001),
Layman and Carsey (2002), Stoker and Jennings (2008), McCarty et al. (2005), Poole and Rosenthal (2007), among others, has shown strong evidence demonstrating increased party polarization in the electorate and the Senate. Accordingly, this influence on Senatorial behavior can be seen in the confirmation hearings for members of the Supreme Court. An example of polarization playing a factor in the questioning of Supreme Court nominees include having more contentious confirmation hearings when the nominee is nominated by a president of the minority party. The president can take heightened levels of polarization into consideration in making their choices for the Supreme Court, as Epstein and Segal (2005) notes that a president would pick a second or third choice for the Supreme Court if those nominees are more ideologically aligned with the Senate. This is an apparent example of political climate influencing the choosing of a nominee to the Supreme Court which can also influence the confirmation hearing.

Epstein et al (2006), Segal (1987), and Sulfridge (1980) have started research into this phenomenon and found evidence of ideology and partisanship playing a role in Supreme Court confirmation hearings. Epstein at al (2006) has found evidence of this trend appearing as early as the 1950s, much earlier than the 1980s as the conventional wisdom of the confirmation hearings often contend. Even so the researchers conclude that this phenomenon has reached new heights in recent decades. Segal’s (1987) research develops highly accurate models in predicting contentious confirmation floor votes in which ideology plays a role in creating the political climate surrounding the hearing. Segal found that partisanship plays a major role in determining the success of failure or nominees to the Supreme Court. Sulfridge (1980) finds in his early study that ideological opposition is not sufficient in its own right to derail a nomination to the Supreme Court. It is important to note that this study was published at the very start of the trend toward higher polarization in the Senate that has been noted by later scholars. Epstein and Segal (2005) found that the further apart a nominee is ideologically from a Senator the less likely they would receive their vote to confirm when the full Senate
takes up their confirmation vote, to the tune of 57% of the votes from ideologically opposed senators compared with 98% if the nominee and the senator were close ideologically. Even with this result showing a relationship between ideology and support, Epstein and Segal still contend that the most important indicator of support is the perceived qualifications of the nominees to the Supreme Court. They found that those considered qualified received support of ideologically close senators 99.3% of the time and 94.8% of the time from members that are ideologically distant from the nominees, showing that qualifications trump ideology. Their results also provide a foundation for my hypotheses, which will be discussed later in this thesis.

The Ringhand and Collins (2010) study is similar to the one being undertaken here, but they employ a descriptive analysis while this thesis sets out to create a model to predict the types of questions asked. Their unit of analysis is the change of speaker instead of the exchanges between the senator and the nominee, which provides a wealth of information on the dialogue that takes place during the hearings. The descriptive findings reached in this thesis and their study is very similar, which as a result strengthens the model developed during the course of this thesis as a predicator of senatorial behavior during confirmation hearings. Ringhand and Collins’ study fills an important gap in the knowledge of the confirmation process and as a result will serve researchers in the future.4

One of the indicators of increased ideological differences between the parties that can spill over into the confirmation process is an increase in polarization on cultural issues. Cultural issues including abortion, privacy, and gun control has increasingly been the main source of political debates at the ballot box and in Congress. Likewise, such issues can be expected to find their way in debates concerning nominees to the Supreme Court. Lindaman and Haider-Markel (2002) studied these cultural battles in order to find any evidence of issue evolution in the mass public. Even though little evidence

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4 Moreover, whereas Ringhand and Collins employ a very descriptive statistical analysis, I attempt to build a workable model to predict the nature of the confirmation hearing.
was found for issue evolution in the mass public, there was evidence that partisan elites like office holders, paid greater attention to these issues.

The debate over the proper scope of questioning toward Supreme Court nominees concerns itself in some respects to this debate over cultural issues. See Comiskey (1993), Kagan (1995), Carter (1995) Post and Segal (2006), Ringhand (2009), Rutkus (2005), Williams and Baum (2006). A majority of the debate over the proper scope of questioning fits into the discussion on the influence of cultural issues in the political discourse. With the parties taking stands on cultural issues, the instances of increased party polarization affecting the confirmation process becomes more relevant as these issues become more debated in the political discourse.

The increased level of polarization between the parties has coincided with the increased level of press coverage of the confirmation hearings over the past three decades. Maltese (1995) and Epstein and Segal (2005) have both commented on this increase of press coverage on Supreme Court confirmation hearings and reached differing conclusions on their effect. Maltese argues that it has made the process more politicized and cites the increase length of time for the hearings as well as the expansion of the hearings to include testimony from lobbying groups as evidence of this troubling trend. Epstein and Segal (2005), on the other hand, doubt such claims by stating their belief in the power of ideology, partisanship, and qualifications playing the largest roles in Senate behavior. They do agree, however, that the public is now much more aware of the confirmation process than ever before thanks to this increase in media attention.

The increase in media attention has led to an increase in special interest groups testifying for or against nominees during the confirmation hearings, bringing a more ideological argument for or against the nominee than in previous years (Epstein and Segal 2005). Epstein and Segal (2005) provide evidence of increasing special interest lobbying corresponding with an increase in media attention by presenting
data that shows this trend increasing rapidly following Sandra Day O’Connor’s 1981 confirmation hearing. The increase in media attention is a platform that these special interest groups, and crusading senators, cannot pass up in their defense or attack of the president’s nominee.

Divided government has been cited as a factor in determining the contentiousness of Supreme Court confirmation hearings in numerous studies. A quick glance at the nomination history of presidents from the Washington administration to the George W. Bush administration saw presidents nominating members of their party to fill Supreme Court vacancies 130 times compared to just 17 occurrences of the nominee coming from an opposing party (Epstein & Segal 2005, 26). Also, in instances of divided government, the Senate confirms the nominee only 59% of the time compared to 90% during unified government (Epstein & Segal 2005, 17). With this in mind, it appears safe to assume that instances of divided government results in contentious confirmation hearings. Yalof (1999), Segal and Spaeth (2002), Shipan and Shannon (2003) and Ruckman (1993) among others researched the effect of divided government on the success or failure of Supreme Court nominations. Some, like Yalof, Segal and Spaeth, and Ruckman, find that divided government plays a role in determining the contentiousness of Supreme Court nominations, while Shipan and Shannon find little evidence of this trend. Epstein et al. (2006) finds empirical evidence suggesting greater support amongst members of the president’s party for the nominee to the Supreme Court during the Senate’s final confirmation vote.

Another important aspect of the concept of political climate is the popularity of the President at the time of the nomination. McMahon (2007) found strong support for the theory that the strength of the president and his political coalition is an excellent indicator of which nominations will receive the most resistance in the Senate. The analysis provides a contradiction to the idea that divided government plays a strong role in determining the contentiousness of the confirmation process, a view adopted by Yalof (1999) and Segal and Spaeth (2002). Even with this seemingly contradictory finding against earlier
studies, McMahon did find that divided government plays a smaller role in predicting contentious confirmation hearings.

Impact of Salient Supreme Court Decisions

There are numerous examples of the Supreme Court making public policy decision having a tremendous impact on the political climate of the United States, making the relative lack of empirical study in this area surprising. In the 19th century, the Supreme Court’s rulings on salient issues, such as the National Bank and slavery, brought the Court at odds with the other branches of government. During the 20th century, the Court faced a very real attack from the Roosevelt Administration following its rulings against the New Deal. More recently the Supreme Court’s decisions on cultural issues like abortion and criminal justice have become major issues in Presidential and Congressional elections (Stephenson 1999, 219-220; Unah 2009, 54). The Supreme Court has turned into a more salient body in the American political system, making the confirmation process more political in recent years. Increased saliency by the Supreme Court should make it open to questions of concern by the American people, as the Court makes rulings that affect the everyday life of millions of Americans. There have been instances of this occurring, such as during Abe Fortas’ 1965 hearing for associate justice when Senator Strom Thurmond brought up the issue of crime and criminal procedure at a time when the issue was heavily salient (Abraham 1999, 32).

