REVIEW ESSAY

Is There a Confirmation Mess? An Analysis of Professor Stephen Carter's Critique of the Federal Appointments Process

THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS
PROCESS. By Stephen L. Carter.† New York: Basic Books, 1994.
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Reviewed by Michael A. Kahn‡

INTRODUCTION

The key to understanding Yale Law Professor Stephen Carter's book, *The Confirmation Mess*, is the dedication of the book: "For Thurgood Marshall." Carter reveres Marshall (for whom he clerked) and describes Marshall with unrestrained praise and admiration.¹ Carter believes (correctly) that Marshall was unfairly harassed and vilified during his 1967 confirmation hearing (pp. 3-5); and, more significantly, Carter opines that if Marshall were nominated today he might not be confirmed because he would have "too much baggage, too many eccentricities, too many enemies" (p. 4) and therefore would be disqualified in the court of public opinion. Indeed, Carter believes "[t]he chances are . . . that under today's silly rules, the nomination would have been withdrawn" (p. 4). To Professor Carter, the idea that the magnificent Thurgood Marshall might be denied a seat on the Supreme Court is blasphemous and clearly indicates that the system by which we select and confirm Supreme Court Justices badly needs fixing (p. 5).²

I do not agree with Carter's gloomy prognostication about a hypothetical 1990s nomination of Thurgood Marshall to the Supreme Court. I believe that were he considered today, Marshall would be nominated and confirmed. More importantly, I do not agree with Carter's assessment that

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1. Carter believes this view is widely shared and describes Marshall as "perhaps the most admired human being ever to sit on the Supreme Court" (p. 4).

2. Carter said in an interview, "That we have a world now where Thurgood Marshall could not be confirmed shows how absurd, how utterly absurd, our confirmation process has become." *Interview: Stephen L. Carter*, DALLAS MORNING NEWS, June 12, 1994, at 1J, 10J.

the system is a mess, nor that the state of institutional and attitudinal "disrepair" which Carter describes, is a recent phenomenon. This Essay will seek to explicate and criticize Carter's thesis and themes, as well as his suggestions for reform.

I

WHAT CARTER CLAIMS IS WRONG WITH THE CONFIRMATION PROCESS

In the preface, Carter reminds the reader that he has been thinking and writing about the "confirmation mess" in Washington for six years (p. xii). However, he disclaims the goal of comprehensive historical presentation of the process and, rather, stakes out the inushier sermonizing ground of an "extended essay" (p. xi) about "decency" and "honesty" (p. ix). One is tempted to respond that an essay about decency and honesty is an inappropriate vehicle for a serious discussion of so political a process as a public confirmation hearing held by the United States Senate. Indeed, though Carter's heart is clearly in the right place, this dialectical conflict between a value-driven process to which Carter, the apostle of honesty and decency, aspires and the results-oriented, venal political process which is the engine of our democratic system, threatens to undermine and trivialize Carter's entire analysis. The reader is confronted with two choices: either to interpret Carter's book as a humanistic plea for a more polite, reasoned, and even spiritual process of the selection and confirmation of persons to the High Court or other appointed office—which it clearly is—or to take Carter's appeal to the higher ground as a means to his more practical end of devising a solution to the problem.

Carter himself is ambivalent about the meaning of his work. Is it a blueprint for how to clean up the mess, or is it meant as a sermon to inspire better behavior by all parties concerned? In the last paragraph of the book Carter warns that unless we change our attitudes and become nicer and more principled—i.e., decent and honest—the confirmation mess will not be cleaned up and we will muddle through leaving "lots of blood along the way" (p. 206). One reviewer, upon coming to this summation, wondered why he was put to the trouble of reading Carter's meanderings if his conclusion was so trivial and wishy-washy.³

I reject the view that Carter's book is merely a sermon about the sins of the confirmation mess and a prayer and admonition that we change our attitudes. Rather, I think that despite his protestations to the contrary, Carter does purport to analyze comprehensively the history of the confirma-

3. The legal affairs editor of *The New Republic* commented about the book's conclusion: "Well then, the reader may ask, why have I just spent more than 200 pages trudging through a book called *The Confirmation Mess*?" Jeffrey Rosen, *Prosecuting the Nominees*, WASH. POST, June 19, 1994, (Book World), at 11.

tion process of Supreme Court Justices, cabinet officers, and other appointees, albeit with a broad brush. It is to that analysis that I now turn.

