

# THE INSTITUTIONALIZATION OF SUPREME COURT CONFIRMATION HEARINGS\*

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## ABSTRACT

In 1816, the Senate created the Committee on the Judiciary to assist in its task of providing the president with advice and consent regarding appointments to the federal courts. Over the past two centuries, the work of this committee has evolved in substantial ways. This paper uses an original database of confirmation hearing dialogue to examine how the Committee's role in Supreme Court confirmations has changed over time and to explore the motivations for those changes. To do this, we investigate a variety of developments, including the introduction of nominee testimony, opening the hearings to the public, changes in the rigor with which nominees are scrutinized, and the equalization of hearing questioning between majority and minority party senators. This research demonstrates that institutional change is motivated by both legitimizing and instrumental factors.

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The Senate Judiciary Committee hearings of Supreme Court nominees are today one of the most visible aspects of the confirmation process. Nominee testimony before the Committee frequently captures the national imagination, sparking intense debate about a nominee's fitness for the bench and the proper place of the Court and the Constitution in the American political system. The Judiciary Committee's role in the process has not always been so high-profile, however. Indeed, an observer from the founding era would scarcely recognize the means by which the Senate currently performs its advice and consent task. In this paper, we investigate the institutional developments that have transformed the Judiciary Committee's role in the Supreme Court confirmation process, focusing primarily on the question and answer sessions that are the heart of the confirmation hearings.

Better comprehending this transformation is important for a number of reasons. First, it contributes to our understanding of change in American political institutions by illustrating how the role of one of the most visible Senate standing committees has evolved over time. As we demonstrate, what began as a largely inconspicuous body has become one of the most public examples of checks and balances in the entire political system. Despite this, we lack a firm grasp on the developments that lead to this evolution. We remedy this situation by providing a longitudinal investigation into the institutionalization of the Judiciary Committee, paying particular attention to the confirmation hearings. Second, this research illuminates how changes in one institution can affect those in another, furthering our understanding of interbranch relations. We show that, as the power of the Supreme Court expanded, the dynamics of the Senate Judiciary Committee hearings changed to give enhanced public scrutiny to potential members of the Court. Third, this research further corroborates how institutional change affects the behavior of political actors (e.g., Hall and Taylor 2006; March and Olsen 1984). For example, we demonstrate how gavel-to-gavel television coverage of the hearings enhanced the ability of senators to use the hearings to convey information

to their constituents, contributing to the lengthening of the hearings. We argue that senators took advantage of this increase in public attention to the hearings for instrumental reasons, as it allowed them to position take, credit claim, and advertise in a high-profile forum, thus potentially enhancing their reelection prospects (Mayhew 1974). Finally, this research speaks to proposals to reform the confirmation process. In providing a theoretical and empirical treatment of the development of the confirmation hearings, we affirm the need for advocates of changing the process to be attentive to why the confirmation hearings developed into the institutions they are today, and consider proposed reforms in that context. Taken as a whole, this research informs our understanding of institutional change, the Senate's advice and consent role, institutional interactions, the behavior of political actors, and challenges to reforming the process.

### **The Institutionalization of Confirmation Hearings**

Scholars have long been concerned with the development of political institutions, such as the British House of Commons (Hibbing 1988), state legislatures (Squire 1992), the presidency (Ragsdale and Theis 1997), the Supreme Court (McGuire 2004), the House of Representatives (Polsby 1968), the Senate (Swift 1996), as well as legislative committees and procedures (Binder 2007; Fenno 1962; Schnickler 2001; Sinclair 1988). We build on this work by presenting the first systematic investigation of the institutionalization of the Senate Judiciary Committee hearings of Supreme Court nominees. By institutionalization, we are referring to the means by which institutions adopt regularized procedures that enable them to fulfill their given tasks (Hibbing 1988; Huntington 1965; McGuire 2004). Over time, institutions embrace certain characteristics that facilitate the achievement of a distinct identity and way of doing things (Ragsdale and Theis 1997: 1282). This results in the institution achieving a level of self-maintenance as the organization becomes prized “for its own sake” and develops an identity that is uniquely its own (Selznick 1957: 17).

As it applies to the Judiciary Committee and the Supreme Court confirmation process, we view the primary task of the Committee to aid the Senate in performing its advice and consent role; that is, to assist senators in making informed decisions as to whether or not to support or oppose a nominee's appointment to the Court (e.g., Epstein and Segal 2005; Ringhand and Collins 2011; Williams and Baum 2006). Institutionalization then refers to the procedures the Committee adopts to fulfill this role and stake out its unique identity in the Supreme Court confirmation process. While this has occurred in a variety of ways, our focus in this paper is on the most visible, and arguably the most significant, role of the Committee: the development of the Supreme Court confirmation hearings.<sup>1</sup> Through these question and answer sessions, senators are able to examine nominees on a host of topics, including their backgrounds, judicial philosophies, understanding of existing precedent, and views on the most pressing issues facing society (Batta et al. 2012; Ringhand and Collins 2011). The nominees' responses, made in public and under oath, provide substantial information to senators and the American public, potentially shaping these actors' views of the nominees' fitness for the high bench. As a result, the hearings can affect the fate of the nomination before both the Judiciary Committee and the full Senate (e.g., Collins and Ringhand n.d.; Watson and Stookey 1988; Wedeking and Farganis 2010).

We also explore the motivations for institutional changes to the confirmation hearings. To do this, we focus on how institutional developments were established for legitimating and instrumental purposes (Hall and Taylor 1996; Pierson 2000). By legitimating, we mean that institutional arrangements are put into place to as a means to promote social acceptance of the

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<sup>1</sup> Other notable developments relating to the Judiciary Committee's place in the broader confirmation process include the changing role of interest groups (e.g., Maltese 1995; Steigerwalt 2010) and the evolution of judicial selection to the lower courts (e.g., Binder and Maltzman 2009; Goldman 1997).

activities of the institution. In this sense, norms develop that are viewed as appropriate in light of the institution's role in the political process. As the institution gains legitimacy, it becomes valued for having a unique and venerable place in the governing system (e.g., Meyer and Rowan 1977). Institutions seek to gain legitimacy both to foster the public's acceptance of the institution and to enhance the power of the institution in the governing system (e.g., Fenno 1962).

