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REVIEW

Confirmation Messes, Old and New

Elena Kagan†

The Confirmation Mess. Stephen L. Carter.
Basic Books, 1994. Pp xiii, 252.

What confirmation mess?

Stephen Carter's new book decries the state of the confirmation process, especially for Supreme Court nominees. "The confirmation mess," in Carter's (noninterrogatory) phrase, consists of both the brutalization and the politicization of the process by which the nation selects its highest judges. That process, Carter insists, is replete with meanness, dishonesty, and distortion. More, and worse, it demands of nominees that they reveal their views on important legal issues, thus threatening to limit the Court "to people who have adequately demonstrated their closed-mindedness" (p xi). A misguided focus on the results of controversial cases and on the probable voting patterns of would-be Justices, Carter argues, produces a noxious and destructive process. Carter's paradigm case, almost needless to say, is the failed nomination of Robert Bork.

But to observers of more recent nominations to the Supreme Court, Carter's description must seem antiquated. President

† Assistant Professor of Law, University of Chicago. I served as Special Counsel to the United States Senate Committee on the Judiciary in connection with the nomination of Justice Ruth Bader Ginsburg to the Supreme Court. The views expressed in this Review are, of course, mine alone. I thank Al Alschuler, David Currie, Richard Epstein, Tracy Meares, Cass Sunstein, and Mark Tushnet for helpful comments. The Class of 1964 Fund and the Russell J. Parsons Faculty Research Fund provided financial support.

Clinton's nominees, then-Judges Ruth Bader Ginsburg and Stephen Breyer, confronted no unfair or nasty opposition; to the contrary, their confirmation hearings became official lovefests. More important, both nominees felt free to decline to disclose their views on controversial issues and cases. They stonewalled the Judiciary Committee to great effect, as senators greeted their "nonanswer" answers with equanimity and resigned good humor. And even before the confirmation process became quite so cozy (which is to say, even before the turn toward nominating well-known and well-respected moderates), the practice to which Carter most objects—the discussion of a nominee's views on legal issues—had almost completely lapsed. Justices Kennedy, Souter, and Thomas, no less than Justices Ginsburg and Breyer, rebuffed all attempts to explore their opinions of important principles and cases. Professor Carter, it seems, wrote his book too late. Where, today, is the confirmation mess he laments?

The recent hearings on Supreme Court nominees, though, suggest another question: might we now have a distinct and more troubling confirmation mess? If recent hearings lacked acrimony, they also lacked seriousness and substance. The problem was the opposite of what Carter describes: not that the Senate focused too much on a nominee's legal views, but that it did so far too little. Otherwise put, the current "confirmation mess" derives not from the role the Senate assumed in evaluating Judge Bork, but from the Senate's subsequent abandonment of that role and function. When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public. Whatever imperfections may have attended the Bork hearings pale in comparison with these recent failures. Out, then, with the new mess and in with the old!¹

I. CARTER'S CRITIQUE

Carter depicts a confirmation process out of control—a process in which we attend to the wrong things in the wrong manner, in which we abjure reasoned dialogue about qualifications in favor of hysterical rantings about personalities and politics. Car-

¹ And no, I haven't changed my mind since, several months after I drafted this Review, the Senate turned Republican and Orrin Hatch assumed the chairmanship of the Judiciary Committee. The conclusion of this Review still holds—even if I am no longer quite so sanguine about it.

ter is no partisan in this description; he blames Republicans and Democrats, right and left alike (pp 10, 142). Similarly, Carter takes no sides as between the President and the Senate; he assumes that both ought to evaluate judicial candidates by the same criteria and argues that both have performed poorly this evaluative function (pp 29-30). Carter views the current mess as having deep roots. He refers often to the attempt of segregationist senators to defeat the nomination of Thurgood Marshall (pp 62-63) and describes as well some yet more distant confirmation battles (pp 65-73). Although he focuses on the nomination and confirmation of Supreme Court Justices, he buttresses his case with discussion of the recent travails of Lani Guinier (pp 37-44) and Zoe Baird (pp 25-28). Always, though, the face in the foreground is Robert Bork's. Carter's understanding of the Bork hearings informs—sometimes explicitly, sometimes not—the whole of his argument and analysis.