Carter's basic historical thesis is that up until roughly 1971, presidents had their own way in the selection of Justices and other confirmation candidates (p. 78). Carter divides pre-Nixon history into two historical phases. He asserts that prior to the presidency of Rutherford B. Hayes (1877-1881), presidents routinely consulted the leading members of Congress before sending the Senate a name for confirmation to the cabinet (pp. 34-35). As a result, prior to 1877, the confirmation process privately took into account senatorial prerogatives and venalities. The entire process at the very least was less publicly unpleasant and was, for the most part, smooth running and predictable (p. 35). President Hayes, however, would have none of this senatorial pandering. He established the current practice of unilaterally proposing a candidate while the Senate is left to do the confirming (or disposing, as the case may be). Carter observes that the procedures introduced by Hayes evolved into a presumption of presidential prerogative that has had an insidious effect on the current process (p. 34).

According to Carter, what evolved from Hayes' time was an assumption that the President had a right to have persons of his choosing in the cabinet. The implicit notion is that the appointment is a sort of extension of the presidential electoral mandate, with the President allowed to field a team to enable him to carry out the popular will (pp. 31-37). Carter denies that Supreme Court nominees are entitled to a presumption of confirmation (p. 73) and clearly longs for the good old days when Millard Fillmore consulted with Daniel Webster et al., before filling cabinet vacancies. Carter believes that the flawed process adopted by President Hayes has led to what he describes as the "disqualification problem" (pp. 21, 34-35).

Carter sees the emphasis on disqualification as the procedural root of all current confirmation evil: "[W]e presume nominees to be entitled to confirmation absent smoking guns, and then we look for the smoke in order to disqualify them (p. 7). . . . [T]he greatest problem with our approach to the confirmation process is the tendency to search for disqualifying factors" (p. 159). According to Carter, the focus on disqualification infects the current system at different stages and in different ways, although all of its manifestations are negative.

During the appointment phase (currently the exclusive realm of the executive branch as directed by the incumbent President), the focus on disqualification results in arbitrary and capricious rejection of candidates for no good or fair reason. Recent examples are Kimba Wood's failed candidacy for Attorney General and the inappropriate nanny problem disqualifier which surfaced during the Clinton presidency (pp. 7, 25-31, 179-82). By Carter's lights, the focus on noncritical issues such as casual long-past college drug use, "minor nannygate" problems, and even more remote matters such as whether a candidate's wife had an abortion, unfairly disqualifies

excellent candidates and deprives the nation of their service. Carter believes emphasis on the disqualification problem results in executive branch vetoes of candidates for the wrong reasons because of a fear of public opinion. Thus, the disqualification problem has a double whammy, or at least a double sifting effect, in that candidates are unfairly eliminated by the executive branch's own disqualification terms *and* by the administration's perception of the public's disqualification terms.

It is the public disqualification process that draws Carter's most fervent ire. His gripe is that the public airing of the disqualification process is mean, nasty and unfair—indeed, indecent and dishonest. Carter makes his case by selecting the most obvious examples of the ways in which Robert Bork's and Lani Guinier's views were distorted and misused during the campaigns against them. He tells us that the reasons for these unfair attacks on confirmation candidates are both political and process-oriented (pp. 23-53).

Carter argues that much of the public reaction to candidates for the Supreme Court is results-oriented and therefore political and not principled. He cites as a nonobvious example of this phenomenon the record of Ruth Bader Ginsburg regarding abortion rights. As Carter tells it, Ginsburg criticized the rationale of *Roe* though she agreed with its basic outcome (p. 94). Carter observes that the support for Ginsburg among most pro-choice groups establishes that they are only interested in results, i.e., policy, not jurisprudence or law (p. 95).