By instrumental, we mean that institutional change is motivated by goal-seeking behavior. That is, institutions develop that promote the ability of actors in those institutions to achieve various ends (Pierson 2000). Membership on the Judiciary Committee allows senators to pursue both policy and electoral goals (Fenno 1973).<sup>2</sup> Insofar as the Supreme Court is a policy making institution (e.g., Segal and Spaeth 2002), questioning nominees to determine their fitness for the bench can influence the fate of the nomination, enabling Committee members to shape the makeup of the Court and consequently the future of public policy. Thus, by interrogating nominees on the issues most relevant to them (and their constituents), senators can improve the quality of information they have about a given nominee, thereby enhancing their ability to use their confirmation votes to advance their policy preferences through the Court.<sup>3</sup>

Senators can also utilize the hearings in pursuit of electoral goals, such as advertising, credit claiming, and position taking (Mayhew 1974). Since Supreme Court confirmation hearings are highly

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<sup>2</sup> In addition, we recognize that senators desire to wield power in government. However, this goal pertains primarily to winning election and obtaining committee assignments and leadership positions (Fenno 1973), rather than implicating the institutional development of a committee.

<sup>3</sup> This information includes not just the nominee's substantive positions, but also which positions the nominee is willing to commit to in public and under oath. The information is thus valuable even if senators have other methods of determining the nominee's stands on given issues (Collins and Ringhand n.d.).

salient events, the appearance of senators at the hearings raises their profile in the public eye, allowing them to advertise. Moreover, senators can use the hearings to claim credit for their contributions to the policies being debated at the hearings. Two examples from the Ginsburg hearing illustrate how Committee members credit claim at the hearings:

Senator KENNEDY: As someone who is a sponsor of that Fair Housing Act, along with others on this committee, I was struck by the appreciation that you showed in your opinion for the need for private enforcement actions against this kind of discrimination.<sup>4</sup>

Senator PRESSLER: In the 1970's, when I was a member of the House, I was quoted by the Supreme Court, albeit in a footnote, because they wanted some legislative history. I had helped the Sioux Tribes by working for legislation that allowed them to go back into court enabling them to file suit in the Court of Claims for compensation for the Black Hills of South Dakota...<sup>5</sup>

In addition, senators can utilize the hearings to stake out policy positions, highlighting to their constituents and the broader American public where they stand on salient legal and policy issues. Examples of this abound. For instance, Southern senators used the early hearings to signal their opposition to *Brown v. Board of Education* (1954), as illustrated in the following quote:

Senator ERVIN: I think the *Brown v. Board of Education* was a most unfortunate decision from the standpoint of law, Constitutional law, in the United States. ...[T]he Court said that it couldn't turn the clock back to 1868 when the Amendment was ratified or even to 1896 when *Plessy v. Ferguson* was decided, and yet since Constitutional provisions are to be interpreted to ascertain and give effect to the intention of the people who drew them and approved them, that is exactly what the Supreme Court should have done. They should have turned the clock back to 1868 when the Amendment was ratified.<sup>6</sup>

More recently, Senator Kohl (D-WI) took the opportunity at the Alito hearing to express his unequivocal support for the Family and Medical Leave Act: "In my view, one of the most important

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<sup>4</sup> Ginsburg Transcript, questioning by Senator Kennedy (D-MA) at 139.

<sup>5</sup> Ginsburg Transcript, questioning by Senator Pressler (R-SD) at 237.

<sup>6</sup> Stewart Transcript, questioning by Senator Ervin (D-NC) at 124.

pieces of social legislation enacted in the last two decades was the Family and Medical Leave Act in 1993.”<sup>7</sup> Similarly, Senator Leahy (D-VT) used the Kagan hearing to signal his support for the Second Amendment and *District of Columbia v. Heller* (2008): “Two years ago, in the *District of Columbia v. Heller*, the Supreme Court held the Second Amendment guarantees to an American’s individual right to keep and bear arms. I’m – I’m a gun-owner, as are many people in Vermont, and I agreed with the *Heller* decision.”<sup>8</sup>

As we demonstrate below, opening the hearings to the public helped to legitimize the Judiciary Committee’s role in the confirmation process following a scandal. Other changes were made to enhance the ability of Committee members to achieve instrumental goals. This includes contributing to the ability of senators to make informed choices on the fate of judicial nominees and providing them a highly visible forum to engage in advertising, credit claiming, and position taking. Still other changes developed to fulfill both legitimating *and* instrumental functions, such as increasing the scrutiny of Supreme Court nominees. Thus, rather than developing for solely legitimating or instrumental reasons, the Judiciary Committee has become institutionalized in various ways for both of these purposes.

### **The Development of Confirmation Hearings**

Like other congressional committees, it was not preordained that the Judiciary Committee would ever exist, much less hold public hearings of Supreme Court nominees. The Constitution says very little about the confirmation process beyond charging the president with nominating judges to the Supreme Court and the Senate with confirming them. Prior to the creation of the Judiciary Committee, the Senate as a whole handled Supreme Court nominations in private without the benefit of confirmation hearings (Beth and Palmer 2011; Rutkus and Bearden 2009). In 1816, the

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<sup>7</sup> Alito Transcript, questioning by Senator Kohl (D-WI) at 384.

<sup>8</sup> Kagan Transcript, questioning by Senator Leahy (D-VT) at 6.

Senate established the Committee on the Judiciary as a standing committee, along with 11 other standing committees (Gamm and Shepsle 1989). Despite the fact that overseeing the federal judiciary was part of its original charge, not all Supreme Court nominations were referred to the Judiciary Committee during its first 50 years: from 1816-1867, only two-thirds of Supreme Court nominations reached the Committee, all by motion. However, in 1868, the Senate initiated the norm of automatically referring Supreme Court nominations to the Committee. Since this date, all but seven nominations have been referred to the Committee (Rutkus 2010).<sup>9</sup> This change was made as part of a general revision of Senate rules aimed at streamlining and clarifying the chamber's procedures (Beth and Palmer 2011).

The Judiciary Committee did not initially hold hearings for Supreme Court nominees, and the norm of holding public hearings featuring nominee testimony was not instituted until 1955. The first confirmation hearing of a Supreme Court nominee occurred in 1873, when the Committee held closed-door sessions on the nomination of George Williams to the position of Chief Justice. During these hearings, the Committee examined documents and took testimony from outside witnesses involving allegations that Williams used Department of Justice funds for household expenses. His nomination was subsequently withdrawn by President Grant (McFeely 1981: 391; Rutkus and Bearden 2009: 41). Following this, the Committee held hearings on the nominations of Louis Brandeis in 1916 and Pierce Butler in 1922, both of whom were confirmed. The Brandeis hearing marked the first time hearings were open to the public. Although seemingly centered on whether Brandeis was “too radical” for the Court, it is clear that opposition to his nomination was also motivated by anti-Semitism (Maltese 1995). The Butler hearings were held behind closed doors and

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<sup>9</sup> The seven exceptions to this were all former or current (at the time of their nomination) federal executive or legislative branch officials, who each enjoyed a smooth path to confirmation, reflecting the Senate's one-time deference to federal office holders (Rutkus 2010).



focused on allegations that Butler acted in an unprofessional manner while serving on the University of Minnesota Board of Regents, and was biased toward railroad interests (Stras 2009).

