A Vapid and Hollow Charade?
Supreme Court Confirmation Hearings and Nominee Candor

BOOK PROSPECTUS

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Overview

Have Supreme Court nominees really become more evasive in recent years? Critics certainly think so. Senate confirmation hearings are routinely derided as “exercises in obfuscation” or a carefully choreographed “Kabuki dance” – devoid of real substance because nominees now duck and dodge the most important and difficult questions.

These are serious charges. Confirmation hearings are an integral part of the American system of checks and balances. They provide senators – and, by extension, the public – with their best opportunity to shape and influence the Court. As such, the idea that nominees might not be forthcoming during their testimony before the Judiciary Committee – the last real moment of accountability they will face – has profound implications for American democracy.

But do today’s nominees really sidestep more questions than their predecessors? Is the mainstream view of the hearings – namely, that the process has been reduced to what Elena Kagan called “a vapid and hollow charade” – an accurate one?

Our book suggests that it is not. Based on a line-by-line analysis of every confirmation hearing since 1955 – an original dataset of nearly 11,000 questions and answers – we discover that nominees are far more forthright than generally assumed, and that there has not, in fact, been a dramatic decline in candor in recent years. To the contrary, some of the earliest nominees were actually less willing to answer questions than their contemporary counterparts. In short, we challenge the widely-held belief that Supreme Court nominees have become more evasive over the past two decades. We then explore the sources of this widespread misperception about the hearings, and find that a number of factors – most notably, perhaps, the introduction of televised coverage of the hearings in 1981 – have helped create the impression that nominee candor is in decline. We close by examining the effect that a nominee’s responsiveness has on his or her confirmation chances. Despite what senators often claim, their votes are driven by party and ideology, and not the degree to which the nominee answered their questions.

Overall, then, we believe that our project makes at least three significant contributions. First, it “busts the myth” that Supreme Court nominees are less forthcoming today than they were in the past. Second, it introduces a scoring system for judicial nominee testimony – one that can easily be used to evaluate future Supreme Court nominees, as well as nominees for other federal court positions. And third, it sheds light on the complex interaction between candor, confirmation voting, and changes in the Senate committee system and congressional culture. Taken together, these findings should appeal to a wide range of readers – scholars, students, journalists, and even more casual Court enthusiasts – who are interested in the Supreme Court, judicial behavior, and judicial politics.

Existing Work

We believe that as the first large-scale empirical analysis of Supreme Court nominee testimony, our book can offer something quite different from existing work. Previous efforts have made important contributions by offering suggestions for how to fix the “defective” or “broken” confirmation hearings (Davis 2005; Eisgruber 2007), analyzing the politics of the confirmation process from an institutional point of view (Maltese 1995; Silverstein 1994; Watson & Stookey 1995), and providing historical perspective (Abraham 1999; Comiskey 2004). But none of these books has attempted to analyze changes in the hearings from the vantage point of nominee candor – the part of the hearings that has generated more attention and criticism than any other.
While the number of recent books on Supreme Court confirmation hearings and nominee testimony has been somewhat limited, journal and law review articles have been more abundant. Here, the recent work by Ringhand and Collins (2010) is particularly noteworthy, as it carefully documents changes in the types of questions that senators have asked over time, and correlates those changes to things such as partisanship, race, and gender. This expands on previous efforts by Czarnezki, et al. (2006), Williams and Baum (2006), and Ringhand (2008), all of which examine the question-and-answer dynamic during the confirmation hearings, though with a more limited scope or date range. Meanwhile, a lively debate – mostly among legal academics – continues over whether the Judiciary Committee should be asking difficult, substantive questions of the nominees – and whether the nominees should be expected to answer them. Here we are thinking of widely cited pieces by Carter (1988), Post and Siegel (2006), and, of course, Kagan (1995). We believe that our book will help deepen this debate by providing crucial empirical evidence and data about the nominees that has, until now, been missing.

Lastly, our book also aims to speak to recent scholarship on changes in the political culture of Congress – and in particular the Senate and its committees. We highlight several changes in the nominee confirmation process and how they intersect with several important trends in Congress: the increasing levels of party polarization, the movement beyond ideology as the only source of conflict in the Senate, and the renewed importance of constituent preferences for Senate voting on Supreme Court nominees. These intersections help explain a crucial part of what we call the growing “misperception” that nominees are becoming more evasive.

Chapter Outline

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Chapter One: A Vapid and Hollow Charade?