What little research that has been done on issue salience in relation to the Supreme Court, so far, has focused on topics including the saliency of Supreme Court decisions (see Franklin, Kosaki, and Kritzer 1993), saliency’s effect on Supreme Court decision making (see Epstein and Segal 2000; Link 1995), and saliency of Supreme Court nominees (see Gimpel and Wolpert 1996). The study by Franklin et al. (1993) is particularly relevant to this study because it shows how previous Supreme Court decisions can become salient issues themselves, which would then lead to a series of questions during a
confirmation hearing. A well known, controversial, case can easily grab the public’s attention and affect the public’s opinion on the issue at hand. It can be assumed then that the Senate, being an elected body, is well aware of this shift in public opinion caused by a Supreme Court decision. The Court itself can be influenced by change in public opinion. Link (1995) shows that in some areas, such as criminal procedure, the Court often moves with shifting public opinion. It can be reasoned that this same effect is apparent in the confirmation process as well. Likewise, Epstein and Segal (2000) found that issue saliency has an effect on Supreme Court decision making, with the justices being careful not to generate controversy that can cause harm to the institution. This harm can be done by Congress, who has the power to restrict the Supreme Court by limiting the scope of their appeals review as well as the size of the Court. While Supreme Court nominees are by and large unknown to the majority of the American people during the confirmation process, Gimpel and Wolpert (1996) find evidence of controversial nominees becoming salient in the public, especially when a controversial issue like abortion is of major focus during the hearing.

Ringhand and Collins (2010) finds that certain issues are discussed more so than others during confirmation hearings and the issues discussed correspond with issue salience. For example, they found that civil rights was the most frequently discussed topic of the hearings held from 1955-2009, which corresponds with the emergence of that issue on the national scene following 1954’s *Brown v. Board of Education* school desegregation case. That case brought the issue of civil rights front and center on the national consciousness. Likewise, issues concerning gender discrimination rose to prominence in the 1970s during the height of the Women’s Liberation movement. Even though this saliency can also be tied to recent Supreme Court decisions prior to the hearings, echoing the study conducted by Franklin, Kosaki, and Kritzer (1993), the fact that they are brought up during the confirmation hearings show a concern on the part of the Senate to find how the nominee stands on issues of concern to the public.
Taken together, the studies discussed above show that political context has an effect on the confirmation process. Political context is affected in many ways due to many different variables, all of which appears to have an effect on the types of question being asked of Supreme Court nominees. For instance, it appears that the increase in polarization has impacted the type of questions being asked of Supreme Court nominees. The context created by divided government provides the president’s nominees with a tougher time during the confirmation process while party polarization finds smaller levels of agreement between the parties, which can also play a role. The emergence of the Supreme Court as a body creating salient issues in the public could affects the questions being asked, as the most salient issues of the time dominate the hearings. Still, a full scale empirical study is needed to show what factors, if any, impact the type of questions asked of the nominees to the Supreme Court.
CHAPTER THREE: THEORY, HYPOTHESES, METHODOLOGY AND DATA

Theory

As noted there have been several claims by various researchers that the Supreme Court confirmation process has somehow undergone a fundamental change in recent times to a more politicized version of its former self. This new politicized version of the confirmation process allegedly manifests itself through the interactions between the senators on the Judiciary Committee and the nominees to the Supreme Court. These interactions occur during the public hearing part of the confirmation process in which the nominees appear before the senators of the judiciary committee and receive questions about their personal qualifications, biography, and ideological views. It is this last question topic, those on ideological views, which are pointed to as evidence of the newly politicized confirmation process.

Several factors can play a role in creating this new environment for Supreme Court nominees. They include increased party polarization and divided government. Party polarization is a broad term that includes differences in the ideology of the senators and presidents. Divided government occurs when the Senate and the White House are controlled by members of different parties. The overarching theory that can be established by studying senatorial behavior using these broad factors is that as the parties become more polarized, the level of ideologically based questions of views that are asked of the nominees increases. Thus, the theory concerning senatorial behavior in the Supreme Court confirmation process is that the senators are influenced by the ideological differences between them and the president. The individual factors that make up this theory are next developed into hypotheses that can be tested empirically in order to: find out (1) if the theory that the Supreme Court confirmation process has changed over time and (2) If this change is the result of changing senatorial behavior due to ideology.
Accordingly, the theory will be tested by breaking down its main contentions, which is the Supreme Court confirmation process has changed over time as a result of ideology, into testable hypotheses that together can lend support to the theory. The theory is hardly unique, as the literature review has shown, but what is unique is the focus on the questioning which is something that has not been studied as much in depth. As such, the hypotheses developed using this theory focuses on senatorial behavior when it comes to the questioning of the nominees. This portion of the confirmation hearings has not been studied as extensively in the past, and the scope of this study dwarfs studies down previously on this topic. I believe that this theory can be adequately tested by analyzing the questions asked of the Supreme Court nominees, as it is the senators on the Judiciary Committee who set the tone for the confirmation process. Their asking of questions, ranging from questions on views to questions on facts, sets this tone as it can either put the nominee on the defensive or allows them to sail through the process with little opposition.

It is assumed for the purposes of this study that the more instances of questions on views the more politicized the hearing would be. A nominee facing a barrage of questioning on their judicial philosophy, opinions on past cases, and their ideology in general would be said to have faced a more contentious hearing as opposed to a nominee who mostly faced questions based on their personal qualifications for the position. The contentiousness reflects a more politicized confirmation process that some commentators claim has marred the process as a whole (Carter 1995). Thus by tracking the changes in the types of questions being asked it is thought that one can track the politicization of the process as a whole.

Hypotheses

Several hypotheses will be tested. The effect of divided government will be tested by measuring the variable of divided government with the rate of questions of views over time. The hypothesis (H1) is
that in instances of divided government the rate of questions of views will increase. The null hypothesis is instances of divided government result in the same or less amount of questions of views. This hypothesis was developed due to the fact that members of the opposing party of the president will be the dominant members of the Judiciary Committee, they will be more likely be focused on their ideological views. Divided government’s effects on the Supreme Court confirmation process has not been as studied as extensively and the testing of this hypothesis can help bridge the gap in this knowledge.

As mentioned, an increase of ideological partisanship has been noted by academics for decades and has been credited with several changes in American politics as a result. The hypothesis (H2A) to be tested will be the effect ideological polarization has had on the Supreme Court confirmation process. The hypothesis will be tested by taking the absolute difference between the median first-dimensions CS-Nominate scores of the median Democrat and the median Republican in the Senate. I expect to see higher percentages of questions on views as the levels of polarization increases. Another hypothesis (H2B) to be tested will be ideological distance, measured by the difference between the ideological scores of the questioning senator and the nominating president. I expect to find an increase in the amount of questions of views asked of the nominee to the Supreme Court the further apart the senator is from the president ideologically. If there is evidence of polarization having an effect on the confirmation process, than this would give more credence to the conventional wisdom that the confirmation process has become more politicized in recent decades. This hypothesis can also test the conventional wisdom that the increase in politicization started following the 1987 Bork hearings or if it started earlier in the time period being studied.