These early hearings differed from contemporary hearings in four significant ways. First, the hearings were reserved for “controversial” nominees. From 1873-1922, there were 37 appointments to the Court, but only three hearings (Rutkus and Bearden 2009). Second, the hearings were limited in their scope, in that they focused on the nominees’ qualifications to serve on the bench, particularly relating to their likely judicial temperament and ethical standards. Third, at none of these hearings did the nominees themselves testify. Instead, the hearings were limited to scrutinizing documents and taking testimony from witnesses other than the nominee (Rutkus and Bearden 2009). Fourth, two of the three hearings were held behind closed doors. Thus, the norm of holding open, public hearings featuring unrestricted nominee testimony was not yet established.

Harlan Stone was the first nominee to testify before the Judiciary Committee in 1925. However, like the three previous hearings, the purpose of his hearing was to deal with claims that he was unfit to serve on the high Court, rather than to engage the nominee in open-ended questioning. In particular, Stone testified at the urging of President Coolidge to answer a limited set of inquiries regarding his prosecution of the Teapot Dome affair during his tenure as attorney general. Stone’s hearing was closed to the public and the questioning was restricted to his involvement in that scandal (Ringhand and Collins 2011; Rutkus and Bearden 2009). From 1925-1939, six other nominations were made to the Court, three of which featured confirmation hearings. At none of these hearings did the nominees testify (Rutkus and Bearden 2009).

In 1939, a major change to the Committee’s role in the confirmation process was made when it initiated the practice of holding open public hearings for all Supreme Court nominees. In part, this was motivated by various reforms of the Progressive Era, such as the passage of the Seventeenth Amendment (increasing senatorial accountability) and the growing diversity of the

electorate as a result of the Nineteenth Amendment and the burgeoning civil rights movement. As discussed below, these changes required senators to expand their electoral appeal to a wider array of constituents, and to do so in ways that addressed the varied concerns of those constituents. But more importantly, the Committee in 1939 faced a much more specific problem: the need legitimize its work in light of its handling of the nomination of Hugo Black (Collins and Ringhand n.d.).

Black was nominated by Franklin Delano Roosevelt in 1937 and was assured a speedy path to confirmation because he was a former senator. In fact, the Senate took just five days to confirm him and the Judiciary Committee did not hold public hearings on the nomination (Rutkus and Bearden 2009). After he was confirmed, Ray Sprigle of the *Pittsburgh Post-Gazette* revealed that, prior to his appointment, Black had accepted and never relinquished a lifetime membership to the Ku Klux Klan (Leuchtenburg 1973). These allegations took the country by storm and the public demanded to know why Black's nomination was rushed through the Senate and why no public hearings were held to address his membership in the Klan. Belief in a cover up was exacerbated when President Roosevelt broke tradition by having Black sworn in at a private ceremony at the White House, instead of the customary public ceremony at the Supreme Court. In response to public pressure, Black discussed his affiliation with the KKK in a radio address in which he admitted belonging to the Klan as a young man and receiving an "unsolicited" lifetime membership, while also stating that he had resigned from the organization a decade before his appointment to the Court ("Radio Talk is Brief" 1937). Black unceremoniously took his seat on the bench just three days after his radio speech, but the damage to the Senate and the Judiciary Committee was done. No longer would the public accept closed-door hearings seemingly instituted to cover up a nominee's past indiscretions.

As a result of the Black debacle, the Senate had a legitimacy problem relating to its role in the Supreme Court confirmation process. To remedy this situation, the Judiciary Committee

instituted the practice of holding open public hearings of Supreme Court nominations. “In view of criticism of the Senate’s speedy confirmation” of Justice Black, the Chair of the Judiciary Committee declared that the nomination of Felix Frankfurter would be “scrutinized thoroughly” before being approved by the Committee (“Hearings are Set on Frankfurter” 1939). Thus, rather than moving toward public hearings for instrumental reasons, the impetus for holding public hearings was the need to legitimize its actions to the public (Hall and Taylor 1996; Pierson 2000). In fact, a consequence of this change is that it potentially limited instrumental behavior in that the move to public hearings hampered the ability of the Committee members to ensure the smooth and non-controversial confirmation of their political allies. Rather than airing a nominee’s dirty laundry in private, the public, including investigative journalists, would now have a chance to observe the goings on in Judiciary Committee hearings and consequently put pressure on senators to support or oppose candidates to the high Court. In short, the Committee appears to have initiated the practice of holding public hearings as a means to define and express its identity in a socially appropriate manner (Hall and Taylor 1996: 949).

### **The Move Toward Nominee Testimony**

Two years after the Black incident, the Committee began the practice of holding open hearings for Supreme Court nominees.<sup>10</sup> In 1939, Felix Frankfurter became the first Supreme Court nominee to take unrestricted questions in an open, transcribed hearing (Ringhand and Collins 2011). The next nominees to testify before the Committee were Robert Jackson in 1941 and John Harlan in 1955. During this period (1939-1955), nine other nominations were referred to the Committee; at

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<sup>10</sup> The lone exception to this is Harold Burton, then a sitting senator, who was confirmed by unanimous consent on the day after his nomination was received. As noted above, this reflected the Senate’s former tradition of withholding hearings for former or sitting federal executive and legislative branch officials (Rutkus 2010).

none of these hearings did the nominees testify (Rutkus and Bearden 2009). It was not until 1955 that nominee testimony became customary.<sup>11</sup>

We posit that nominee testimony was established as the norm in 1955 for two interrelated reasons. First, this era marked the period in which the Court's own institutionalization stabilized. By the mid-1950s, the Court had come into its own as an institution, having found a permanent home, ended the practices of seriatim opinions and circuit riding, and expanded its role in adjudicating matters of significant public policy (McGuire 2004). Second, the 1950s marked the beginning of the Court's aggressive involvement in civil rights and liberties policies. Indeed, the modern era of the Supreme Court is typically identified as beginning in 1953 with the advent of the Warren Court (e.g., Pacelle, Curry, and Marshall 2011; Segal and Spaeth 1993). While the Court had always been involved in contentious public issues, the scope and visibility of its involvement grew in the 1950s. Perhaps the most notable example of the Court's willingness to assert its policy making authority in this era occurred in 1954 when it held in *Brown v. Board of Education* that legally mandated racial segregation in public schools violated the Constitution. With that decision, the Court found itself at the forefront of American political debate. Given this, it should be no surprise that, after *Brown*, the senators were especially interested in examining nominees on their positions on that decision and the proper role of the Court in the political system (Collins and Ringhand n.d.; Farganis and Wedeking 2011; Yalof 2008).