Carter identifies two cardinal flaws in the confirmation process. The first concerns the absence of "honesty" and "decency" (p ix). Here Carter laments the deterioration of public debate over nominations into "the intellectual equivalent of a barroom brawl" (p x). He catalogues the ways in which opponents demonize nominees and distort their records, referring to the many apparently purposeful misreadings of the writings of Robert Bork (pp 45-52) and Lani Guinier (pp 39-44). He describes the avid search for disqualifying factors, whether of a personal kind (for example, illegal nannies) or of a professional nature (for example, ill-conceived footnotes in scholarly articles) (pp 25, 42-43). He deplors "smears" and "soundbites" (p 206)—the way in which media coverage turns nominations into extravaganzas, the extent to which public relations strategy becomes all-important. And in a semi-mystical manner, he castigates our refusal to forgive sin, accept redemption, and acknowledge the complexity of human beings, including those nominated to high office (pp 183-84).

The second vice of the confirmation process, according to Carter, lies in its focus on a nominee's probable future voting record. In Carter's portrayal, the President, Senate, press, interest groups, and public all evaluate nominees primarily by plumbing their views on controversial legal issues, such as the death penalty or abortion (pp 54-56). Carter's paradigmatic case, again, is Robert Bork, a judge of superior objective qualifications whose views on constitutional method and issues led to the defeat of his nomination. Carter is "struck" by the failure of participants in the Bork hearings to consider "that trying to get him to tell the

nation how he would vote on controversial cases if confirmed might pose a greater long-run danger to the Republic than confirming him" (p x). This danger, Carter avers, arises from the damage such inquiry does to judicial independence. Examination of a nominee's views on contested constitutional matters, Carter claims, gives the public too great a chance to influence how the judiciary will decide these issues, precisely by enabling the public to reject a nominee on grounds of substance (p 115). At the same time, such inquiry undermines the eventual Justice's ability (and the public's belief in the Justice's ability) to decide cases impartially, based on the facts at issue and the arguments presented, rather than on the Justice's prior views or commitments (p 56).

The failures of the confirmation process, Carter urges, ultimately have less to do with rules and procedures than with public "attitudes"—specifically, "our attitudes toward the Court as an institution and the work it does for the society" (p 188). We view the Court as a dispenser of decisions—as to individual cases of course, but also as to hotly disputed public issues. Our evaluation of the Court coincides with our evaluation of the results it reaches (p 57). Because we see the Court in terms of results, we yearn to pack it with Justices who will always arrive at the "right" decisions. And because the decisions of the Court indeed have consequence, we feel justified, as we pursue this project, in resorting to "shameless exaggeration" and misleading rhetoric (p 51). The key to change, according to Carter, lies in viewing the Court in a different—a more "mundane and lawyerly"—manner (p 206). And although Carter is unclear on the point, this seems to mean judging the Court less in terms of the results it reaches than in terms of its level of skill and craftsmanship.

In keeping with this analysis, Carter advocates a return to confirmation proceedings that focus on a nominee's technical qualifications—in other words, his legal aptitude, skills, and experience (pp 161-62). At times, Carter suggests that this set of qualifications constitutes the only proper criterion of judgment (pp 187-88). But Carter in the end draws back from this position, which he admits would provide no lever to oppose a nominee, otherwise qualified, who wished to overturn a case like *Brown v Board*² (pp 119-21). Carter urges, as a safeguard against extremism of this kind, an inquiry into whether a nominee subscribes to the "firm moral consensus" of society (p 121). The Senate, Carter writes, should resolve this question by "undertak[ing] moral

² *Brown v Board of Education*, 347 US 483 (1954).

inquiry, both into the world view of the nominee and, if necessary, into the nominee's conduct" (p 124). This inquiry, in other words, would involve a determination of whether a nominee has the "right moral instincts" and whether his "personal moral decisions seem generally sound" (p 152). Carter views this inquiry as wholly distinct from an approach that asks about a nominee's legal views or philosophy (*id.*). He suggests, for example, that the Senate ask a nominee not whether discriminatory private clubs violate the Constitution, but whether "the nominee has belonged to a club with such policies" (*id.*). An assessment of moral judgment alone, independent of legal judgment, would combine with an evaluation of legal aptitude to form Carter's ideal confirmation process.