The type of confirmation hearing being held may have an impact on the types of questions asked as well. To test this hypothesis, the confirmation hearings are coded as either being for chief
justice (1) or associate justice (0). My hypothesis (H3) is that since the chief justice post arguably wields more influence than an associate justice post, a nominee for chief justice will receive more questions of views from the Judiciary Committee. The null then would be that chief justice nominees will receive the same or less amount of questions of views as associate justice nominees.

The year 1981 marked a turning point in Supreme Court Confirmation Hearings as for the first time they were televised. Farganis and Wedeking (2011) note that several of the structural changes in the confirmation process, such as increase in the number of questions and more balance in questioning between the parties, coinciding with this development. With the hearings available in their entirety online and on television stations such as C-SPAN, members of the Judiciary Committee have a platform in which to be seen by the entire nation. The increase in attention can also lead to more questions of views on issues that are controversial to a larger portion of the population. I expect to find higher instances of questions of views following this date as a result (H4).

The nominees themselves might influence the types of questions they receive at their confirmation hearing and this will be tested as well. My next hypothesis (H5) is the more qualified a nominee is perceived then the less likely they will receive questions of views. Likewise another hypothesis (H6) is that the more ideologically extreme a nominee is perceived, the less questions of views as their ideology is already well known. These hypotheses are being tested to see if the nominees play a role in the amount of questions of views they receive from the Judiciary Committee. The hypotheses are based on previous works by Carter (1995), Post and Segal (2006) and others who have found evidence of Bork’s failed nomination being due to the fact that he was perceived as being too much of an ideologue for the Supreme Court.

All of the hypotheses discussed above will be tested in order to find the most empirically plausible explanation for the evolution of the questions asked at Supreme Court confirmation hearings.
Senatorial behavior can be explained using such factors as ideological polarization, while other possible explanations, including increased media coverage, can also play a role. The goal, of course, is to study which of the possible answers developed in the course of studying the literature best explains which types of questions a nominee can expect to answer. There is currently a gap in knowledge on this topic that will be filled as a result. As mentioned in the first chapter of this study, the importance of Supreme Court confirmation hearings lies in the fact that this is the only part of the confirmation process that representatives of the American people have some sort of control on who sits on the Supreme Court. Granted, the person who nominates the nominees to the Supreme Court, the President of the United States, holds the only nationally elected position in the United States but members of the Senate Judiciary Committee hold posts that put them in positions in which they are more responsive to the electorate.

Data Collection

The data that will be used to test my hypotheses were collected using a variety of sources including coding of confirmation hearing transcripts and the use of pre-collected datasets. The data was collected in a way to efficiently and effectively study the evolution of the confirmation process by using statistical analysis. The collected data makes up two datasets with two different units of analysis but with the same set of variables. One dataset uses as the unit of analysis the “exchange”, which is a question and answer between a senator and a nominee. The N for this dataset is 9,670 exchanges. The other dataset that is analyzed collapses the data into the confirmation hearings with each senator’s actions consolidated into one row of data. In this way the senator’s behavior in the confirmation hearing can be effectively analyzed, which makes the senator the unit of analysis. The N for this dataset is 308. Due to differing units of analysis, different statistical tests will be used for each dataset. The larger dataset (henceforth the question dataset), because the dependent variable is a
dummy variable (i.e., whether or not the question was on views), was tested using binary logistic regression (Logit) to test for relationships between the variables. The smaller dataset (henceforth the hearing dataset), uses a count variable as a dependent variable (i.e., the number of questions asked on views by each senator during each hearing) used Poisson regression to study the relationship between the variables. Most of the data used in my datasets originated from Farganis and Wedeking’s (2011) study on nominee candor. The datasets used in this thesis started as subsets of the dataset used by Farganis and Wedeking, with my own independent variables which will be discussed below.

The majority of my data came from coding transcripts from all confirmation hearings beginning in 1955 (Harlan) and ending in 2005 (Alito). The coding was done by the author and an advising professor, who collected the data in order to study nominee candor in a forthcoming article. The coding collected the exchanges that occurred during confirmation hearing between the senators and nominees. Information such as the name and party of the senator asking the questions and the president who nominated the nominee was also recorded, which allowed for an analysis of the effects of divided government. A more detailed explanation of the coding methodology is later in this chapter.

The other main form of data collection was the use of preexisting datasets collected by other scholars. The datasets were used to collect data on the ideological variables, as the data collected by Poole and Rosenthal provided data on the ideological scores of senators and presidents involved in confirmation hearings (www.voteview.com). The other pre-collected dataset used was Segal and Cover’s on perceived ideological and qualification scores on Supreme Court nominees. The scores provide insight in how nominees are perceived by the public, and by proxy the senators on the Judiciary Committee, at the time of their nomination (Segal and Cover 1989; updated through 2010 on http://www.stonybrook.edu/polsci/jsegal/).
Below is a further explanation of the data collection and decisions made in the process. It will start with an explanation of the coding methodology employed in the coding of the confirmation hearing transcripts. Then, the datasets used will be explained and the decisions that went into deciding which to use and why will be explained. The dependent and independent variables will then be described, defended, and operationalized to allow for a statistical analysis to occur. Finally, the statistical analysis that was used will be described and defended.

Coding Methodology

The main part of the datasets used in this thesis originated from a study on nominee candor conducted by Farganis and Wedeking (2011). Dr. Farganis and Dr. Wedeking coded the manuscripts of all the Supreme Court confirmation hearings from 1955-2010. Due to data limitations that will be discussed later in this chapter, I only used the hearings that took place from 1955-2005. Only the portions of the hearings in which the nominee faced questioning from the Judiciary Committee was coded.

All confirmation hearings from 1955-2005 were coded by exchanges. An exchange is defined for coding purposes as a question posed by a senator to a nominee. For example, an exchange would be a situation where the senator asks the nominee about his/her professional background and the nominee responds. Instances where the nominee did not have a chance to respond to the question due to interference by a senator were not coded as an exchange. Also, if the nominee is asked a follow up question that was clarifying in nature, such the nominee being asked to repeat him or herself, was not coded as a separate exchange. All together there are 9,617 exchanges. The sheer number of exchanges

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5 I coded a portion of the transcripts while working as a graduate assistant to Dr. Farganis.
6 Dr. Farganis coded 75% of these exchanges while I coded the remaining exchanges. The inter-coder reliability for whether or not an exchange was on a Question of View was 96.67% (kappa .9318, p<.001) after a random sample of 901 exchanges from four different hearings was coded. This level of reliability reflects the second stage of reliability checking. See Farganis and Wedeking (2011) for further explanation of the inter-coder reliability.
makes this study the most comprehensive examination of this portion of the confirmation process yet conducted. Previous studies only focused on one hearing (see Ward 2008) or provided commentary on the appropriateness of the asking of certain kinds of questions (see Comiskey 2006, Ringhand 2009, Williams and Baum 2006, Rutkus 2005).

Out of these exchanges the question types were recorded. The questions were separated into two categories: Questions of View (substantive) and Questions of Fact (non-substantive). A question was considered a Question of View if it asked the nominee their views or opinions while Questions of Fact are those in which the nominees were asked objective questions on their background or professional qualifications. For example, if a nominee was asked a question such as “Brown v. Board of Education was decided in 1954, correct?” than this question was coded as a question of fact since it was asking for an objective, factual answer. If the nominee was asked a question like “Do you believe Brown v. Board of Education was rightly decided?”, then the question was coded as a question of view since it is asking for their specific view on a past case or issue (Farganis and Wedeking 2011, 12). It is important to note this distinction, as both questions refer to a past case but one is coded as a Question of Fact and the other as a Question of View.