This change appears to have been made for primarily instrumental reasons, although it also served to further legitimate the Committee. By compelling nominees to take unrestricted questions

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<sup>11</sup> 1955 also marked the first year that confirmation hearings were held before the entire Judiciary Committee. Prior to this date, hearings were held before a subcommittee (Collins and Ringhand n.d.; Yalof 2008: 146).

in public and under oath, Committee members contribute to their ability to make informed choices on nominees and enhance their reelection prospects. This occurs in at least three ways.

First, regularized nominee testimony provides Committee members with the ability to examine nominees on issues that may factor into their decisions to support or oppose a nominee, such as a nominee's qualifications for office or positions on the pressing issues of the day. In addition, because the hearings take place in public during this era, the senator's constituents are able to follow the hearings, giving senators the opportunity to obtain their constituents' views on a nomination, which may factor into their voting decisions. Second, due to the public nature of the hearings, Committee members can utilize their allotted time to take positions, credit claim, and advertise (e.g., Mayhew 1974). Thus, even if a Committee member goes into the hearing knowing how he or she is going to vote on the nomination, the question and answer session still provides instrumental benefits (Watson and Stookey 1988). In position taking, Committee members can use the question and answer session to stake out their positions on the nominee and other salient issues. By credit claiming, Committee members can highlight particular policies they want to advance, and demonstrate to their constituents that they are fulfilling their representation duties by relaying their constituents' concerns to potential members of the Supreme Court (Collins and Ringhand n.d.). Finally, the substantial media attention devoted to confirmation hearings provides excellent opportunities for senators to make themselves seen.

In addition to serving a variety of instrumental goals, establishing the norm of having nominees testify helped to legitimate the Committee's role in the confirmation process. As noted above, the growing civil rights movement was bringing new voters with new concerns into the electoral process. If the Committee's work was to be seen as legitimate in the face of these voters, new issues would have to be addressed, most notably those involving racial discrimination and voting rights (Ringhand and Collins 2011). By requiring nominee testimony, Committee members

were able to signal to the American public that they were in touch with these emergent issues, thereby helping the public recognize the value of the Committee in the confirmation process.

### **The Increasing Scrutiny of Supreme Court Nominees**

We now turn to demonstrating how the Committee institutionalized its scrutiny of Supreme Court nominees. To do this, we rely on an original database of confirmation hearing dialogue. This dataset contains information on every Supreme Court nominee who took unrestricted questions before the Judiciary Committee from 1939-2010 and is based on the transcripts of the hearings.<sup>12</sup> The unit of analysis in the database is the change of speaker, meaning that a new observation begins whenever the speaker changes (e.g., from senator to nominee). We coded a host of variables for each statement, including the senator asking the question, the senator's political party, whether or not the question or comment involved the discussion of a judicial decision, and the issue and subissue areas involved in each statement. To code the issue and subissue variables, we relied on the categories used in the Policy Agendas Project (Baumgartner and Jones 2013), with the addition of several hearing-specific issue areas.<sup>13</sup> Intercoder agreement tests reveal that the data are very reliable.<sup>14</sup>

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<sup>12</sup> The transcripts come from the following sources: Frankfurter to Blackmun: Mersky and Jacobstein (1977); Powell to Alito: United States Senate (2012); Bork: Library of Congress (2012); Sotomayor: *New York Times* (2009a, 2009b, 2009c); Kagan: *Washington Post* (2010a, 2010b). We excluded the portion of the Clarence Thomas hearing that was devoted to questions regarding allegations of sexual harassment brought by Anita Hill since that aspect of the hearing was focused solely on those allegations and thus did not involve unrestricted questioning (Yalof 2008: 163).

<sup>13</sup> The topics adopted from the Policy Agendas Project include macroeconomics; civil rights; health; agriculture; labor and employment; education; environment; energy; transportation; law, crime, and family; social welfare; community development and housing; banking, finance, and domestic

[ Figure 1 About Here ]

We begin our investigation into changes in the Committee’s scrutiny of nominees – that is, the rigor with which nominees are questioned – by examining the number of comments made at each hearing, which is reported in Figure 1. Nominees appear along the x-axis, while the total number of statements made at each hearing constitute the y-axis. The solid line indicates the number of comments made at each hearing, while the dashed line is the predicted number of comments, based on the Poisson regression model that appears in upper left hand corner of the figure.<sup>15</sup> Our purpose in providing the predictions from the regression model (and those in the figures that follow) is to visually illustrate temporal changes to the hearings, as well as those related to the specific events that triggered the hearing developments that we identify below. Accordingly, in

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commerce; defense; space, technology, and communications; foreign trade; international affairs and aid; government operations; public land and public water; state and local government; weather; fires; arts and entertainment; sports and recreation; death notices; and churches and religion. We added the following categories: federalism; court administration; statutory interpretation; best/favorite justices; best/favorite cases or opinions; worst cases or opinions; standing/access to courts; non-standing justiciability issues; judicial philosophy; hearing administration; nominee background; media coverage of the hearing; and pre-hearing conversations/coaching.

<sup>14</sup> To verify the reliability of the data, we extracted a random sample of 740 observations (2.4% of the data), which gives us precision of  $\pm 3.6\%$  with 95% confidence. The mean intercoder agreement rate for variables used in this paper is 96.8% and the average kappa value is 0.936, which is considered “almost perfect” by one commonly used metric (Landes and Koch 1977).

<sup>15</sup> We employ Poisson regression models in Figures 1-3 since each of the dependent variables is a count that does not exhibit over-dispersion.

Figure 1 we include a variable capturing the year of the hearing (*Year*) and a *Post-O'Connor* dummy variable, scored 0 for hearings held from 1939-1981 and 1 for hearings held from 1986-2010.