We begin with Elena Kagan’s description of recent Supreme Court confirmation hearings as a “vapid and hollow charade.” Kagan’s characterization captures what nearly all scholars and pundits seem to believe: that recent nominees have become more evasive in the face of Judiciary Committee questioning, and that the confirmation hearing process has suffered greatly as a result. In fact, Kagan’s characterization of the post-1980s hearings as a “vapid and hollow charade” enjoys nearly universal assent among scholars, pundits, senators, and just about anyone else who follows the Supreme Court confirmation process. The precise descriptions themselves may vary – from “exercise[s] in obfuscation” (Yalof 2008) to a “‘kabuki’ dance,” (Fitzpatrick 2009), a “farce” (Benson 2010), or simply a “mess” (Carter 1988) – but the basic idea is the same: Supreme Court nominees are no longer forthcoming during their testimony, and Supreme Court confirmation hearings are no longer working properly as a result. In this book we test this argument.

Chapter Two: The Hearings in Historical Perspective

In Chapter Two, we trace the evolution of Supreme Court confirmation hearings. We begin with a discussion of the pre-hearings era. Some readers might be surprised to learn that prior to the mid-1950s, nominations were generally moved through with little debate; in fact, until 1868, they were not even referred to the Judiciary Committee. And even after 1868, the first few decades worth of hearings were
not public, and the nominees themselves rarely appeared. Finally, in 1955 – not coincidentally just one year after the Court’s controversial ruling in *Brown v. Board of Education* – the hearings became a regular feature of the confirmation process.

Interestingly, the hearings have undergone a number of important structural changes over the past fifty years. We showcase three of these developments, using figures for greater illustration, because each of them ultimately plays a pivotal role in explaining differences in nominee candor – the central focus of our book. The first of these changes is that the number of questions that each nominee is asked by the Judiciary Committee has increased dramatically since the hearings began. For example, in 1962 Byron White was asked only six questions, while Samuel Alito, in 2006, faced more than seven hundred. A second important change is that the questioning has become much more evenly distributed between the two parties over time. For instance, Democrats asked nearly 95 percent of the questions during Potter Stewart’s 1959 hearings. Today, however, the balance is much closer to a 50-50 split between the two parties. The final change we highlight here is the advent of televised coverage of the hearings in 1981. This development, perhaps more than any other, will prove critical to explaining why recent nominees are perceived to be more evasive than their predecessors, even when they are not.

**Chapter Three: Coding the Hearings**

Chapter Three provides a clear and detailed discussion of the method that we developed for measuring nominee candor. Using abundant examples from the hearing transcripts themselves, we walk through the coding process. Each question and answer from every hearing from Harlan to Kagan was analyzed – a dataset comprising nearly 11,000 exchanges. We explain how both the questions and the responses were carefully categorized. Questions were divided into those that sought basic factual information (e.g., “Where did you go to law school?”) and those that sought opinions and views (e.g., “Do you believe the Constitution protects the right to an abortion?”). They were also divided by topic (e.g., constitutional philosophy, states’ rights, foreign affairs, civil liberties, etc.). Nominee responses were then divided into one of five categories, depending on the level of candor, or “forthcomingness,” that they exhibited. We also allowed for partially forthcoming answers, as well as interrupted answers, and a special category for “non-answers” – responses that used only facts to answer questions that were seeking opinions or views. Crucially, if the nominee was not fully forthcoming in their response, we coded the reason for their lack of candor. Here again, we generated enough categories to ensure coverage of all of the most likely options, including concerns about the issue coming before the Court in the future, concerns about judicial independence, and insufficient information to answer the question.

**Chapter Four: Are Supreme Court Nominees Forthcoming?**

In Chapter Four, we turn to our central inquiry: Have nominees become significantly less forthcoming over time, as the conventional wisdom suggests? The short answer, we discover, is no. Roughly speaking, responsiveness has been fairly stable over time, with most nominees answering more than 60 percent of questions without any qualification or hesitation at all. Outright non-responsiveness, it turns out, is quite rare both for recent nominees and their predecessors. Nominees from Harlan to Kagan have, on balance, been better about answering questions than we expected. And while there has been a slight decline in responsiveness since the Bork hearings, it is nothing on the level of what we had been led to believe by critics.