Because it is so results-oriented, the disqualification process becomes a no-holds-barred, win-or-lose affair in which any means to the end of winning is acceptable, indeed, justified (p. ix). Carter uses Bork's fate as the archetype. He characterizes the fight to defeat Bork as replete with distortions of truth by those who would do whatever was necessary to achieve their goal—to eliminate Bork (pp. 45-50). Because of the presumption of confirmability, the only effective ammunition in this battle was criticism which went to the issue of the candidate's disqualifications. Carter believes that the nature and extent of the public vilification of candidates is different in degree and kind today from at any other time in our nation's history. Therefore, he concludes, the system is a mess and needs to be cleaned up.

Before turning to Carter's solutions, one further aspect of the current situation that troubles him should be identified. Carter is concerned about the relationship between his ideal vision of judicial independence and the implications of the current state of the confirmation process on our democratic values (pp. 147-50). Carter's view is that the Court is and should be our most undemocratic institution (pp. 85-118). The historical and jurisprudential analysis he adduces makes the case that the purpose of the Court in our system is to stem the tide of an inevitably tyrannical majority that will attempt to run society in a manner which violates our most cherished values. Indeed, Carter points out that some of the most important decisions

regarding race relations, school prayer, and criminal defendants' rights were accomplished by the Court *despite* the will of the majority (pp. 89, 117).

Carter believes that the ideological basis of the political, results-oriented disqualification process is the notion that the majority can and should impose its will on the Court. Thus, the theory behind the current process ("mess") is that the majority can legitimately interfere with the confirmation process in order to manipulate a result in the Supreme Court: for example, abolishing the abortion right, upholding the death penalty, or overruling the school busing rulings. To Carter, this is a frightening prospect that eliminates judicial independence and thus erodes one of our society's greatest protections for its fundamental values (p. 116). Carter's solution, of course, is to eliminate the results-oriented focus upon disqualifying characteristics and "return" to a process in which the focus is on a candidate's qualifications, and the goal is to select and confirm a wise and moral justice who will properly exercise his or her judicial independence.⁴ How Carter proposes to do this is the subject I now address.

II

CARTER'S PREFERRED PROCESS

In order for any confirmation process to work, Carter insists, our politicians, and presumably the media and the public, need an attitude adjustment in the direction of acknowledging the benefits of judicial independence. We all need to eschew the goal of trying to control the outcome of the judicial process—that is, the vote of the Justice on a specific issue or set of issues. Instead, according to Carter, "the political task in the real world . . . is to people the bench not with Justices holding the right constitutional theories but with Justices possessing the right moral instincts" (p. 152). Having urged this political lobotomy upon us all, Carter then offers us the tools, or at least the topology, with which to accomplish his goal.

The remedy for our confirmation process ills, Carter maintains, is to focus on the qualifications of a candidate and to balance those qualifications against any negative factors that may arise. Carter groups negative factors by type, so as to capture the situations that have arisen during the recent heyday of the confirmation mess. The five types of "potentially disqualifying factors" (p. 160) are: (1) lack of qualifications; (2) loss of public respect; (3) immoral conduct; (4) illegal conduct; and (5) unprofessional conduct (p. 178). Carter states that these disqualifying factors exist on a curability continuum ranging from "never curable" for the first category, lack of qualifications, to "occasionally curable" for illegal conduct, to "somewhat more frequently curable" for unprofessional conduct (p. 178). It is hard to take this methodology seriously or even literally.

4. Carter describes such a person as "The Moral Judge" (p. 112).

Surely Carter, who takes academic discourse as a worthy pursuit, is not inviting his fellow former-Supreme Court-clerk law professors to analyze and rip apart his categories and rationalizations. Rather, I think he is making a simpler and more profound observation. Carter believes that whether or not someone should sit on the Supreme Court, or be an assistant attorney general for that matter, should be determined after a careful inspection of her qualifications (p. 159). If these qualifications are found to be abundant we should be extremely careful about booting the candidate out of the game. Moreover, when the reason for blackballing a candidate is trivial or, even worse, the product of malicious gossip or perversion of the candidate's views, we should rise up and overrule the objection to the candidacy. Since Carter does not believe that such a simple point will grab the attention of the nation's decisionmakers, he has couched it in a methodological topology.⁵ Of course, any means of getting this view across ought to be applauded.