As this figure makes evident, there was a relatively steady increase in hearing discourse during the first five decades of hearings, a sharp increase in the mid-1980s, then a period of relative stabilization that continues to this day. During the 1930s and 40s, an average of 129 comments were made at each hearing. This increased to 409 in the 1950s and about 560 in the 1960s and 70s. There was a large increase in hearing dialogue in the 1980s, with an average of 1,640 comments per hearing, followed by a period of stabilization. In the 1990s the average number of hearing comments was 1,569, while the average for the 2000s was 1,934. Thus, insofar as the number of comments at each hearing “signals the degree of inspection applied to each potential judge” (Dancey, Nelson, and Ringsmuth 2011: 129), it is clear that the Judiciary Committee has substantially increased its scrutiny of Supreme Court nominees over time.<sup>16</sup>

Below, we investigate in greater detail how the expanded scope of the hearings contributed to the increase in the number of comments made at the hearings into the 1980s. Here we explain the increase in the quantity of hearing dialogue in the 1980s. We attribute this development to the introduction of gavel-to-gavel television coverage of the hearings. In 1981, C-SPAN first televised the hearings, and coverage was expanded to public television in 1986 and to CNN and other cable networks in 1987 (Comiskey 1999; Farganis and Wedeking 2011: 531). In the decade preceding O'Connor’s 1981 appearance before the Committee, an average of 664 statements were made at the

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<sup>16</sup> These results hold if we separate statements made by nominees and senators: the correlation between the number of comments made by senators and nominees is 0.99.



hearings. During the O'Connor hearing, 868 statements were made. Post-O'Connor, an average of 1,779 comments were made at the hearings.<sup>17</sup>

Thus, although O'Connor's was the first televised hearing, the most significant increase in hearing dialogue began with the subsequent hearing – that of William Rehnquist in 1986 for the Chief Justice position. This is made evident by the relatively large coefficient corresponding to the *Post-O'Connor* variable in the Poisson regression model and the corresponding increase in the predicted (and actual) number of hearing comments beginning with Rehnquist in 1986. It therefore appears that the O'Connor hearing taught Committee members that Americans had a great deal of interest in the hearings, and the expanded broadcast of the hearings that followed provided senators increased opportunities to tap into that interest in a new way. Consequently, even though it was unlikely that most Americans would tune into the hearings for hours on end, broadcasting the hearings provided the public with the option of watching portions of the hearings live or catching recaps on nightly news. As a result, for the first time, Americans could watch and listen to Committee members probe nominees on the salient issues of the day. Senators took advantage of

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<sup>17</sup> This figure drops to 1,620 comments when we exclude the Bork hearing, which is a clear outlier. We verified that the increase in hearing dialogue came immediately after the O'Connor hearing by running a Poisson regression model using the total number of comments as the dependent variable, with independent variables capturing the Rehnquist and Bork hearings and the year of the hearing. This corroborated that the increase in hearing dialogue is attributable primarily to Rehnquist's Chief Justice hearing in 1986 (the first post-O'Connor hearing) as the coefficient associated with the Rehnquist hearing was three times greater than the coefficient associated with the Bork hearing. This finding also suggests that the increase in hearing dialogue is primarily attributable to television coverage, and not to the fact that the Bork hearing marked the first time that nominees faced questions from all members of the Judiciary Committee (Wedeking and Farganis 2010).

this fact and began to use the hearings as an opportunity to take public positions, claim credit, and advertise (see also Yalof 2008). Thus, televising the hearings resulted in the increased scrutiny of Supreme Court nominees, which promoted the ability of Committee members to pursue electoral goals.

### **Changes in the Content of Hearing Discourse**

This increased scrutiny, moreover, is substantive, not superficial. It is due to a reduction in non-substantive dialogue, combined with increased attention to judicial decisions and an expansion in the scope of issues discussed at the hearings. As we show below, the hearings were initially quite short and often chummy affairs. In the late-1960s through the mid-1970s, they turned into more serious discussions as Committee members began examining nominees on their views of judicial decisions and increased the breadth of their questions. Perhaps more than anything else, these developments helped define the unique role, and unique value, of the Judiciary Committee in the confirmation process, enabling senators to both enhance the legitimacy of the hearings and pursue instrumental goals.

Although Supreme Court confirmations have long been subject to political conflicts (Abraham 2008; Epstein and Segal 2005), prior to Thurgood Marshall's appearance before the Committee in 1967, the hearings tended to be brief and often non-confrontational (Yalof 2008). From 1939-1965, an average of only 260 comments were made at the hearings. From Marshall to O'Connor, this increased to 1,074 statements per hearing (and to 1,778 in the post-O'Connor era). Importantly, the qualitative content of hearing discourse during this time period changed in three notable ways. First, senators moved away from devoting a substantial amount of their "questions" to expressing their admiration for the nominees and engaging in non-substantive dialogue. For example, at Charles Whittaker's hearing in 1957, more than a third of questions involved basic background information, such as where the nominee was born, went to school, and his family status.

Senator Watkins (R-UT) went as far as to praise Whittaker for his “persistency” for having ridden a pony to and from school each day. Likewise, during the hearing of Byron White in 1962, a full third of the hearing was devoted to the senators gushing about White’s athletic prowess (he was a former professional football player). While it was not uncommon for Committee members to express their esteem for later nominees and engage them in congenial questioning, the senators no longer devote such substantial portions of the hearings to doing so.

**[ Figure 2 About Here ]**

Instead, a large proportion of hearing inquiries today are dedicated to examining nominees on their perspectives on judicial decisions, the second notable development we identify. Figure 2 illustrates this by reporting the number of comments at each hearing involving judicial decisions, as well as the predicted number of comments based on the Poisson regression model.<sup>18</sup> In addition to a variable capturing the year of hearing (*Year*), this model also includes a dummy variable (*Marshall*) scored 0 for hearings held before 1967 and 1 for those held from 1967-2010.

Figure 2 reveals that discussions of precedent were rare at the earliest hearings: an average of only 12 comments at hearings prior to 1967 involved questioning nominees on judicial decisions and precedents were never broached at three hearings, those of Jackson, Brennan, and White. Beginning with Marshall’s appearance, however, debates about precedent became a mainstay at the hearings: from 1967-2010, an average of 291 comments implicated the nominees’ views of judicial decisions. Though there is some notable variability in this figure, with modest attention devoted to precedent

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<sup>18</sup> We coded all instances in which a statement unambiguously related to a named case as involving the discussion of a judicial decision, even if the senator or nominee did not identify the case in a given comment. For example, if a senator asked a nominee about his or her position on a case and the nominee provided that position without referencing the case, both statements are coded to reflect the fact that they implicated a judicial decision.

at the Burger (1969) hearing and those held in the 1970s, the Marshall hearing nonetheless ushered in a new age in hearing content (Batta et al. 2012). This is substantiated by the large increase in the predicted (and actual) number of comments involving judicial decisions beginning in 1967.