Pre-Collected Data

In order to measure the impact ideology of the senators has had on the confirmation process, the ideological scores of the senators and presidents were recorded. The scores came via Rosenthal and Poole’s database found on voteview.com and is separated into two measures: Dynamic Weighted (DW)-Nominate and Common Space (CS)-Nominate scores. The DW-Nominate scores measures the ideology of the nominee for that session of Congress, for instance the 101st Congress. There are two separate scores, one measuring their ideology on economic issues (first dimension) and the other on social issues (second dimension), such as civil rights. The scores run from -1, which is most liberal, to 1, which is most
conservative. Likewise, the CS-Nominate scores have the same measures but it measures the senator’s ideology over the entirety of their careers up to the 111th Congress. Out of these measures, the first-dimension CS-Nominate scores were used since it gives the best indication of the ideology of the senator doing the questioning. The scores also allow for comparisons across time of the effects of ideology, and is the standard measure used in cross-time analyses utilizing these ideology measures (i.e., Krutz and Peake 2009).

The ideological and qualification scores of the nominees themselves were also collected. Using the Perceived Qualifications and Ideology of Supreme Court Nominees database compiled by Jeffrey Segal and Albert Cover, and found at Segal’s website on the State University of New York Stony Brook political science department page (http://www.stonybrook.edu/polsci/jsegal/), the perceived qualifications and ideology of the nominees was recorded in the dataset. The scores were collected by conducting a survey of the editorial pages of four major American newspapers: the New York Times, Chicago Tribune, Los Angeles Times, and Washington Post. The scores range from 0 (least qualified) to 1 (most qualified) for the qualification measure and 0 (most conservative) to 1 (most liberal) for the ideological measures. In order to create a measure of nominee ideological extremism, I took the absolute value of the difference between 0.5 (the ideological midpoint) and the Segal and Cover ideology measure. This created a score from 0 to 0.5, with 0.5 indicating extreme ideology and 0 indicating moderate ideology. This was done to see if the more extreme nominees at the time of their hearings would face a harsher barrage of questions of views at their hearings.

Dependent Variables

*Types of Questions Asked*

The question being researched is what influences the type of questions asked of Supreme Court nominees. Accordingly, the dependent variable will be the question category, either Question of Fact or
Question of View. A Question of View is a question that seeks the nominee’s opinion, such as “Do you believe that *Brown v. Board of Education* was rightly decided?” (Farganis and Wedeking 2011, 12). As mentioned earlier, this variable was collected through the process of coding Supreme Court confirmation hearing transcripts from the time period studied. It is a dependent variable as I expect to see a rise in the number of questions falling into the Question of View category over the last five decades. The reasoning is that if the confirmation process has indeed become more politicized since the time of John Marshall Harlan II’s confirmation hearing in 1955, this would be seen in an increase of questions asking the nominee of their views on issues that may face the Supreme Court. Time and factors affecting political climate would have an effect on the prevalence of this type of question being asked of the nominee if the overarching theory, that the process has become more politicized over the last 55 years, is in fact true. Thus this dependent variable is one that is easily testable to see if time and politicization has had any effect on this variable.

The dependent variable to be tested in this thesis originated from research conducted by Farganis and Wedeking (2011)\(^7\). Their research focused on the candor of the nominees during the confirmation hearings, and the dataset that they compiled provided the dependent variables used in this thesis. The coding methodology described earlier in this chapter is taken from the coding manual used in their study and the examples of the variables are also taken from their study. Even though the dependent variable came from their study, the independent variables that will test the dependent variables are ones that I developed myself. The independent variables to be tested are described and operationalized below.

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\(^7\) The author of this thesis worked as a coder for Farganis and Wedeking’s (2011) study during the spring of 2010.
Independent Variables

**Ideological Polarization**

Ideological polarization is measured by the ideological scores of the nominating president and the questioning senator. As the ideological distance between the president and questioning senator increases, the expectation is that the senator will be more critical and skeptical of the nominee’s views and thus ask more questions on views. The nominee could be seen as a proxy of the president by those members of the Judiciary Committee who are ideologically opposed to the president. The measure is the absolute values of the difference between the nominating president’s CS-Nominate Score and the questioning senator’s CS-Nominate score. The greater the distance between the senator and the president ideologically, it is expected that Question of Views are asked of the nominees. The variable is named ideodistance.

Divided government is operationalized as one party controlling the White House and the other party controlling the Senate. The instances of unified government were coded as 0 while divided government as 1. It is expected that instances of divided government will yield more questions of views due to the fact that the majority of the members of the Judiciary Committee will be members of the opposite party of the nominating president during the confirmation hearing. It is also expected that the more polarized the parties are from one another then more questions of views will be asked of the nominees during periods of divided government as a result.

**Senator’s Ideology**

The questioning senator’s ideology is tested to see if there is a relationship between liberals and conservatives in the amount of questions of views asked. To do this, the CS-Nominate scores are included in my model to test this variable. The variable will provide a descriptive statistic to show if
there is a difference between liberal and conservative members of the Judiciary Committee. The expectation is that conservative senators are likely to ask more questions on views because of conservatives’ general distrust of Supreme Court activism on many of the issues the Court addresses.

**Nominee’s Perceived Ideology and Qualifications**

Using the database compiled by Segal and Cover, the ideology and qualification scores of the nominees to the Supreme Court was compiled in my dataset in order to see if more moderate nominees face fewer questions of views as opposed to their more ideological counterparts. Extreme nominees, whether liberal or conservative, are expected to face increased questioning on their views by opposing senators. The basis of this variable comes from the outcome of the Bork hearings, in which a very conservative judge was denied a seat on the Supreme Court due in part to his views that was out of line with the majority of the senate. Epstein et al. (2006), Guiliuzza et al. (1994), and Ruckman (1993) discussed the issue briefly in their studies and found some evidence of this occurring. The variable to be tested to see if the nominee’s perceived ideology is labeled \( \text{nomextreme} \) and is operationalized by taking the absolute distance from .5 of the nominee’s perceived ideology based on their Segal-Cover scores. The idea is that a score of 0 represents an absolute liberal or conservative while those farther away from this point is less of an ideologue. The variable will be tested to see if a relationship exists between the nominee’s ideological extremism and the amount of questions of views they receive from the Judiciary Committee. The expectation is of a positive relationship (H6).

The perceived qualification of the nominee and its effects on the amount of questions of views a nominee receives is also tested. The variable was tested to see if some of the criticisms leveled on the confirmation process by some observers have merit. Comiskey (2006) argues that such a process actually dilutes the effectiveness of the Supreme Court due to the confirmation of less qualified nominees. It is expected that a relationship will be found in which perceived highly qualified nominees
are asked more questions of views than their less qualified counterparts (H5). The variable is operationalized by using Segal and Cover’s scores which range from 0, not qualified, to 1 which is most qualified. It is expected that the more qualified the candidate the more questions of views that person will receive. The reasoning behind this line of thinking is that if a candidate is perceived as being qualified to sit on the Supreme Court, than their views on issues will become more relevant as they have a good chance of being confirmed to the Court. Even though some of the perceived less qualified nominees may very well go on to become great Supreme Court Justices once seated, it will be interesting to see if such a relationship does exist between question on views and the ideology and qualifications of those nominated to the Supreme Court.