However, since Carter has little confidence that his basic plea for decency and honesty will be heeded, and since he clearly does not think his new disqualification topology will sweep the nation, he ends the book with an attempt to prove by exclusion that attitudinal, rather than institutional, reform is our only salvation.

The last chapter is entitled "Some Modest Proposals, Reviewed" (p. 187). There is, however, nothing modest about the proposals Carter discusses. What is modest, and almost flippantly dismissive, is Carter's review of them. The nine proposals range from tinkering with the timing of the potential Justice's testimony to amending the Constitution to allow for direct, contested election of our Supreme Court Justices (pp. 187-203). Carter considers this latter proposal to be so modest that he dedicates less than a page (p. 202, if you are curious) to its review. Obviously, Carter, who is clearly capable of producing a lengthy analysis of this idea, has no interest in seriously exploring it.

Carter cursorily discusses these strawmen in the last chapter to make a point: viewed from the perspective of institutional changes, the current system does not seem so broken after all. More importantly, if one's goal, like Carter's, is to produce a more honest and decent appointment and confirmation process that eliminates the counterproductive focus on disqualification, reinforces judicial independence, and encourages great and good people to enter public service for the right reasons, then one can forget about any of the proposed reforms because each of them would be vulnerable to the problems of the current system and indeed might accentuate them. Aha, concludes our author, since we cannot fix the system because it is not broken, then the inexorable conclusion is that we need an attitude adjustment.

5. Presumably, Carter aspires to presidential recognition of his efforts following President Clinton's celebrated reading of Carter's previous effort, *The Culture Of Disbelief*. See Ross K. Baker, *Political Booknotes: The Confirmation Mess*, WASH. MONTHLY, May 1994, at 59.

As Carter states the case: "I would prefer that we make important changes in our national mood rather than tinker around with the Constitution" (p. 22). But do we in fact need this mood or attitude adjustment? It is to that question which I now turn.

III

ASSUMPTIONS RECONSIDERED

I have three basic disagreements with Professor Carter's analysis. First, I do not agree with his conclusion that the process whereby we elevate persons to the Supreme Court has drastically changed (if it has changed at all). Second, I disagree with Carter's assertions, implicit and explicit, that the Supreme Court is not a political body and that the need for judicial independence qualifies it for unique treatment in our political system. Third, though I am also repelled by the means that have been utilized in many confirmation fights, I am not ready to throw out this proverbial baby with the dirty bath water upon which Carter dwells. I will discuss these points seriatim.

A. Carter's Historical Conclusions Are Not Warranted

Carter identifies 1971 as the great divide after which he believes the confirmation process for Supreme Court Justices simply got out of hand (p. 78). His thesis is that there is something new and different in the current process in that it has become a political free-for-all in which large-scale campaigns have been mounted for or against a candidate. Carter laments every aspect of these political activities but is especially offended by the unprincipled way the records of qualified candidates such as Lami Guinier and Robert Bork have been distorted. Carter goes to great lengths to demonstrate that the examples used to prove that Bork was a monstrous woman-hater—the so-called sterilization decision (pp. 45-48)—and that Guinier was a radical reverse racist—the *Michigan Law Review* article (pp. 40-42)—were unfairly represented by Bork's and Guinier's foes. According to Carter, "In both cases . . . activists opposed to confirmation could not content themselves with stating in reasoned, thoughtful terms the grounds for their disagreements . . ." (pp. 50-51).