II. CURRENT EVENTS

Does Carter's critique of the confirmation process ring true? It might have done so eight years ago. It ought not to do so now.

Carter tries to update his book, to make it more than a comment on the Bork proceedings. He invokes the nomination, eventually withdrawn, of Lani Guinier to serve as Assistant Attorney General for Civil Rights (pp 37-44). Consider, Carter implores us, the distortion of Guinier's academic work, initially by her many enemies, finally and fatally by some she thought friends. Do not the exaggeration, name-calling, and hyperbole that surrounded the discussion of Guinier's views prove the existence of a confirmation mess? And Carter then invokes the battle over the nomination of Clarence Thomas to serve as a Supreme Court Justice (pp 138-42). Recall, Carter tells us (and it is not hard to do), the intensity and wrath surrounding that battle—the fury with which the partisans of Thomas and Anita Hill, respectively, exchanged charge and countercharge and bloodied previously unsullied reputations. Does not this episode, this display of raw emotion and this unrelenting focus on personal traits and behavior, demonstrate again the existence of a confirmation mess?

Well, no—not on either count, at least if the term "confirmation mess" signifies a problem both specific to and common among confirmation battles. Carter is right to note the distortions in the debate over Guinier's prior writings; but he is wrong to think they derived from a special attribute of the confirmation process. It is unfortunate but true that distortions of this kind mar public debate on all important issues. Professor Carter, meet Harry and Louise; they may convince you that the Guinier episode is less a part of a confirmation mess than of a government

mess, the sources and effects of which lie well beyond your book's purview. And the Thomas incident, proposed as exemplar or parable, suffers from the converse flaw. That incident is unique among confirmation hearings and, with any reasonable amount of luck, will remain so. The way the Senate handled confidential charges of a devastating nature on a subject at a fault line of contemporary culture reveals very little about the broader confirmation process.

Indeed, Carter's essential critique of the confirmation process—that it focuses too much on the nominee's views on disputed legal issues—applies neither to the Guinier episode nor to the Thomas hearings. Carter concedes that the Senate ought to inquire into the views and policies of nominees to the executive branch, for whom “independence” is no virtue (p 32). The public debate over Guinier's articles (problems of distortion to one side) thus fails to implicate Carter's concern with the focus of the process on legal issues. And so too of the Thomas hearings. Carter's own description of the “mess” surrounding that nomination highlights the Senate's inquiry into the charges of sexual harassment and not its investigation of the nominee's legal opinions (pp 133-45). The emphasis is not surprising. No one can remember the portion of the hearings devoted to Justice Thomas's legal views, and for good reason: Justice Thomas, or so he assured us, already had “stripped down like a runner” and so had none to speak of.³ The apparent “mess” of the Thomas hearings thus arose not from the exploration of legal philosophy that Carter abjures, but instead from the inquiry into moral practice and principle that he recommends to the Senate as an alternative.⁴

What, then, of the “confirmation mess” as Carter defines it—the threat to judicial independence resulting from a misplaced focus on the nominee's legal views and philosophy? Lacking support for his argument in the recent controversies surrounding Guinier and Thomas, Carter must recede to the Bork hearings for a paradigm. But time has overtaken this illustration: no subsequent nomination fits Carter's Bork-based model

³ Clarence Thomas, as quoted in Linda Greenhouse, *The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Questions of What He Is*, NY Times A19 (Sept 13, 1991).