*Chief Justice vs. Associate Justice Hearing*

Another independent variable tested is whether or not nominees for chief justice receive more questions of views due to their potential leadership role on the Supreme Court. Since the chief justice plays an important part in the direction of the Court, their ideas and views on issues should play a role in the confirmation hearing. In order to see if there is a relationship between a person being nominated as Chief Justice and the amount of questions of views that person receives all confirmation hearings for chief justice was coded as 1 while those for associate justice as 0. I expect to see more questions on views for those nominated as chief justice as opposed to associate justice (H3).

*Impact of Televised Hearings*

In order to gauge the change in the number of questions of views over time a variable was added that effectively split the dataset in half. Post-1980 splits the dataset into hearings that occurred before 1980 and after. This date was chosen since the confirmation hearings were televised for the first time during Sandra Day O’Connor’s 1981 confirmation hearing. The increase in visibility of the confirmation process potentially gives the senators on the Judiciary Committee higher visibility, which
gives those senators a platform to ask questions of views than was previously available. All observations occurring after 1980 is coded one, whereas all prior observations are coded zero. I expect to see more questions of views after this date due to higher levels of polarization in the Senate (H4).

Statistics Employed

The statistical tests that I will use will differ based on the dataset being tested. The larger dataset, the question dataset (N=9,670), will use a logistic regression. This test was chosen due to the large N as well as its ability to construct a workable model to test whether a pattern occurs between political climate and the amount of questions of views asked of the nominees. The smaller dataset, the hearing dataset (N=308), uses Poisson regression likewise due to its size, and its ability to construct a model to predict the political climate in which questions of views is more likely to occur due to the variable being a count variable.
CHAPTER FOUR: RESULTS, DISCUSSIONS AND CONCLUSIONS

Descriptive Data Results

The distribution of the occurrences of questions on views compared to the overall questions asked of the nominees is shown below as figure one.

As can be seen by this distribution, the amount of question on views as part of the overall amount of questions asked during confirmation hearings has increased over time, as has the overall amount of questions. This is to be expected, as the duration of the hearings has also increased over this time period (see Shipan and Shannon 2003). What is noticeable about this distribution, however, is all of the nominees after Sandra Day O’Connor, with the exception of Scalia, faced upwards of 400 questions at their confirmation hearings. This only occurred twice before O’Connor’s 1981 hearings, Marshall’s 1967 hearings and Rehnquist’s hearings for Associate Justice in 1971. That is a drastic rise in the number of questions asked over the past thirty years, and it appears to coincide with the rise of polarization in the Senate (see Poole and Rosenthal 2007; Brewer 2005; Fleisher and Bond 2004; Hetherington 2001;
Jones 2001; Stoker and Jennings 2008). In fact, there is a positive correlation of (Pearson’s r=.26) between polarization and the percentage of question on views asked, but this finding is only significant at the p<.1 level. Given the weak relationship, we cannot reject the null hypothesis. Even so, 1981 does appear to be a watershed year for the confirmation process changing into what it is today. For instance, it is striking to see how the confirmation process has changed from the early 1960s, when Byron White was asked a mere six questions, to today when Samuel Alito was asked 779 at his confirmation hearing. It is also notable that the three nominees, who have faced the most number of questions over the last thirty years, Bork, Thomas, and Alito, also had the closest confirmation votes in the Senate, with Alito and Thomas being confirmed by a narrow margin and Bork famously going down in defeat. The result by no means shows a causal relationship, but an interesting observation to make in light of the findings. It does, however, gives support to my hypothesis (H4) that the amount of question of views asked of the nominees to the Supreme Court increased after 1981. Divided government has proven to not be a key indicator on the mean percentage of question on views, as the mean percentage during divided government is 66% while during unified government it is 65%. A difference of means test indicates that the relationship between divided government and the percentage of questions on views is insignificant.

How qualified a nominee was perceived to have an effect on the percentage of questions asked were on views. This measure was gathered using Segal-Cover scores and was accessed from Jeffrey Segal’s website at www.stonybrook.edu/polsci/jsegal/. Figure two show the results below. It is quite apparent by this graph that a nominee’s perceived qualification is highly correlated with the percentage of question of views they receive. In fact, the graph shows that the more qualified a nominee is, the less likely they were to receive questions on views. The relationship is significant at the .05 level and has a Pearson’s r of .42. The result is notable since it shows that the members of the Judiciary Committee are more concerned about the viewpoints of a nominee who is more likely to receive their seat on the Supreme Court on the basis of their qualifications alone.
Since this is a lifetime appointment and the Supreme Court makes highly salient decisions that affect the nation, it appears that the senators are engaging in this behavior to find out the nominee’s views on issues. Since the senators do not have the ability to go after the nominees on their qualifications, it makes sense that they will focus instead on their views, rather than their qualifications, during the confirmation hearings. This gives support to my hypothesis (H5) that the more qualified the nominee is perceived to be, the less questions of views they will receive.

*Homer Thornberry (1968) is excluded due to lack of Segal-Cover scores.

The perceived ideological extremity of the nominee provides less concrete results. The figures, as mentioned earlier in Chapter Three, took the absolute value of their Segal-Cover score from .5, which provided a measure of their ideologically extremity with .5 as an absolute moderate. Figure three has the findings below. What the result shows is that the perceived ideological extremity of the nominee plays a small role in determining whether the nominee will receive questions of views. The relationship is not statistically significant and has a Pearson’s r of .23. The graph appears to show that the less extreme the nominees are perceived to be ideologically, they actually receive more questions on views.
This is surprising and is difficult to explain. One such explanation is a nominee’s lack of notoriety of their views before the hearing, making the nominees more of a mystery to the Judiciary Committee who would then want to find out the nominee’s views during the confirmation hearings. Since the measure is how they ideologically extreme the nominee is perceived at the time of their hearing, it is reasonable to infer that they are not as well known before taking their seat on the Supreme Court than after. This lack of knowledge of the nominee could then lead to this increase in question of views.

*Homer Thornberry (1968) is excluded due to lack of Segal-Cover scores.

What the descriptive findings essentially show is that the confirmation process has changed over time. The results show a change that was mostly gradual but increased significantly after 1980. The question still remains of what causes this change to occur. Since the public hearing portion of the confirmation process is one of the few checks Congress has on the Supreme Court, it is important to
account for this change. The results discussed below help to shed light on what accounts for the change in the confirmation process. The larger dataset, the Question dataset, will be discussed first and its findings are reported as table one. Following the discussion of the results from the Question dataset, the findings of the smaller dataset, the Hearing dataset, will be discussed and presented as table two.

Question Dataset Results

The result of the larger dataset, the Question dataset, is reported below as table one.