There is no doubt that Guinier and Bork were the victims of mean-spirited, results-oriented political campaigns. However, in the heavenly queue of such victims, they will have to join many other similarly mistreated candidates. Take, for example, John Crittenden, whose main deficiency was that he was appointed by the lame duck President John Quincy Adams (who was, after all, only following a family tradition in doing so). Crittenden in 1828 and 1829 complained about the unfair and scurrilous treatment he received at the hands of the Senate and, though he remained a public figure until his death over thirty years later, the rest of his political

career was haunted by this experience.⁶ But poor John Crittenden was not even the first victim of this type of treatment. George Washington's nomination of John Rutledge for Chief Justice in 1795 was rejected on purely political grounds, and Rutledge was so despondent over the event that he attempted suicide.⁷ In 1881, the Senate confirmed President Garfield's nominee to the Court, Stanley Matthews, by the narrowest margin (twenty-four to twenty-three), and only after two months of acrimonious debate.⁸ Thus, results-oriented campaigns and accompanying ugly Senate fights are not unique to the new generation. Indeed, they have occurred throughout our history.

There is no question that the means by which nominees are attacked today are more modern and perhaps more efficient. The use of mass mailings, television commercials, and other instruments of our current political battlefield may lead us to feel that contemporary struggles over appointments are more intense and overwhelming than those of the past. But the campaign against the Supreme Court and all appointees who refused to spout a racist line in the 1950s following the *Brown* decision, which included, among other things, billboards denouncing Earl Warren dotting the Southern landscape,⁹ was equally ugly. Moreover, there can be no doubt that the massive resistance of Southern society (and others) to the racial freedom movement of the fifties and sixties cast a pall over the deliberations of the Supreme Court and placed the appointment and confirmation of Supreme Court Justices in a confrontational environment.¹⁰ The disingenuous and truncated confirmation process endured by John Harlan in 1954 and 1955, and by Potter Stewart in 1959, including obvious and sustained grandstanding and race baiting by Southern senators, were reminders that the political stakes in Supreme Court appointments were high and political emotions deeply felt during that time period.¹¹

Moreover, Carter too easily dismisses the significance of the disgraceful process whereby Louis Brandeis was elevated to the Court.¹² If we focus on Brandeis' list of legitimate qualifications it is easy to rank him right up there with Thurgood Marshall as one of history's most qualified candidates. Indeed, by the time of his appointment, Brandeis, who had excelled at Harvard Law School, had been a nationally renowned corporate

6. See Michael A. Kahn, *The Appointment of John McLean to the Supreme Court*, 1993 J. SUP. CT. HIST. 59, 60-63.

7. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 73 (3d ed. 1992).

8. *Id.* at 136-37.

9. See CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 364 (1993).

10. Michael A. Kahn, *Shattering the Myth About President Eisenhower's Supreme Court Appointments*, 22 PRESIDENTIAL STUD. Q. 47, 50-54 (1992).

11. *Id.* at 50-54.

12. See ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 465-508 (1946). Carter "chalks up" the attacks on Brandeis to society's difficulties in accepting Jews (p. 77).

lawyer, introduced sociological jurisprudence to the Court with his "Brandeis" brief, and achieved national prominence as "the people's lawyer."¹³ Yet, incredibly, seven former presidents of the American Bar Association, one of whom happened to be a former President of the United States, William Howard Taft, joined in statements to the Senate subcommittee holding hearings on the nomination that stated Brandeis was not qualified to sit on the Court.¹⁴ No doubt anti-semitism fueled this opposition, but it was substantially motivated by conservative and big business forces who feared Brandeis' liberal views.¹⁵ This incident is remarkable for its similarity to modern confirmation battles. No one could seriously contend that Brandeis was not qualified for the Court. Yet, that is exactly the way criticism of him, like that of Robert Bork and Thurgood Marshall, was framed.¹⁶ Moreover, twenty-two senators (out of sixty-nine voting) voted against him.¹⁷

Judge John J. Parker is another person who was victimized by the Senate and a public out to get a scalp. Parker had the misfortune to be unsuccessfully nominated by an increasingly unpopular and out-of-touch President during a bleak period of our history (1930). After he was nominated by President Hoover, he was attacked in the most vicious and personal fashion.¹⁸ Though the attacks against Parker were couched as personal criticism, their underlying political motivation is clearly revealed by the fate of Charles Evans Hughes' nomination for Chief Justice just months before. Hughes had already served on the Court and was a former nominee of his party for President. (He lost the election by a whisker.) Nevertheless, in opposing him, Nebraska's progressive senator, George W. Norris, declaimed Hughes, stating that, "No man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes."¹⁹ Eventually, despite his many achievements and his national stature, twenty-six senators voted against Hughes and he was confirmed only after a bitter and distasteful fight.²⁰

I do not mean to suggest that Carter is unaware of this musty history. On the contrary, Carter has sufficient familiarity with some of these inci-

13. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 83-84 (Kermit L. Hall et al. eds., 1992).

