Please read through this document carefully. The Excel spreadsheet you received includes all senators' questions/statements from the Senate Judiciary Committee' Confirmation hearing for a Supreme Court nominee. None of the nominees' responses are included. We are trying to capture the hostility of senators' questions/statements during these hearings.

In the spreadsheet you will see that the second column, labeled hostility, is empty. In this column, you will type the number that you think best represents the senators' portion of the exchange with the nominee in this column. Please code as follows:

1 = Encouraging/Pleasant/Complementary
2 = Factual/Neither positive or negative
3 = Hostile
4 = Not sure
7 = Cross-chatter
999 = missing text & uncertain because of missing text

If you are unfamiliar with Supreme Court confirmation hearings please visit: https://www.c-span.org/video/?294264-2/kagan-confirmation-hearing-day-2-part-1. This is a video clip from now Justice Elena Kagan's confirmation hearing in 2010. The examples below will help illustrate what we mean by hostile, encouraging, and factual.

If you find any questions that you think are (1) perfect examples of any of the four categories or (2) amusing/memorable please add a 1 to the column labeled "Example."

If you have any questions throughout your coding at all please email laneeli1@msu.edu **and** schoen31@msu.edu and include "Grandstanding Coding" in the first part of your subject line.

GRANDSTANDING CODING – EXAMPLES

Encouraging/Pleasant:

1. Senator. AS a friend of mine at home says, "Bingo."

2. Senator. Much has been said about your ability to be a consensus builder, and the collegiality of the Court. Do you think that the collegial atmosphere of the John Marshall Supreme Court is preferable to the more-or at least it appearing-to the appearing contentious atmosphere of the Court today; and what do you think are the advantages of collegiality and consensus, and what role do you think you can play to help bring this about

3. Senator. Thank you, Mr. Chairman. Judge Breyer, we all admire not only your outstanding record, but your perseverance in surviving this deliberation. We trust that you will be kinder to the people who appear before you at Court than we are to you. I have been particularly intrigued with the opportunity to read some of your writings-I have not read all of them, but I have read some-and to listen to your responses. You strike me as an individual who is not only a legal scholar but as someone who combines it with a scientific approach to examining facts. I sense in you a willingness to go beyond a doctrinaire political philosophy and look at facts in making up your mind. Is that a fair judgment

4. Senator. But your point that a judge should be willing to do what is unpopular, just as Senators should be willing to do what is unpopular, tell me something in the background of Judge Breyer that indicates a willingness to stand up to do what is unpopular (The senator is giving him an opportunity to speak about his credentials)

5. And that – please continue. I didn't mean to interrupt. I like what you are saying

6. Well, we all did a little of that. In any event, your remarks when you spoke with hardly or nary a note at 2 p.m. today was very impressive. I think to me, as a person who practiced law for 18 years in really what I thought of as the real world-and it was; you know, I have represented some real weird people, and did some real weird cases with some weird results, too, I can tell you that. [Laughter.]

   So the thing that impressed me is to hear you able to describe yourself and then hear you describe answers and form answers to pretty piercing questions from Senator Biden, Ted, Howard, Orrin, Strom. All of those-your answers come back with the lucidity of very impressive degree.

   I have always had the peculiar view that legislating should be done in a way-as I said earlier, in a way that is understandable to the governed. And certainly I always had a view of the law practice that if your clients could not understand what you had drafted for them, what was the purpose of practicing law?

   I know that is a screwy view, but it was mine. In other words, if the client did not know and looked at a contract that you had drafted and did not know what it said, what is the purpose of the law practice?

   And I think as a judge, writing opinions, what greater purpose of a judge is to write an opinion that the public can understand or to answer a question in a way that the public can understand, not just from some intellectual level, but from the gut level, from the commonsense level?

   And that is what has been most impressive to me-to hear you respond to these questions in a way that is extraordinarily understandabl-

Factual:

1. Senator. Well, let me make sure I understand your, for lack of a better phrase, rules of construction. If Congress delegates to the EPA the authority to make a judgment about what is necessary or reasonable to protect against a particular risk and not delegate that to the Court, then doesn't the Court basically have to show that the agency acted in a capricious manner? (Asking for clarification)

2. Senator. As I recall, he expressly stated that his opinion did not call into question State laws regarding homosexual conduct. (Asking for clarification)

3. Senator. I might point out that we are familiar with the cost of expensive buildings. You are in one right now. As a matter of fact, when it was first built, it was I believe the most expensive building in the city of Washington at that time, the Hart Building. As a matter of fact, most Senators were reluctant to move into this building, and by congressional fiat, the Senate leadership ordered the younger members to vacate the premises that they were then occupying and move in here, because the senior members were unwilling to take the public reaction to the costs of this Taj Mahal

4. Is that the school to which you would count yourself a graduate (Asking for clarification)

5. Who was the attorney general at that time (Asking for clarification)

Hostile:

1. Senator. It is a big deal in terms of outcome, whomever has the burden. We understand that in terms of criminal law. We understand that if the defendant had the burden to prove that he or she was innocent, it makes a big difference, the same facts, the same circumstances, it would make a big difference. In these cases, which affect economic rights and affect public health and welfare, whomever has the burden makes a big difference.