**TABLE ONE**

Logit Model of Political Context Effects on the Probability of Question on Views Asked of the Nominees to the Supreme Court 1955-2005

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Coefficient (standard error)</th>
<th>$\Delta p$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological Distance</td>
<td>.65*** (.108)</td>
<td>(+.14)</td>
</tr>
<tr>
<td>Between senator and president</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senator Common Space</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nominate Score 1</td>
<td>.11 (.103)</td>
<td>(-.05)</td>
</tr>
<tr>
<td>Divided Government</td>
<td>-.21*** (.054)</td>
<td>(+.06)</td>
</tr>
<tr>
<td>Post-1980</td>
<td>.2*** (.05)</td>
<td></td>
</tr>
<tr>
<td>Nominee Qualification$^a$</td>
<td>2.36*** (.1)</td>
<td>(+.41)</td>
</tr>
<tr>
<td>Extremity of Nominee’s Ideology$^a$</td>
<td>-1.74*** (.195)</td>
<td>(-.19)</td>
</tr>
<tr>
<td>Chief Justice</td>
<td>-.06 (.073)</td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-.89*** (.13)</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>9579</td>
<td></td>
</tr>
<tr>
<td>Nagelkerke R²</td>
<td>.13</td>
<td></td>
</tr>
<tr>
<td>% Correctly Predicted</td>
<td>68.9</td>
<td></td>
</tr>
<tr>
<td>% Modal Category</td>
<td>64.9</td>
<td></td>
</tr>
<tr>
<td>Proportional Reduction in Error (PRE):</td>
<td>.11</td>
<td></td>
</tr>
</tbody>
</table>

***significant at <.001  $^a$ Homer Thornberry (1968) is excluded due to lack of available data on perceived qualifications and ideology.
There are two variables that really jump out from table 1 as playing a significant role in the probability of a nominee facing questions of views at their confirmation hearing. The first one is the ideological distance between the questioning senator and the nominating president. The results show that if the questioning senator is one standard deviation above the mean ideological distance between the senators and the presidents, than the probability of a question being on views increases by 14%. This variable is statistically significant at the .001 level. The result supports my hypothesis (H2) that ideology plays a role in increasing the probability of questions of views during confirmation hearings. Clearly, conservative (liberal) senators are much more likely to ask questions on views of nominees of liberal (conservative) presidents. The variable is one of the variables that make up the ideology factor, which gives some evidence of this factor playing a substantial role in influencing the type of questions the nominee receives from the Judiciary Committee.

The other variable in the model that stood out is Nominee’s Perceived Qualifications. The results show that the probability of questions of views being asked at a confirmation hearing increases if a nominee is perceived to be highly qualified to serve on the Supreme Court. This variable is also significant at the .001 level. It specifically states that if the nominee is perceived as fully qualified, with a score of 1, the probability that they will receive a question on views is increased by 41% compared to nominees who are perceived as less qualified. The result supports my hypothesis (H5) that the more qualified the nominee then the more questions of views they will receive. This is due to the fact that since they cannot be attacked on their qualifications to sit on the Supreme Court, then their views on issues that have been, or might be, before the Supreme Court since their confirmation solely becomes relevant. The fact that the nominees have such an increase in the probability of being asked questions of views if they are perceived as being qualified indicates that it is a major factor in determining the probability of a nominee facing questions of views.
Another significant variable that is apparent in the results is the Extremity of the Nominee’s Views. As opposed to the other variables already discussed, this variable actually has a negative effect on the probability of questions of views asked. Table 1 specifically shows that the more extreme the nominee is in their views; they would then expect to see fewer amounts of questions of views. The model predicts 19% fewer questions for these nominees as opposed to those who are more ideologically moderate. This is a very surprising finding and it rejects my hypothesis (H6) that the more extreme the nominee’s views than the more questions of views they will receive. It was expected that since the views of the more ideologically extreme nominees would be better known, which leads to an increase of questions on views. This is not happening according to this analysis, which is a very surprising finding.

The other variables in the model also show signs of having an effect on the probability of the nominees facing questions of views but to a significantly lesser degree than the variables discussed above. Nominees nominated after 1980 also see an increase probability of being asked questions of views but only by only 6%. This result is also significant at the .001 level. Likewise, divided government does not play a major role in deciding the probability of questions of views, with a decrease in probability of 5% of this type of questioning occurring during divided government. This variable is also significant at the .001 level. Apparently ideology plays a bigger role than party division in determining the probability of questions of views being asked.

Finally there are two variables that play no effect at all in influencing the probability of questions of views. The senator’s ideology plays almost no role in affecting the probability of questions of views being asked. This variable is not significant at any level. As a result my hypothesis (H2) is not disproven, but instead shows that the more conservative members of the Judiciary Committee are not more likely to ask questions of views compared to their liberal counterparts. A relationship exists
concerning the differences in ideology of the president and the senator which shows that ideology is a factor. Hearings for chief justice also did not have a significant impact as it had a negative effect of .9%. This variable is not significant at any level as well. This result disproves my hypothesis (H3), which predicted higher occurrences of this type of questions during Chief Justice Hearings.

The last two variables discussed are the weakest in my model, but they do not weaken it to the point of being ineffective. Overall my model is strong, with a 68.9% success rate in predicting the occurrence of questions of views with a modal category success rate of 64.9%, which is a very high rate of success. The Nagelkerke $R^2$ is moderately strong at .13, with a significant proportional reduction in error of .11. The reported strength of the model is also evident in the fact that all but two of my variables are significant at the .001 level. The fact that these variables are significant at this level can be explained by the large N in the dataset, which could easily make these variables significant. All of the measures indicate a strong model in predicting the probability of questions of views during confirmation hearings.

Hearing Dataset Results

For the smaller dataset, Poisson regression was used and the results were similar to those of the larger dataset. The results are reported as Table 2. Despite the smaller N, all of the variables are significant but not all of them produce a notable effect on the number of questions of views being asked. In some cases, the results of this model actually produced different results from the earlier model which casts some doubt over which factors actually contribute to questions of views during Supreme Court Confirmation hearings. Table 2 follows below:
TABLE TWO
Poisson Regression Model of Political Context Effects on the Probability of Question on Views
Asked of the Nominees to the Supreme Court 1955-2005

<table>
<thead>
<tr>
<th>Parameters</th>
<th>Coefficient (Standard Error)</th>
<th>Marginal Effects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological Distance Between Senator and President</td>
<td>.902*** (.06)</td>
<td>(+3.65)</td>
</tr>
<tr>
<td>Senator Common Space Nominate Score</td>
<td>.249*** (.05)</td>
<td>(+2.02)</td>
</tr>
<tr>
<td>Divided Government</td>
<td>.224*** (.03)</td>
<td>(+2.78)</td>
</tr>
<tr>
<td>Post 1980</td>
<td>.738*** (.03)</td>
<td>(+12)</td>
</tr>
<tr>
<td>Nominee Qualification(^a)</td>
<td>.308*** (.06)</td>
<td>(+0.77)</td>
</tr>
<tr>
<td>Extremity of Nominee’s Ideology(^a)</td>
<td>1.02*** (.1)</td>
<td>(+1.84)</td>
</tr>
<tr>
<td>Chief Justice Hearing</td>
<td>-.107** (.04)</td>
<td>(-1.1)</td>
</tr>
<tr>
<td>Constant</td>
<td>1.4*** (.08)</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>305</td>
<td></td>
</tr>
<tr>
<td>LR Chi(^2)</td>
<td>1182.37</td>
<td></td>
</tr>
<tr>
<td>Goodness-of-fit chi(^2)</td>
<td>8429.119</td>
<td></td>
</tr>
<tr>
<td>Pseudo-R(^2)</td>
<td>.155</td>
<td></td>
</tr>
<tr>
<td>Log likelihood</td>
<td>-3201.0128</td>
<td></td>
</tr>
</tbody>
</table>

**significant at <.01
***significant at <.001

Note: Marginal effects determined by increasing the value of each X variable from its mean to one standard deviation above its mean (or from 0 to 1 for dummy variables). The score represents the additional number of questions on views over the baseline expected value of Y. Baseline EV(Y): 11.01

\(^a\) Homer Thornberry (1968) is excluded due to lack of available data on perceived ideology and qualifications.