14. MASON, *supra* note 12, at 489. Taft, of course, was later to serve as Brandeis' Chief Justice for nine years.

15. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 13, at 84.

16. See MASON, *supra* note 12, at 465-508.

17. *Id.* at 505.

18. See KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER 37-53 (1990); C. DAVID TOMPKINS, SENATOR ARTHUR H. VANDENBERG: THE EVOLUTION OF A MODERN REPUBLICAN, 1884-1945, at 55-56 (1970); NORMAN L. ZUCKER, GEORGE W. NORRIS: GENTLE KNIGHT OF AMERICAN DEMOCRACY 104 (1966).

19. ABRAHAM, *supra* note 7, at 201.

20. *Id.*

dents to acknowledge them (*see, e.g.*, pp. 73-74). However, Carter's sympathy for poorly treated nominees seems to be much more acute when he deals with his friends and acquaintances than when he thinks about past victims.²¹ The unvarnished truth is that for John Rutledge, John Crittenden, Louis Brandeis, Charles Evans Hughes, John Parker, and others, the confirmation process was as nasty and brutish (if not as short) as it was for Robert Bork and Lani Guinier.

Carter misses the mark when he complains that the most recent politically-motivated attacks on presidential nominees are unique. The seeming ubiquity and pervasiveness of media and interest groups spewing forth propaganda about candidates creates the perception that the message is more urgent and ugly. But the fact of the matter is that from its inception the process of nominating and confirming appointments to the Supreme Court has been sporadically, yet predictably, infested with ugly, mean-spirited, and unfair campaigns against virtually defenseless fodder for our political cannons.

Nevertheless, if Carter is correct that the system is a mess, it begs the question to observe that it has been flawed from the start. The issues that Carter joins, and to which I now turn, are whether the nature of the Court and the need for judicial independence are such that we continue to endure and utilize this problem-laden system at our peril.

B. Carter's Argument for Political Immunity for Court Nominees Must and Should Fail

Carter is genuinely disturbed at the institutional ramifications of our current system of selecting Supreme Court Justices. He believes that the logical consequence of validating a results-oriented series of campaigns for or against Supreme Court candidates is to undermine the cherished value of judicial independence (pp. 147-50). In this regard Carter seems to dispute, or at least to ignore, the enshrined wisdom of Mr. Dooley who observed that the Supreme Court follows the election returns.²² Indeed, similar wisdom of the colloquial variety ("a switch in time saves nine"), of the jurisprudential variety (the political question doctrine), and of the scholarly variety (myriad books pronouncing the good political judgment of the Supreme Court in its decisions) pervades our understanding of the historical activities of the Court.²³ Yes, it is true that the Supreme Court has, in a seemingly undemocratic fashion, plowed new and important ground in race relations and other fields. However, the other branches of government have, in equally undemocratic fashion, arrogated power for purportedly higher motives. Franklin Roosevelt's policy toward England before our

21. Although Carter purports to be objective, his disdain for the process is surely fueled by his personal outrage over the treatment of his friend, Lani Guinier, and his colleague's wife, Zoe Baird.

22. MR. DOOLEY'S OPINIONS 26 (1901).

23. Carter himself makes this point (pp. 109-11).

entry in World War II, Abraham Lincoln's usurpation of the right of habeas corpus in the name of saving the Union, and countless other acts committed by presidents in the face of public pressures and legal prohibitions to the contrary, give the Presidency a claim to the mantle of the nation's most undemocratic institution which Carter is quick to award the Court (*see* p. 117). Moreover, it is ironic to claim that the Court, which can act only by a vote of five of its members, is less democratic than the President, who may act alone.