**[ Figure 3 About Here ]**

The third change in the content of hearing dialogue we explore involves the range of issues discussed at the hearings. This information appears in Figure 3, which reports the total number of unique issues addressed at each hearing based on the 39 categories discussed in footnote 13. The solid line indicates the number of issues, while the dashed line is the predicted number of issues based on the Poisson regression model. The model includes a year of hearing variable (*Year*), as well as a dummy variable (*Stevens*) scored 0 for hearings held before 1975 and 1 for those held from 1975-2010.

This figure reveals a rather steady increase in terms of the diversity of hearing discourse over time. With the exceptions of Fortas (1968) and Stewart (1959), all of the hearings prior to 1975 involved the discussion of less than ten issues. From 1975-2010, an average of 17 issues were addressed at each hearing. Thus, the Stevens' hearing marked a change in the substance of the hearings, as is evidenced by the sharp increase in the predicted (and actual) number of issues discussed at each hearing beginning in 1975. As Ringhand and Collins (2011) demonstrate, much of the change in the focus of hearing dialogue involved increased attention to issues that gained particular salience beginning in the 1960s and 70s, most notably racial and gender discrimination. It is apparent that the senators responded to the expansion of the political community to include minorities and women by investigating nominees' positions on issues salient to these groups.

We attribute the three changes identified above to both fostering the legitimacy of the hearings and promoting the ability of Committee members to pursue instrumental goals. Transitioning the hearings from chummy affairs among friends to forums in which nominees are

pressed on their views on Supreme Court precedent and salient legal and political issues increased the legitimacy of the hearings to an expanding citizenry. It did this by helping to establish the hearings as important democratic checks on the makeup of the Supreme Court. While many early nominees were able to win confirmation by currying favor with senatorial “insiders,” for later nominees the hearings are a moment of democratic reckoning. Responding to the concerns of an expanding electorate, nominees today are expected to provide their perspectives on a wide range of significant issues and affirm the existing constitutional consensus before taking their seats on the high Court (Collins and Ringhand n.d.). Thus, the transformation of the content of hearing dialogue helped establish the hearings as having a unique and significant role in the Supreme Court confirmation process.

At the same time, these changes allowed Committee members to pursue instrumental goals. First, the growing substance and gravity of nominee questioning better enabled senators to make informed choices as to whether or not to support or oppose a nominee’s candidacy for the Court. Second, the move away from devoting significant attention to non-substantive questioning to primarily debating salient legal and political issues, including the Court’s precedents, provided a high-profile forum for Committee members to engage in position taking and advertising on issues that are important to their constituents (a role that was made even more visible after the hearings were televised in 1981). Finally, diversifying the range of topics discussed at the hearings increased the opportunities for senators to claim credit on their own contributions to the development of the policies debated at the hearings.

### **Equalizing Questioning**

The final institutional development we explore involves the equalization of nominee questioning between Committee members of both parties. Figure 4 reports the percentage of comments made by majority party senators (solid line), along with the predicted percentage of

majority party comments (dashed line), based on the results of a Tobit model.<sup>19</sup> This model includes a variable capturing the year of hearing (*Year*) and a *Post-1970s* dummy variable, scored 0 for hearings prior to 1981 and 1 for those held between 1981-2010.

During the first four decades of hearings, there was substantial imbalance in the number of statements made by majority and minority party senators. From 1939-1975, Democrats, who were in control of the Judiciary Committee, contributed 75% of all hearing dialogue. Beginning with the O'Connor hearing, however, dialogue evened out. From 1981-2010, questions made by majority party senators accounted for 53% of all hearing dialogue. Thus, the past three decades of hearings have been defined by a move toward equality in nominee questioning (see also Farganis and Wedeking 2011), as is evidenced by the large coefficient associated with the *Post-1970s* variable and the corresponding decrease in the predicted (and actual) percentage of majority party comments.

**[ Figure 4 About Here ]**

Differences in questioning based on partisanship are, of course, partly attributable to the makeup of the Committee. As would be expected, during periods of Democratic control of the Committee, Democratic senators have more members and tend to ask more questions. However, it is important to recognize that the move toward equity in questioning is also due to changes in the distribution of committee assignments in the Senate. As Sinclair (1988) notes, the 1980s marked a period in which Committee assignments were distributed more evenly and senators took up more committee positions. As it pertains to the Judiciary Committee, a consequence of this is that we would expect to see less one-party dominance of the hearings beginning in the 1980s, which is borne out in Figure 4.

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<sup>19</sup> We use a Tobit model since the dependent variable, the percentage of comments made by majority party senators, is censored between 0 and 100.

We concur with Sinclair (1988) that increased equity in Committee assignments, a consequence of which was the equalization of hearing questioning, was pursued for primarily instrumental reasons. Distributing committee assignments more evenly allowed more senators to take advantage of the benefits that can accrue from their participation in confirmation hearings. Namely, a wider range of senators were enabled to engage nominees, allowing them to make better informed choices regarding their confirmation votes, and use the hearings to position take, credit claim, and advertise.

### **Conclusions**

The development of institutions has long piqued the interest of scholars and for good reason. As institutions evolve, they establish norms that help them carve out their identity as a legitimate part of the governing system. In the process, political actors are able to utilize these changes to advance their own goals. Thus, studying institutional change enhances our understanding of both the political system at large and the behavior of actors in that system. In this paper, we presented the first analysis of the institutionalization of the Senate Judiciary Committee hearings of Supreme Court nominees.<sup>20</sup> As we illustrated, what began as a largely non-descript committee with only limited input into the fate of Supreme Court nominees developed into a highly visible institution that plays a starring role in the confirmation process.

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<sup>20</sup> While we have explored a range of institutional developments, we have focused on major changes to the confirmation hearings, as opposed to more minor alterations such as setting aside a portion of the hearings for closed-door sessions regarding the confidential investigations of the nominees conducted by the FBI that began in 1992 (Rutkus 2010). In addition, we have omitted developments exogenous to the Committee, including the increasing use of “murder boards” to prepare nominees for their hearings (Rutkus 2010).