As can be seen from these results, certain variables played a larger role in determining the amount of questions of views. The biggest change can be seen from hearings held after 1980. The model...
shows that after this date nominees to the Supreme Court can expect to see 12 more questions of views per senator during their hearing as opposed to those nominated before 1980. The finding is significant at the .001 level. The hypothesis (H4) concerning hearings that took place after this date is then confirmed in this model and it leads to credence to the hypothesis (H2) that ideology plays a major role in increasing the probability of a nominee facing questions of views. Brewer (2005), Fleisher and Bond (2004), Hetherington (2001), Jones (2001), Stoker and Jennings (2008), Layman and Carsey (2002), and Poole and Rosenthal (1984) have noted in their research that the parties have become increasingly more polarized since the 1980s, leading to more politics in various aspects of the work Congress does. This could then understandably seep into the work of the Judiciary Committee when they evaluate nominees to the Supreme Court, as Shipan and Shannon (2003) have shown that the length of time from nomination to confirmation has increased in recent decades. The introduction of televised hearings at this time could also play a role, as senators now have a platform to let their views be known on such high profile appointments.

A note on the result of this variable as it seems to contradict the findings of my larger model, as it appears to not match the findings of that model. This is not so much of a contradiction as it is another way to describe the same phenomena. Shipan and Shannon (2003) find that the duration of these hearings has increased over time, with the 1980s marking the start of these longer confirmation hearings. With longer hearings come more questions which would naturally increase the number of questions of views being asked of the nominees. A 6% increase in the probability of these questions being asked can then easily translate into a 12 question increase per senator, which would not put these results into conflict with each other. Also, since the unit of analysis is different between the two datasets, a perfect comparison between these two results is not exactly feasible.
The other variables in the model, save for one, also show a positive impact on the amount of questions of views. The most significant after the post-1980 variable is the ideological distance between the nominating president and the questioning senator. The model shows at a statistically significant level of .001 that the further the distance between the senator and the president, the nominee can expect to face nearly 4 additional questions on their views as opposed to senators who are closer ideologically to the president. This finding then supports the ideology hypothesis (H2). Even though this number is not as high as the post 1980 finding, it shows that ideology is increasingly playing a role in confirmation hearings with the nominees facing the brunt of the ideological battle. The fact that this finding still exists even with this control being present shows that ideological differences between the president and the senator plays a significant role in the number of questions of views. There is no way to tell from this model when this trend started, but this is still a significant difference for the nominee as the Judiciary Committee is 19 members strong and if each asks 4 more questions of views each, than the nominee can expect to face an additional 76 questions of views during their confirmation hearing. Even though not all of the members on the Judiciary Committee will be ideologically distant from the president, it could be assumed that roughly half would be which would greatly increase the number of questions of views asked of the nominees.

Divided government (H1) also proves to be a reliable factor influencing questions of views. Under this model periods of divided government produced just fewer than 3 additional questions of views per senator, per hearing, significant at the .001 level. This was expected, especially after 1980, with the parties becoming increasingly polarized during this decade. Divided government was prevalent during the 1970s, with Presidents Nixon and Ford serving the entirety of their presidencies during periods of divided government which affected all of their Supreme Court nominees. There was also an extended period of divided government from 1987-1993, which affected two of President Reagan’s nominees and both of George H.W. Bush’s nominees. The model suggests that nominees face on
average 3 additional questions of views from each senator during their hearing, which is a significant increase in questioning.

Likewise, the ideology of the senator questioning the nominees also had somewhat of an impact as it adds about two additional questions per senator per confirmation hearing. The result also shows that the more conservative the senator the more likely they asked questions on views. Again, this could be due to conservatives’ distrust of the Supreme Court’s more activist rulings, which would make them wearier of placing a person on the Court whose views they disagree with.

The model also gives support for my hypothesis (H6) that the more extreme the nominee’s views the more likely they would face questions of views. The model predicts an increase of just under two more questions per senator per hearing if the nominee is ideologically extreme. The result is also significant at the .001 level. Even though this does not appear to be a large increase in the number of questions of views, the fact that there are nineteen members on the Judiciary Committee, and if they each ask two additional questions, would result in a net gain of thirty eight additional questions on views. This is a substantial increase in the potential questions on views for the nominee.

The other two variables in my model provided statistically significant results, but not big enough changes in the probability of being asked questions of views to be considered major factors. Chief justice confirmation hearings actually produced a negative result of questions of views with these nominees expecting to see one fewer question per senator on views compared to associate justice nominees. The result corresponds with my earlier model which shows almost no difference in the amount of questions of views asked. Likewise, the nominee’s perceived qualifications do not have a noticeable impact on the asking of questions of views. The results show a net increase of less than one additional question per senator per senator. This may appear small but again it is important to keep in mind that with nineteen senators on the Judiciary Committee this could lead to an additional nineteen questions per hearing for
the nominee. According to model, the level of qualification a nominee has and whether they are chief justice nominees does not have an impact on senators asking more questions of views during the confirmation hearings.

Overall the model is a moderately strong with a pseudo-R² of .16. The fact that most of these variables are statistically significant despite the substantially reduced N compared to the first dataset also gives the model strength. The log likelihood scores show a high level of convergence after only two iterations which represent a strong intermodal relationship. What is interesting to note is that there are some variables in this dataset that suggest influence that do not do the same thing in the other dataset. This could be explained by the differences in Ns and the different forms of regression used to analyze the results but it draws doubts on what really causes more questions of views to be asked. Since I am attempting to find the factors that contribute to an increased asking of questions of views, it makes more sense to use a count analysis as opposed to a probability analysis to answer this question. An example of this variance is the senator’s ideology variable, known as Senator’s Common Space Nominate Score 1 in the tables, which is not significant in the first analysis but is in the second analysis with the second dataset showing an additional two questions of views per senator, per hearing, from more conservative members of the Judiciary Committee. This difference makes pinpointing which variables are most likely to cause questions of views to be asked difficult, but the fact that the variables post 1980 and ideological distance produce consistent results which pin point which factors do influence questions of views.

One issue that must be addressed concerning the Poisson analysis is that it does not take into consideration the overall rising number of questions over time. As a result, the findings may be skewed which would invalidate the analysis. For a study over a period of time, an ordinary least squares regression might be a better test, using a percentage of questions on views as opposed to the number of questions on views. It is expected that as the total number of questions increases, so will the questions
on views. Since the Poisson regression used a count variable for its dependent, the total number of questions, it is highly susceptible to this type of error.  

Discussion and Conclusions

The findings from both models show that an array of factors goes into influencing the amount of questions of views. The fact that nearly all of the variables tested is statistically significant, with some increasing the probability of questions of views by double digits, indicate that not just one factor lead to an increase in this line of questioning. The two variables that are consistent in raising the probability of nominees facing questions of view, post 1980 and ideological distance between the nominating president and the questioning senator indicate that ideological polarization is a major factor in determining the likelihood of questions of views being asked. The other factors, including the perceived qualifications of the nominees and their respective ideology, are not consistent enough between the two models to draw much inference on the impact these variables have on questions of views.

The one thing that is certain after reviewing the results is that future nominees to the Supreme Court can expect to see more questions of views than ever before if the trends continue. The fact that this line of questioning significantly increased after 1980, the year that the levels of polarization started to rise (see Brewer 2005; Fleisher, Bond, and Krutz 2002; Hetherington 2001; etc.), means that this trend is not going to abate anytime soon. This could lead to an increase of evasiveness by the nominees (see Farganis and Wedeking 2010 and Ringhand 2008) and the possibility of mediocre nominees ascending to the Supreme Court (Comiskey 2006). The fact that there is empirical evidence supporting these scenarios provides some credence that the rise of questions of views has altered the confirmation process, and it is debatable if it is for the betterment of the confirmation process.