In short, without belaboring the argument, I think it facile to label the Court undemocratic and to attempt to insulate it from politics because one wishes to preserve its undemocratic characteristics. In truth the Court is a highly political institution. Indeed, I would be surprised if any person has ever served on the Court without a profound sense of its political nature. It is obvious that the Court plays a vital counterbalancing role (which varies dramatically over time) within the democratic political system which governs us. Moreover, Supreme Court Justices are appointed by a politician and confirmed by one hundred other politicians. Each of these politicians has subjected his own career to the vicissitudes, perils, and degradations of political campaigns in order to attain the power to choose and vote upon Supreme Court Justices. Often, the act of appointing or voting on a justice is a visible and significant part of an ongoing political campaign to retain that power (to which phenomenon we gratefully owe the appointments of Cardozo²⁴ and Brennan²⁵). It is not only naive and unfair, but it also defies the nature of political affairs, to urge that in this blizzard of political activity we should place as a tropical island a principled, qualification-oriented, nonpolitical confirmation process.

In sum, I think Carter is wrong when he argues that the Court is uniquely nonpolitical or that the appointments process can operate in a manner that is not susceptible to domination by results-oriented politics. The Supreme Court has always operated in this highly political environment. Indeed, one of the most remarkable achievements of the Court has been its ability to be such a vibrant, powerful force in this political context despite its lack of inherent resources.

Nevertheless, even if the evidence does not support Professor Carter's conclusion that the Court should be and historically has been uniquely nonpolitical, it does not necessarily follow that the Court's members must always be selected by a highly charged political process. The question remains: does the confirmation process need changing anyway?

24. ABRAHAM, *supra* note 7, at 204-06.

25. *Id.* at 265-66.

C. If It Ain't Broke, Don't Fix It

Carter's book is in no small part a plea to instill civility into the process by which we appoint and confirm Supreme Court Justices and other presidential appointees. It is difficult to disagree with this sentiment. (One expects that the candidates would certainly agree.) Regardless of one's politics, the specter of Clarence Thomas writhing in pain on his bedroom floor over the unfairness of the process to him and his family, as described in Senator Danforth's new book,²⁶ must evoke revulsion. Obviously, there is something wrong with a system that rewards public-minded candidates with relentless personal vilification and humiliation. President Clinton would no doubt agree with this sentiment, though he may have a different perspective on who the main victim of unwarranted, unfair, and disgraceful personal attacks has been in recent years.

In evaluating the appointments process, this country's political process may serve as an apt comparison. It is difficult to mount an argument that somehow Bork, Thomas, Guinier, or Baird was treated more unfairly or harshly than the crop of candidates who ran for office in the 1994 mid-term elections. Indeed, the entire history of our political process (not to mention that of our fellow democracies) is riddled with the devastated bodies and souls of our citizens who entered the arena only to be pummelled in the process. Sometimes the victims of the most vicious attacks persevere and are able to respond philosophically like Abraham Lincoln who commented, "If I were to try to read, much less answer, all the attacks made on me, this shop might as well be closed for any other business. . . . [But] [i]f the end brings me out all right, what is said against me won't amount to anything."²⁷ However, more often, it is the vanquisher, like Richard Nixon (whose victims like Jerry Voorhis²⁸ and Helen Douglas²⁹ remained scarred for life) who perseveres. Like it or not, mean, rotten, and nasty personal campaigns have always been the stuff of our democracy. Each generation believes that it has seen the worst of it and each generation works hard to prove that point.

It is tempting to argue that candidates for elected office ask for this treatment by deciding to run and have the tools to defend themselves in their own campaigns. One may wish to argue, as Carter does, that somehow our political appointees deserve special treatment. Upon closer inspection, however, such a distinction does not seem justified.