⁴ The same is true of the controversy surrounding the nomination of Zoe Baird as Attorney General. As Carter discusses, Baird's nomination ran into trouble because she had hired illegal immigrants and then failed to pay social security taxes on their salaries (pp 25-28). Here, too, the dispute arose from an inquiry into the nominee's personal conduct, rather than her views and policies.

any better than do the nominations of Guinier or Thomas. Not since Bork (as Carter himself admits) has any nominee candidly discussed, or felt a need to discuss, his or her views and philosophy (pp 57-59). It is true that in recent hearings senators of all stripes have proclaimed their prerogative to explore a nominee's approach to constitutional problems. The idea of substantive inquiry is accepted today to a far greater extent than it was a decade ago.⁵ But the practice of substantive inquiry has suffered a precipitous fall since the Bork hearings, so much so that today it hardly deserves the title "practice" at all. To demonstrate this point, it is only necessary to review the recent hearings of Ruth Bader Ginsburg and Stephen Breyer—one occurring before, the other after, publication of Carter's book. Consider the way these then-judges addressed issues of substance and then ask of what Carter's "confirmation mess" in truth consists.

Justice Ginsburg's favored technique took the form of a pincer movement. When asked a specific question on a constitutional issue, Ginsburg replied (along Carter's favored lines) that an answer might forecast a vote and thus contravene the norm of judicial impartiality. Said Ginsburg: "I think when you ask me about specific cases, I have to say that I am not going to give an advisory opinion on any specific scenario, because . . . that scenario might come before me."⁶ But when asked a more general question, Ginsburg replied that a judge could deal in specifics only; abstractions, even hypotheticals, took the good judge beyond her calling. Again said Ginsburg: "I prefer not to . . . talk in grand terms about principles that have to be applied in concrete cases. I like to reason from the specific case."⁷ Some room may have remained in theory between these two responses; perhaps a senator could learn something about Justice Ginsburg's legal

⁵ Senator Joseph Biden made this point near the beginning of the Ginsburg hearings. After listening, in turn, to Senators Hatch, Kennedy, Metzenbaum, and Simpson expound on the need to question the nominee about her judicial philosophy, Senator Biden said: "I might note it is remarkable that seven years ago the hearing we had here was somewhat more controversial, and I made a speech that mentioned the 'p' word, philosophy, that we should examine the philosophy, and most . . . said that was not appropriate. At least we have crossed that hurdle. No one is arguing that anymore." *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary, 103d Cong, 1st Sess 21 (July 20-23, 1993) ("Confirmation Hearings for Ginsburg").*

⁶ *Id* at 184.

⁷ *Id* at 180. See also *id* at 333 ("I can't answer an abstract issue. I work from a specific case based on the record of that case, the briefs that are presented, the parties' presentations, and decide the case in light of that record, those briefs. I simply cannot, even in areas that I know very well, answer an issue abstracted from a concrete case.").

views if he pitched his question at precisely the right level of generality. But in practice, the potential gap closed to a sliver given Ginsburg's understanding of what counted as "too specific" (roughly, anything that might have some bearing on a case that might some day come before the Court) and what counted as "too general" (roughly, anything else worthy of mention).

So, for example, in a colloquy with Senator Feinstein on the Second Amendment, Ginsburg first confronted the question whether she agreed with a fifty-four-year-old Supreme Court precedent⁸ on the subject and with the interpretation that lower courts unanimously had given it. Replied Ginsburg: "The last time the Supreme Court spoke to this question was 1939. You summarized what that was, and you also summarized the state of law in the lower courts. But this is a question that may well be before the Court again . . . and because of where I sit it would be inappropriate for me to say anything more than that."⁹ The Senator continued: if the Judge could not discuss a particular case, even one decided fifty years ago, could the Judge say something about "the methodology [she] might apply" and "the factors [she] might look at" in determining the validity of that case or the meaning of the Second Amendment?¹⁰ "I wish I could Senator," Ginsburg replied, "but . . . apart from the specific context I really can't expound on it."¹¹ "Why not?" the Senator might have asked. Because the question functioned at too high a level of abstraction: "I would have to consider, as I have said many times today, the specific case, the briefs and the arguments that would be made."¹² Many times indeed. So concluded a typical exchange in the confirmation hearing of Justice Ginsburg.