We further explored the motivations behind these changes, demonstrating that both legitimating and instrumental factors contributed to the evolution of the Committee. For example, following public outrage regarding its handling of Hugo Black's nomination, the Committee began holding public hearings of Supreme Court nominees. This change was made in an effort to enhance its legitimacy in the eyes of the public. Other developments occurred for primarily instrumental reasons, such as the increase in hearing dialogue that occurred in the mid-1980s following the inaugural television broadcast of the hearings. Senators took advantage of the opportunity to use the hearings to communicate with their constituents, thereby increasing their opportunities to credit claim, position take, and advertise. Still other changes were motivated by both legitimizing and instrumental factors, such as the evolution of the content of hearing discourse. Thus, this research corroborates the utility of viewing institutional development from both legitimating and instrumental perspectives (e.g., Hall and Taylor 1996; Pierson 2000).

While we have framed our analysis of the institutionalization of Supreme Court confirmation hearings in terms of how developments promoted the legitimacy of the hearings and members' goals, this paper also sheds light as to whether endogenous or exogenous factors shape institutional change (e.g., March and Olsen 1984). We believe two changes are best viewed as being motivated by exogenous events. First, public indignation at the Committee's handling of the Black nomination resulted in the Committee holding public hearings. Second, the introduction of live television coverage of the hearings increased senatorial questioning. The proximate cause of other changes we have identified, such as the alterations in the content of hearing discourse, were endogenous. These developments were pursued by senators "to produce over time a structure reasonably conducive to goal achievement" by members of the Judiciary Committee (Sinclair 1988: 277).<sup>21</sup>

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<sup>21</sup> Another framework for understanding institutional development is to view change in light of measures related to differentiation, durability, and autonomy (e.g., Huntington 1968). While we



This paper also informs our understanding of the wisdom of efforts to reform the confirmation process. Supreme Court confirmation hearings have been subject to a great deal of scrutiny and criticized on a variety of fronts (e.g., Davis 2005; Eisgruber 2007; Yalof 2008). Yet, it is clear that the hearings did not develop into the institutions they are today for haphazard reasons. Rather, they evolved in response to public pressures and as a means for Committee members to pursue their goals. Critics of the process, such as those suggesting that questioning be restricted, held behind closed doors, or eliminated altogether (e.g., Nagel 1990; Reynolds 1992; Wittes 2006), need to keep this mind. Any proposal to reform the confirmation process must recognize that institutions do not evolve at random. Rather, actors make conscious choices to develop institutional norms that enable them to pursue their goals and stake out a unique identity for the institution in the political system.

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believe that such an approach can be very useful, it is better suited to understanding the development of large-scale institutions, such as the House of Representatives (Polsby 1968) or the Supreme Court (McGuire 2004), as opposed to a smaller-scale bodies operating within a larger institutional setting (e.g., Fenno 1962). For example, salaries and expenditures, often used as a proxy for durability (e.g., Polsby 1968; McGuire 2004), are determined at the large-scale institution level (i.e., House or Supreme Court), not at the committee level.

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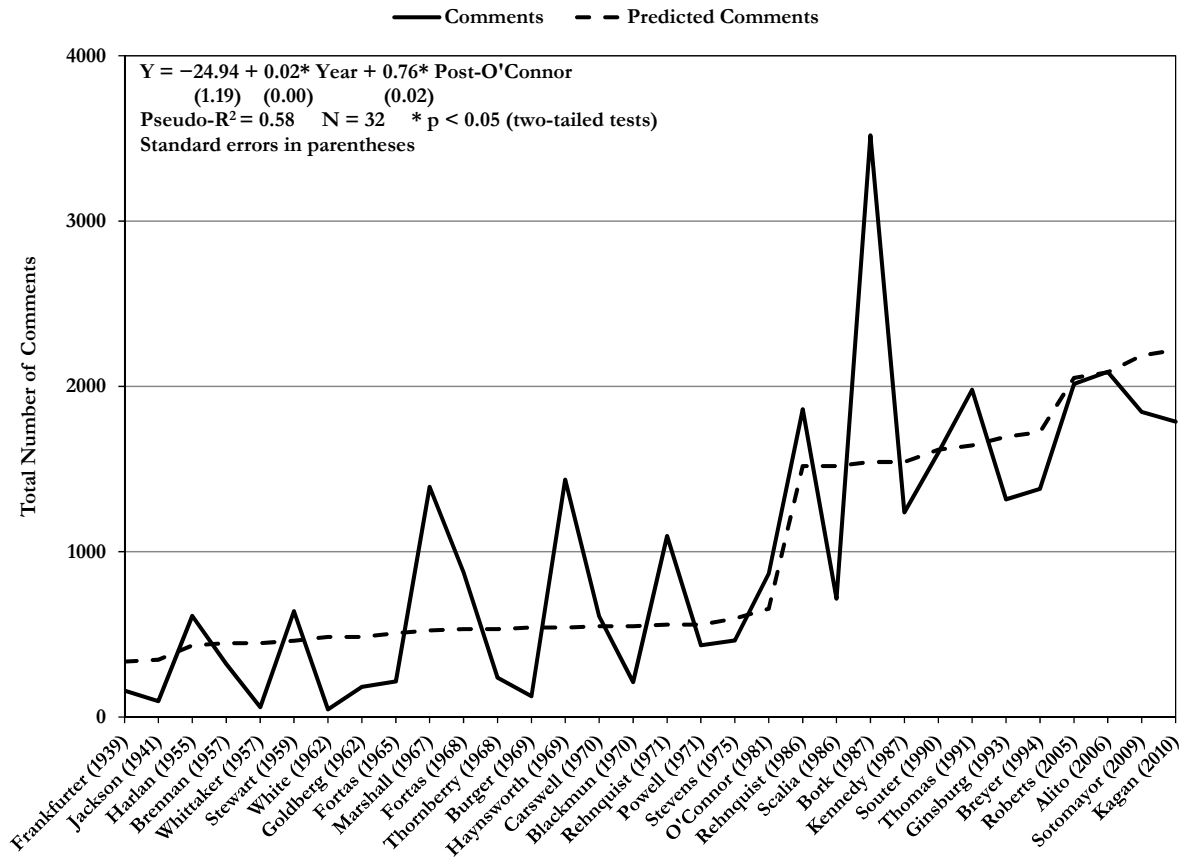
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Figure 1. The Number of Comments Made at Supreme Court Confirmation Hearings, 1939-2010





**Figure 2. The Number of Comments Made at Supreme Court Confirmation Hearings Devoted to Judicial Decisions, 1939-2010**