Why, after all, are political campaigns so hard fought? The simple answer is that it matters, from important policy and special (and not-so-special) interest perspectives, who is elected. To argue that Supreme Court

26. JOHN C. DANFORTH, *RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS* 106 (1994).

27. F. B. CARPENTER, *THE INNER LIFE OF ABRAHAM LINCOLN: SIX MONTHS AT THE WHITE HOUSE* 258-59 (1868).

28. FAWN M. BRODIE, *RICHARD NIXON: THE SHAPING OF HIS CHARACTER* 170-84 (1981).

29. *Id.* at 238-44.

nominees should be immune from such campaigns is to ignore fundamental realities. First, the cases that the Supreme Court decides are critically and fundamentally important to all of our lives. The Court's docket comprises issues, such as capital punishment and abortion, that are literally issues of life or death. Second, the undeniable reality is that who is deciding these issues makes a difference in terms of results.

Carter urges us to put aside the short-sighted focus on this second reality and simply to select the most qualified people and let them decide the cases as a matter of conscience, exercising their undemocratic judicial independence. This may be a good way to go about the process of selecting Justices, but Carter's implicit suggestion that it is the only legitimate way for our body politic to approach the process is unconvincing. Take the choice of Robert Bork. Let us assume that he was unfairly maligned and mistreated. Let us further assume that employing all of Carter's criteria he was fully qualified to sit on the Court. Let us further assume that he was a sure fifth and deciding vote to reverse *Roe*. Why would it be less appropriate to engage in a full-scale, no-holds-barred campaign against him than it would be to engage in such a campaign against a president who might appoint him or a senator who might confirm him?

It is important in this discussion to distinguish personal behavior and principles from legitimate political behavior. I personally may be drawn to Carter's dispassionate, reason-oriented decision-making philosophy, but that does not mean that I do not acknowledge the legitimacy of other forms of political behavior within our system. This is where I believe Carter's argument breaks down. It is unrealistic, and even unfair, to urge that participants in an unrestrained political system refrain from political activity (however personally offensive) when faced with the lifetime anointment of a highly political officer who is to be endowed with vast power and discretion over their lives.

Finally, though on an individual basis the system surely produces many victims who are treated unfairly or even disgracefully, on a broader perspective it is not convincing to argue that the system is not working. I may not always agree with them, but I find it impossible to sanction the criticism that the current Supreme Court Justices are not honest, intelligent, thoughtful persons of the highest integrity. It is always easy to take pot shots at a system for its failures,³⁰ but it seems to me that a process that has given us the services of the likes of both Marshalls, both Harlans, Holmes, Warren, Brennan, and Brandeis is significant for its remarkable successes, not for its failures.

30. I have argued elsewhere that because of the political nature of our system, Learned Hand never served on the Court. Michael A. Kahn, Note, *The Politics of the Appointment Process: An Analysis of Why Learned Hand Was Never Appointed to the Supreme Court*, 25 STAN. L. REV. 251 (1973).

Thus, I believe that Carter has it wrong on all accounts. The appointment and confirmation process has always worked pretty much as it operates now—as a highly political process within a democratic system—and it has always, in the main and viewed as a whole, served us well. In short, it ain't broke and it don't need fixing—even if we could use a little attitude adjustment.

CONCLUSION

We should not ignore Carter's aspirations. All of the foregoing notwithstanding, Carter has done us a service with his book. Carter's moral and philosophical message should be heeded. Obviously, the confirmation process is not always, or even usually, unacceptably indecent and dishonest. Moreover, as difficult as this is to believe, I think the process is always restrained, even in the cases of Thomas and Bork, by our own morality and views of appropriate restraint. Carter appeals to our better selves. He urges us to focus on the right things and to devalue the currency of disqualification. He urges us to be honest and decent in this process for the sake of the system and for ourselves. These are important messages and they clearly resonate. We do not need to deny the legitimacy and the success of our political system to aspire to be better actors within it. We do not need to reform our processes to be more decent and honest. We do not need to deny the importance of the immediate results of the Supreme Court's deliberations and our role in affecting those results to achieve the attitude adjustment that Carter counsels. And, thus, we do not have to accept Carter's historical or political analysis to adopt his moral and philosophical aspirations.