Justice Breyer was smoother than Justice Ginsburg, but ultimately no more forthcoming. His favored approach was the "grey area" test: if a question fell within this area—if it asked him to comment on issues not yet definitively closed (and therefore still a matter of interest)—he must, he said, decline to comment.¹³ Like Justice Ginsburg, he could provide personal anecd-

⁸ *United States v Miller*, 307 US 174 (1939).

⁹ Confirmation Hearings for Ginsburg at 241-42 (cited in note 5).

¹⁰ *Id.* at 242.

¹¹ *Id.*

¹² *Id.*

¹³ Confirmation Hearings for Stephen G. Breyer to be an Associate Justice of the United States Supreme Court, Senate Committee on the Judiciary, 103d Cong, 2d Sess 85 (July 12, 1994) (Miller Reporting transcript). Sometimes Justice Breyer referred to this test as the "up in the air" test. So, for example, when Chairman Biden asked him to comment on the burden imposed on the government to sustain economic regulation,

dotes—the relevance of which were open to question. He could state settled law—but not whether he agreed with the settlement. He could explain the importance and difficulty of a legal issue—without suggesting which important and difficult resolution he favored. What he could not do was to respond directly to questions regarding his legal positions. Throughout his testimony, Breyer refused to answer not merely questions concerning pending cases, but questions relating in any way to any issue that the Supreme Court might one day face.

I do not mean to overstate the case; Justice Ginsburg and Justice Breyer did provide snippets of information. Both Justices discussed with candor and enthusiasm issues on which they previously had written. So the Judiciary Committee and public alike learned much about Justice Ginsburg's current views on gender discrimination and abortion and about Justice Breyer's thoughts on regulatory policy. Both Justices, too, allowed an occasional glimpse of what might be termed, with some slight exaggeration, a judicial philosophy. A close observer of the hearings thus might have made a quick sketch of Justice Ginsburg as a cautious, incrementalist common lawyer and of Justice Breyer as an antiformalist problem solver. (But how much of this sketch in fact would have derived from preconceptions of the Justices, based on their judicial opinions and scholarly articles?) If most of the testimony disclosed only the insignificant and the obvious—did anyone need to hear on no less than three separate occasions that Justice Ginsburg disagreed with *Dred Scott*?¹⁴—a small portion revealed something of the nominee's conception of judging.

Neither do I mean to deride Justices Ginsburg and Breyer for the approach each took to testifying. I am sure each believed (along with Carter) that disclosing his or her views on legal issues threatened the independence of the judiciary. (It is a view, I suspect, which for obvious reasons is highly correlated with membership in the third branch of government.¹⁵) More, I am sure

Breyer noted that "this is a matter . . . still up in the air." When the Chairman replied "[t]hat is why I am trying to get you to talk about it, because you may bring it down to the ground," Justice Breyer repeated that "I have a problem talking about things that are up in the air." *Id.* at 55 (July 12, 1994).

¹⁴ *Dred Scott v Sanford*, 60 US 393 (1856). See, for example, Confirmation Hearings for Ginsburg at 126, 188, 270 (cited in note 5).

¹⁵ In 1959, lawyer William Rehnquist wrote an article criticizing the Senate's consideration of the nomination of Charles Evans Whittaker to the Supreme Court. The Senate, he stated, had "succeeded in adducing only the following facts: . . . proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; . . . he was the

both judges knew that they were playing the game in full accordance with a set of rules that others had established before them. If most prior nominees have avoided disclosing their views on legal issues, it is hard to fault Justice Ginsburg or Justice Breyer for declining to proffer this information. And finally, I suspect that both appreciated that, for them (as for most), the safest and surest route to the prize lay in alternating platitudinous statement and judicious silence. Who would have done anything different, in the absence of pressure from members of Congress?