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8 An ordinary least square regression was ran using the variables tested. The only variables that stood up to the OLS analysis were Post-1980 and Nominee Qualifications. As a result, the findings of the Poisson regression are suspect and future research into this topic needs to consider the rise in the total number of questions during confirmation hearings as a factor to greater questions on views.
This modern trend of nominees facing more questions of views also reflect the fact that political climate affect the type of hearing the nominee will face. The factors that make up the political climate, such as ideological polarization as indicated by ideological distance and divided government, all play roles in determining the amount of questions of views asked during confirmation hearings. During more relaxed and less contentious political climate eras, such as the late 1950s through the mid 1960s, the nominees could not only expect to see less questions in general (Shipan and Shannon 2003), but specifically less questions on their views and past decisions made while lower Federal or state judges (Comiskey 1993; Williams and Baum 2006; Ringhand and Collins 2010). The results of the models indicate that the nominees can face more questions on their views as a result of this new political climate, which gives the earlier research done on this subject more support.

It may also influence the presidents in their choices for nominees, as they may choose more moderate and less controversial nominees whose views are not as well known for vacancies on the Supreme Court. With the Judiciary Committee more focused on nominees’ views, it is wise for the president politically to avoid a contentious hearing over the subject of nominee viewpoint. A Justice on the Supreme Court is one of the few ways a president can leave his mark on the nation after his term is over. As a result, such vacancies cause intense political battles, in which the nominees are viewed as carriers of the president’s legacy well past the completion of his term in office. But with this increase in question of views, opponents of the president and his nominee are given more ammunition in which to attack the nominee. The nominee may be well qualified to sit on the Court, such as Robert Bork, but if opponents are looking for a political victory against the president they can focus their energies on derailing the nomination (see Ruckman 1993; McMahon 2007). Bork provides the best example of this occurring, but other recent examples abound. For instance, Sonia Sotomayor was repeatedly asked about her comment, made while a federal appeals court judge to a group of students at the University of California at Berkley, that she “would hope that a wise Latina woman, with the richness of her
experiences, would more often than not reach a better conclusion than a white male who hasn’t lived that life” (New York Times). Even though she was considered highly qualified to serve on the Court, this comment ended up dominating her hearings, as well as another comment she made about how “a court of appeals is where policy is made” (New York Times). Opponents jumped on both comments as examples of a nominee who is highly qualified to serve, but too radical to be confirmed.

The focus on their views can also lead to lower federal or prominent state judges, traditional candidates to fill vacancies on the Supreme Court, to be more cautious in their judging in case they are nominated to the Court. Since their work as a judge leaves a paper trail that is public record, potential nominees to the Court may wish to avoid writing controversial opinions that could become an issue during their hearing. Even though their hands are often tied due to Supreme Court precedent in many of the controversial cases they rule on, the decisions handed down by these judges often become major issues during the confirmation hearing. Sotomayor faced numerous questions regarding her vote in a reverse discrimination case, *DeStefano v. Ricci*, that was ultimately overruled by the Supreme Court a mere few weeks before her confirmation hearing. David Souter had no such paper trial, due to his time spent as a state judge kept him away from ruling on federal issues, and as a result was referred to as a “stealth nominee” during his confirmation hearing since his views were not as well known. Such a noncontroversial nominee may allow for the president to avoid a confirmation battle, which will free him to focus on his broader agenda, but also deprive the American people with a discussion on broad Constitutional issues that affect everyday life. The fear of a confirmation battle may end up causing more harm to the democratic process, since the discussions on controversial Constitutional issues, such as privacy and individual liberty, are not held as a result of a president wishing to avoid a confirmation battle.
A president looking ahead to his reelection campaign may also wish to avoid making his picks to the Supreme Court an electoral issue by nominating someone whose views are not as controversial. The Supreme Court generally stays out of electoral battles, *Bush v. Gore* being a prominent exception, but sometimes it becomes an electoral issue as a result of its rulings. Abortion is the most obvious example, as the religious right mobilized to support presidents who vowed to nominate pro-life justices following the Court’s ruling *Roe v. Wade* in 1973, which legalized abortion nationwide (Toobin 2007). President Obama recently generated controversy by deriding the Supreme Court’s ruling in *Citizens United v. Federal Election Commission*, by declaring that the ruling would lead to more corruption in the electoral system (CNN.com). Thus, by their decisions the Supreme Court can become an electoral issue. It will behoove a president looking to avoid electoral controversies to nominate someone who would not become a liability due to their views. Since the Judiciary Committee is heavily focused on the views of the nominees, it will be difficult for the president to place someone who is not a moderate on the Court without their nomination becoming an electoral issue (see Gimpel and Wolpert 1996). Since elections are increasingly becoming focused on cultural issues (see Layman and Carsey 2002; Franklin et al. 1993), it is now difficult for a president to avoid such divisive issues. Such issues usually reach the Supreme Court, and as a result the fates of the precedents that govern such rulings sometimes hang in the balance when a vacancy occurs on the Court. This would make the vacant seat a valuable prize for whichever party controls the White House, as it may shift policy on the issues one way or the other.

Squire (1988), Ruckman (1993), and McMahon (2007) have written on such instances when a retirement or death of a Supreme Court justice results in a political battle to fill that seat, with Justices themselves being conscience of this fact and timing their retirements accordingly. Jeffrey Toobin’s book *The Nine* (2007) recounts several instances where a Supreme Court Justice times their retirement for when a member of his or her party controls the White House, in order for their seat to be filled by a likeminded
individual. In this instance presidential elections can hinge on the possibility of the Court shifting its ideological balance due to vacancies.

The focus of a nominee’s views on issues can simply lead to the nominee refusing to answer questions during their hearing. Farganis and Wedeking (2011), Ringhand (2008), Ward (2008), Post and Segal (2006), among others have noticed this trend over the course of the public hearing era, which is from 1955 to present. A nominee worried about embarrassing the president by having their nomination defeated as a result of their testimony at their hearing, Robert Bork is one notable example, may refuse to answer most of the questions asked of them, usually by claiming judicial independence, to avoid providing controversial answers to their questions. Before the focus of the hearings became of the views of the nominees, they were willing to provide very forthcoming answers to the questions asked of them. Following this shift, and with the potential of having to recuse themselves from future cases since they gave their opinions on matters that may come before the Court, the nominees became less willing to provide answers to certain questions. While Farganis and Wedeking (2011) has shown that this trend toward less candor by the nominees began before the Bork hearings, it is reasonable to assume that future nominees will be less willing to answer questions posed to them by the Judiciary Committee as a result of this recent trend toward their views. This would understandably deprive the nation of a discussion of Constitutional issues that it sorely needs to have on numerous issues.

The findings in this study have implications for future studies of the confirmation process, as it makes clear that no one set of factors can determine the tone of the confirmation hearing. Even though the findings support the conventional wisdom surrounding these hearings, specifically that the process has become more politicized over the past three decades, it does not go into explaining why this process has become more politicized. This is an area of future study that needs to be conducted in order to further close the gap in knowledge of the confirmation process. Also, other measures need to be tested
in relation to the confirmation process to see if there are more exacting factors that contribute to
questions of views. Future studies also need to expand the analysis to include the two most recent
members of the Supreme Court, Sonia Sotomayor and Elena Kagan, which was the original intent for this
study but the required data to do so was not immediately available\textsuperscript{9}. Research in this topic should also
be expanded to include earlier nominees to the Supreme Court, which will only marginally expand on
the N due to lack of public hearings for all but a handful of candidates, but will be more comprehensive
as a result.

\textsuperscript{9} Specifically, the CS-Nominate scores for the current Congress, which held hearings on the two most recent
nominations, are not available as of this writing.
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