   Now, as you know, Judge Breyer, this is not the first time the Supreme Court has of late elevated-I do not want to be pejorative here-has moved the bar on economic rights. In the early part of this century, as mentioned by my friend from Utah, in the so-called Lochner era, named after the leading case of the time, the Supreme Court routinely struck down health and safety measures as unconstitutional. The Court struck down the types of regulation that everyone in this room now considers normal and appropriate. It struck down minimum wage laws, which we now take for granted, it struck down child labor laws, and it struck down workplace safety laws. The Court finally changed course and put an end to the so-called Lochner-izing toward the end of the 1930's.

   Now, would our society look different today, if the Supreme Court had not gone back on Lochner and still gave economic rights the same level of protection that it did during the Lochner era? What effect would there have been on labor laws, for example, and environmental laws, had West Coast Hotel v. Parrish not come along and overruled Lochner? Talk to us about that. Be a professor for a minute here. Tell us what the effect would be, as you would see it. (Lecturing the nominee and criticizing the Court's past work)

2. Senator. Judge Breyer, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary ("Activist jury/judge/Court" carries a negative connotation)

3. Senator. Judge Breyer, I am glad to hear you say in your previous discussion with Senator Leahy that child pornography is not protected speech. You dealt with child pornography when you served on the Sentencing Commission, and you were making guidelines for violation of the child pornography statutes. There was a January 1987 meeting when one of the Commissioners, Judge MacKinnon, suggested adding an aggravating factor to the crime of transporting, receiving, or trafficking in child pornography. He proposed increasing the sentence when the

large sums of money often correlated with organized crime involvement in child pornography were present. And he made a motion to raise the base sentence by four levels, where the retail value of the exploitative material exceeded $25,000. It passed by -to-l vote. The one vote against the motion was yours. I am sure you had very good a 5reasons. Could you give me the reasons why you were the sole dissenter in a decision to impose tough sentences on the very worst child pornography producers and peddlers (Attacking the nominee's record)

4. Well, I appreciate your response. I think it indicates that you have empathy for the problem. In your writings, as a matter of fact, you reveal real empathy for those who are morally opposed to abortion. For instance, in 1986, as a State supreme court justice, you wrote a special concurrence in a wrongful birth case called Smith v. Coat, outlining, in your words, how a physician with conscientious scruples against abortion-this is a quote: How a physician with conscientious scruples against abortion and the testing and counseling that may inform an abortion decision can discharge his professional obligation, without engaging in procedures that his religious or moral principles condemn. As a matter of fact, that was sort of dictum. That was dictum in the case, it was not necessary.

   As attorney general, you filed a brief in Coe v. Hooker, which emphasized that thousands of New Hampshire citizens possess a very strongly held and deep- seeded moral belief that abortion is the killing of unborn children. That brief went on to conclude, It is not accurate to say that the moral feelings of other individuals and groups, both public and private, may not constitutionally interfere with a woman's otherwise unrestricted right to decide to have an abortion. I start off saying it is not accurate to say that. Now, you obviously indicated a concern for the doctor with conscientious scruples against abortion, you indicated your concern about feelings of individuals and groups, both public and privately.
   My concern is do you have the same degree of empathy for the woman who must make a difficult decision when faced with an unwanted pregnancy. That is really the thrust of my concern, and I think the thrust of the concern, frankly, Judge Souter, of millions of American women, not really wanting to know how you will vote on a particular case, but wanting to know whether you can empathize with their problem

Cross-Chatter:

1. Senator. The hearing will come to order. While we are waiting for the photographers to clear the well, I want the record to show, so I do not get graded badly by Professor Heinzerling from Georgetown, who is sitting behind me, that I do know that Ms. Patterson was not fired; she alleged racial discrimination. And I just want the record to show that, because I get graded by the visiting professors who come and help us on this. So I just want the record to reflect that. Senator Hatch.

2. Senator. Mr. Chairman, is there anything to the rumor that the reason they are going to me next is that the TV cameras had so adjusted their lights for Senator Simpson's head, they want to be consistent

3. Chairman. There is no need for a rollcall vote, unless some- one wishes to have one. If there is no wish to have one, all those in favor of going into closed session, signify by saying "aye"