And of such pressure, there was little evidence. To be sure, an occasional senator complained of the dearth of substantive comment, most vocally during the preternaturally controlled testimony of Justice Ginsburg. Chairman Biden and Senator Spector in particular expressed impatience with the game as played. Spector warned that the Judiciary Committee one day would “rear up on its hind legs” and reject a nominee who refused to answer questions, for that reason only (p 54). And Biden lamented that no “nominee would ever satisfy me in terms of being as expansive about their views as I would like.”¹⁶ But for the most part, the senators acceded to the reticence of the nominees before them with good grace and humor. Senator Simon sympathetically commented to Justice Breyer: “You are in a situation today . . . where you do not want to offend any of us, and I understand that. I hope the time will come when you may think it appropriate . . . to speak out on this issue.”¹⁷ Senator DeConcini similarly remarked to Justice Ginsburg that it was “fun” and “intellectually challenging”—a sort of chess game in real life—for a senator to “try[] to get inside the mind of a nominee . . . without violating their oath and their potential conflicts”¹⁸ And of course no one voted against either nominee

first Missourian ever appointed to the Supreme Court; [and] since he had been born in Kansas but now resided in Missouri, his nomination honored two states.” William Rehnquist, *The Making of a Supreme Court Justice*, Harv L Rec 7, 8 (Oct 8, 1959). Rehnquist specifically complained about the Senate’s failure to ask Justice Whittaker about his views on equal protection and due process. *Id.* at 10. By 1986, when he appeared before the Senate Judiciary Committee as a sitting Associate Justice and a nominee for Chief Justice, Rehnquist had changed his mind about the propriety of such inquiries.

¹⁶ Confirmation Hearings for Ginsburg at 259 (cited in note 5). In a similar vein, Senator Cohen accused Justice Ginsburg of resorting to “delphic ambiguity” in her responses. Senator Cohen recalled the story of the general who asked the oracle what would occur if he (the general) invaded Greece. When the oracle responded that a great army would fall, the general mounted the invasion—only to discover that the great army to which the oracle had referred was his own. See *id.* at 220.

¹⁷ Confirmation Hearings for Breyer at 77-78 (July 13, 1994) (cited in note 13).

¹⁸ Confirmation Hearings for Ginsburg at 330 (cited in note 5).

on the ground that he or she had declined to answer questions relating to important legal issues.

The ease of these proceedings in part reflected the nature of both the nominations and the political context. First replace divided government with single-party control of the White House and Senate. Now posit a President with an ambitious legislative agenda, requiring him to retain support in Congress, but with no judicial agenda to speak of.¹⁹ Assume, as a result, that this President nominates two clear moderates, known and trusted by leading senators of both the majority and the minority parties. Throw in that each nominee is a person of extraordinary ability and distinction. Finally, add that the Court's rulings on some of the hot-button issues of recent times—most notably abortion, but also school prayer and the death penalty—today seem relatively stable. This is a recipe—now proved successful—for confirmation order, exactly opposite to the state of anarchy depicted by Carter. At the least, this suggests what David Strauss has argued in another review of Carter's book:²⁰ that the culprit in Carter's story is nothing so grand and seemingly timeless as the American public's attitudes toward the courts; that the cause of Carter's "mess" is the simple attempt of the Reagan and Bush administrations to impose an ideologically charged vision of the judiciary in an unsympathetic political climate.

But even this view overstates the longevity of the "confirmation mess," as Carter defines it. That so-called mess in fact ended long before President Clinton's nominations; it ended right after it began, with the defeat of the nomination of Robert Bork. The Senate overwhelmingly approved the nominations of Justices Kennedy and Souter after they gave testimony (or rather, nontestimony) similar in almost all respects to that of Justices Ginsburg and Breyer.²¹ This was so even though the Senate knew little about Justice Kennedy and still less about Justice

¹⁹ See David A. Strauss, *Whose Confirmation Mess?*, *Am Prospect* 91, 96 (Summer 1994), reviewing Carter, *The Confirmation Mess*. Herein lies one of the mysteries of modern confirmation politics: given that the Republican Party has an ambitious judicial agenda and the Democratic Party has next to none, why is the former labeled the party of judicial restraint and the latter the party of judicial activism?