That said, some nominees have been more forthcoming than others. Therefore, we look for answers to why this variation exists, and find one very compelling explanation: questions about civil liberties and civil rights issues (e.g., free speech, abortion, and affirmative action) tend to drive down nominee candor levels more than other questions. This, in turn, may help explain why there is such a strong perception that nominees have become less forthcoming of late: civil liberties and civil rights
questions have increased gradually over the years, pushing nominee responsiveness down slightly. But since those types of questions tend to be the most carefully watched exchanges, there is a heightened sense that nominees are answering far fewer questions than they did in years past. Overall, however, our view is that the empirical record does not support the characterization of the hearings as “vapid and hollow”. At the very least, we believe, if one considers today’s hearings to be vapid and hollow, one would also have to say the same about earlier hearings as well.

Chapter Five: Polarized and Televised: Changes in Committee

Having dispelled the myth that recent Supreme Court nominees have become dramatically more evasive, we turn our attention in Chapter Five to the relationship between a nominee’s testimony and the Judiciary Committee’s vote. It is not uncommon today for senators to claim that their confirmation vote is based on the degree to which the nominee is forthcoming during his or her hearings. For example, as Senator Chuck Schumer told John Roberts in 2005, “[T]he first criterion upon which I will base my vote is whether you will answer questions fully and forthrightly” (Schumer 2005, 39). But is this in fact the case? Here we make one of our most surprising discoveries: Since the early 1980s, voting has been driven much more by partisanship than by the nominee’s actual responsiveness during the hearing. Nominee responsiveness was more of a factor in committee voting prior to the 1980s than it is today. In fact, in recent years, responsiveness is not statistically related to how senators vote. What is more surprising, perhaps, is that partisanship played little systematic role in voting prior to the 1980s (though ideology did). This finding calls into question one of the central narratives of the modern confirmation hearings – that nominee responsiveness matters. Instead, as the Senate has become more polarized, and as the hearings have become much more widely watched because of television, the role of ideology in committee voting has increased and the impact of nominee candor has decreased. Thus despite what many current Committee members may want the nominees to believe, the decision on how to vote is probably determined in advance, and is not as the result of how forthcoming or evasive a nominee is during his or her testimony.

Chapter Six: The Perception Gap

In our last substantive chapter we ask, if nominees today are not significantly more evasive than in years past, then what exactly is driving the perception – a widespread one, to say the least – that the hearings have become so “vapid and hollow?” In Chapter Six, we identify three factors that have led to this misperception. First and foremost, hearings before 1981 were not televised, and little attention was paid to them. As a result, critics have a tendency to romanticize earlier proceedings – significantly “rounding up” the degree to which pre-O’Connor nominees answered questions – which has made recent hearings look less substantive by comparison. Second, when they do not answer questions, nominees have increasingly offered two excuses – the issue could come before the Court, or they do not know enough to answer – both of which critics apparently perceive to be particularly evasive. And lastly, the public appetite for answers from nominees has grown over time, as indicated by public opinion survey data. Together, these three factors have created a kind of “perfect storm” whereby recent nominee performances have been framed as being significantly less forthcoming and less substantive than earlier nominees, when in fact the differences are not that great.

Chapter Seven: Can the Hearings Be Improved?

We close by exploring how our findings might influence the ongoing debate about how the hearings should be reformed. We review the two main calls for change – one that says senators should ask the nominees fewer substantive questions, and the other that says they should ask them more. Our findings, we believe, highlight at least three reasons why these proposals have not yet met with much success. Most notably, we argue that by focusing too intently on the post- Bork nominees, critics have failed to
appreciate that whatever problems the hearings might have are inherent to the process. Moreover, by vastly overestimating the degree to which the post- Bork nominees have been evasive, these same critics have suggested changes that are too sweeping. Instead, we suggest a more modest solution that allows senators to use the kinds of findings we present in this book to assess nominees against an objective standard of responsiveness.

**Works Cited**


Williams, Margaret, and Lawrence Baum. 2006. “Supreme Court Nominees before the Senate Judiciary Committee.” Judicature 90(2): 73-80.

Supreme Court nominee Elena Kagan’s law-school criticism of the confirmation...Â ‘vapid and hollow charade,’ â€“ said Sen. Herb Kohl (D-Wis.). Sounding more like his Republican colleagues, Kohl questioned Kagan’s lack of judicial experience and demanded she be forthright about her legal philosophy. She also got beat up by Republicans for having never served as a. Ms. Kagan has less real legal experience of any nominee in at least 50 years,” said Sen. Jeff Sessions (Ala.), the panel’s top Republican. Kagan, a former Harvard Law School dean who quickly won confirmation as Obama’s sol