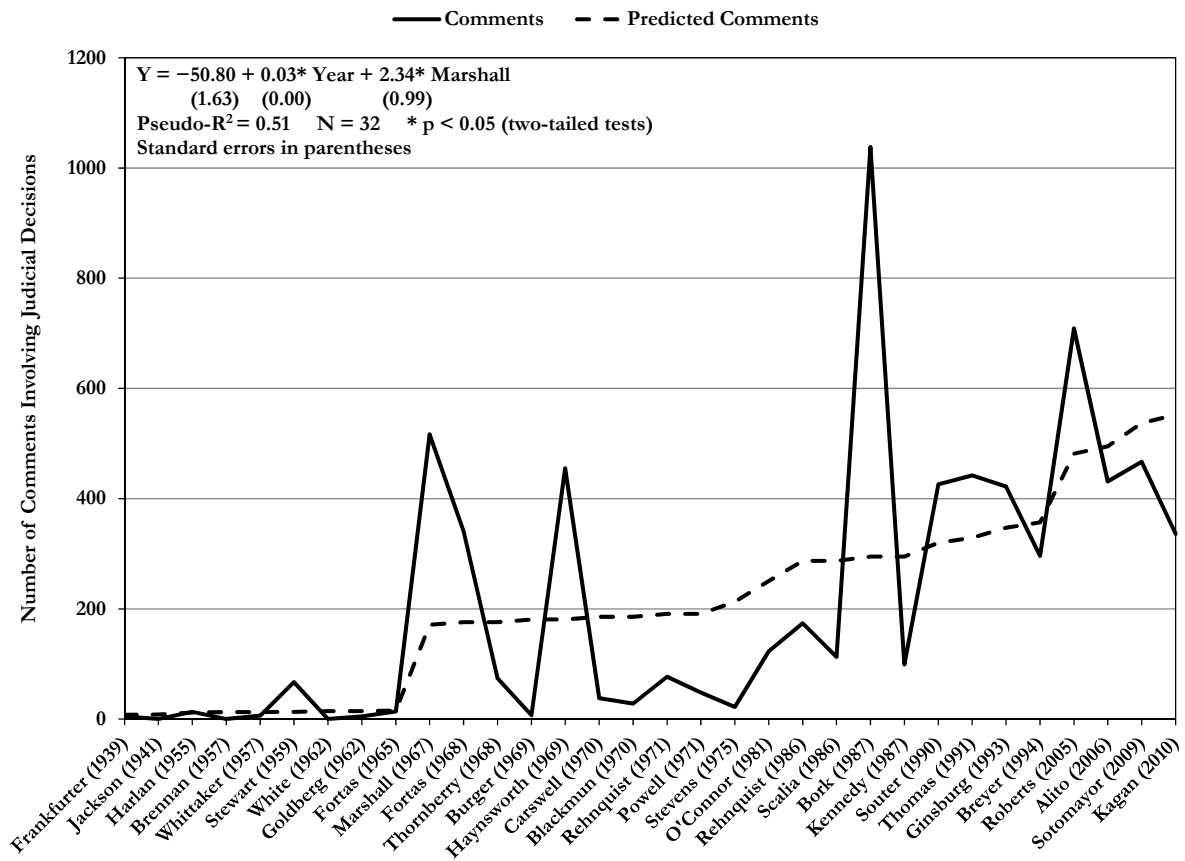


Figure 3. The Number of Unique Issues Addressed at Supreme Court Confirmation Hearings, 1939-2010

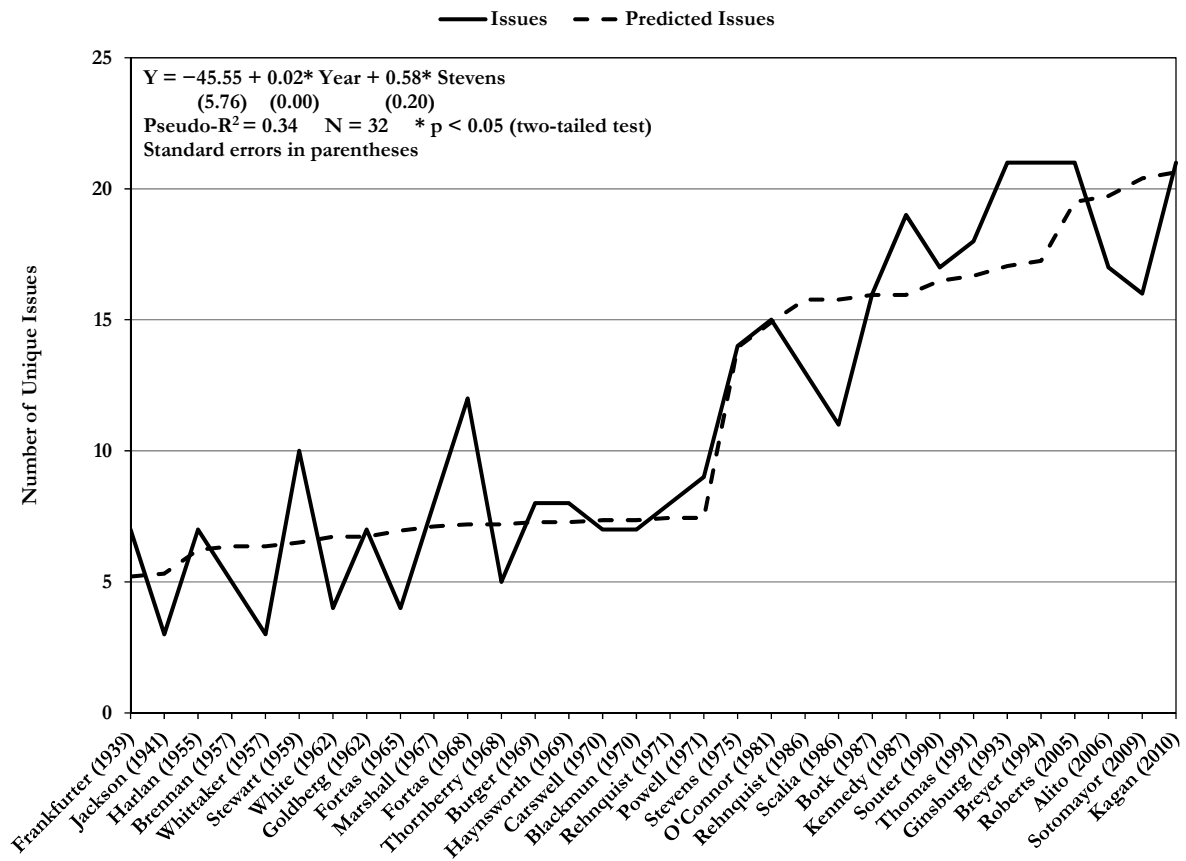


Figure 4. The Percentage of Comments Made by Majority Party Senators at Supreme Court Confirmation Hearings, 1939-2010