²⁰ *Id.* at 92, 95-96.

²¹ Prior to nominating Justice Kennedy, the Reagan White House nominated Judge Douglas Ginsburg, only soon to withdraw the nomination. The decision to pull the nomination followed revelations about Judge Ginsburg's prior use of marijuana. Carter barely mentions this nomination. Carter, however, generally considers the prior illegal conduct of a nominee to be a meet subject for investigation, although not necessarily a sufficient reason for disqualification (pp 169-77).

Souter prior to the hearings—an ignorance which should have increased the importance of their testimony. (Just ask Senator Hatch whether he now wishes he had insisted that Justice Souter be more forthcoming.) The Senate also confirmed the nomination of Justice Thomas after his substantive testimony had become a national laughingstock. Take away the weakness of Justice Thomas's objective qualifications and the later charges of sexual harassment (inquiry into which Carter approves), and the Justice's Pinpoint, Georgia, testimonial strategy would have produced a solid victory.²² This history offers scant support for Carter's lamentation that the confirmation process has become focused on a nominee's substantive testimony and obsessed with the nominee's likely voting record. So what, excepting once again Robert Bork, is Carter complaining about?

If Carter is right as to what makes a "confirmation mess," he had no reason to write this book—or at least to write it when he did. Senators today do not insist that any nominee reveal what kind of Justice she would make, by disclosing her views on important legal issues. Senators have not done so since the hearings on the nomination of Judge Bork. They instead engage in a peculiar ritual dance, in which they propound their own views on constitutional law, but neither hope nor expect the nominee to respond in like manner. Under Carter's criteria, this process ought to count as nothing more than a harmless charade, not as a problem of any real import. It is only if Carter's criteria are wrong—only if the hearings on Judge Bork ought to serve less as a warning than as a model—that we now may have a mess to clean up.

III. CRITIQUING CARTER

What, then, of Carter's vision of the confirmation process? Should participants in the process accede to Carter's view of how to select a Supreme Court Justice? Or should they adopt a different, even an opposite, model?

One preliminary clarification is necessary. Carter's argument

²² The margin of victory would have increased yet further had Thomas not made controversial statements, before his nomination, on subjects such as abortion and affirmative action. Carter is unclear as to whether (or how) participants in the confirmation process ought to take account of such prenomination statements. If Carter does approve of an evaluation of the substantive views expressed by a nominee in prior speeches or writings, then virtually all of the votes cast against Justice Thomas would have derived from the consideration of factors that Carter himself deems relevant to the process.

against a Bork-like confirmation process focuses entirely on the scope of the inquiry, not at all on the identity (executive or legislative) of the inquirer. This is an important point because other critics of the Bork hearings have rested their case on a distinction between the roles of the President and the Senate; they have argued that in assessing the substantive views of the nominee, the Senate ought to defer to the President.²³ Carter (I think rightly) rejects this claim, adopting instead the position that the Senate and the President have independent responsibility to evaluate, by whatever criteria are appropriate, whether a person ought to serve as a Supreme Court Justice.²⁴ Carter's argument concerns the criteria that the participants—that is, all the participants—in the confirmation process ought to use to make this decision. It is thus Carter's contention not merely that the Senate ought to forgo inquiry into a nominee's legal views and philosophy, but also that the President ought to do so—in short, that such inquiry, by whomever conducted, crosses the bounds of propriety. (And although Carter does not address the issue, his arguments apply almost equally well to an investigation of the views expressed in a person's written record as to an inquiry into the person's views by means of an oral examination.)

This analysis raises some obvious questions. If substantive inquiry is off-limits, on what basis will the President and Senate exercise their respective roles in the appointments process? Will this limited basis prove sufficient to evaluate and determine whether a nominee (or would-be nominee) should sit on the Court? Will an inquiry conducted on this basis appropriately educate and engage the public as to the Court's decisions and functions? Some closer exploration of Carter's views, as they relate to this set of issues, will illustrate at once the inadequacy of his proposals and the necessity for substantive inquiry of nominees, most notably in Senate hearings.

Carter argues that both the President and the Senate ought to pay close attention to a nominee's (or a prospective nominee's)

²³ See, for example, John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 *Tex L Rev* 633, 636, 653-54 (1993).

²⁴ This position has become common in the literature on the confirmation process. See David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *Yale L J* 1491 (1992). See also Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *Yale L J* 657 (1970). Because Carter and I agree on the issue, and because the relevant arguments have been stated fully elsewhere, this Review addresses the issue only indirectly.

objective qualifications. There may be, as Carter notes, some disagreement as to what these are (pp 161-62). Must, for example (as Carter previously has argued²⁵), a nominee have served on another appellate court—or may (as I believe) she demonstrate the requisite intelligence and legal ability through academic scholarship, the practice of law, or governmental service of some other kind? Carter writes that we must form a consensus on these issues and then rigorously apply it—so that the Senate, for example, could reject a nomination on the simple ground that the nominee lacks the qualifications to do the job (p 162). On this point, Carter surely is right. It is an embarrassment that the President and Senate do not always insist, as a threshold requirement, that a nominee's previous accomplishments evidence an ability not merely to handle but to master the "craft" aspects of being a judge. In this respect President Clinton's appointments stand as models. No one can say of his nominees, as no one ought to be able to say of any, that they lack the training, skills, and aptitude to do the work of a judge at the highest level.

But Carter cannot think—and on occasion reveals he does not think—that legal ability alone ought to govern, or as a practical matter could govern, either the President's or the Senate's decision. If there was once a time when we all could agree on the single "best" nominee—as, some say, all agreed on Cardozo—that time is long past, given the nature of the work the Supreme Court long has accomplished. As Carter himself concedes, most of the cases the Supreme Court hears require more than the application of "mundane and lawyerly" skills; these cases raise "questions requir[ing] judgment in the finding of answers, and in every exercise of interpretive judgment, there comes a crucial moment when the interpreter's own experience and values become the most important data" (p 151). Carter offers as examples flag burning, segregated schools, and executive power (p 151), and he could offer countless more; it should be no surprise by now that many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value. Imagine our response if President Clinton had announced that he had chosen his most recent nominee to the Supreme Court by conducting a lottery among Richard Posner, Stephen Breyer, and Laurence Tribe because they seemed to him the nation's three smartest lawyers. If we are all realists now, as the saying goes, it is in the sense that we understand a choice among

²⁵ See Stephen Carter, *The Confirmation Mess*, 101 Harv L Rev 1185, 1188 (1988).

these three to have large consequences and that we would view a lottery among them as demonstrating a deficient understanding of the judicial process.

Carter recommends, in light of the importance of a judge's values, that the President and Senate augment their inquiry into a person's legal ability with an investigation of the person's morality. He says that "[t]he issue, finally, is . . . what sort of person the nominee happens to be" (p 151); and he asks the President and Senate to determine whether a person "possess[es] the right moral instincts" by investigating whether her "personal moral decisions seem generally sound" (p 152). Here, too, it is easy to agree with Carter that this trait ought to play some role in the appointments process. Moral character, and the individual acts composing it, matter for two reasons (although Carter does not disentangle them). First, elevating a person who commits acts of personal misconduct (for example, sexual harassment) to the highest legal position in the nation sends all the wrong messages about the conduct that we as a society value and honor. Second, moral character, as Carter recognizes, sometimes will be "brought to bear on concrete cases," so that "the morally superior individual" may also "be the morally superior jurist," in the sense that her decisions will have a "salutary rather than destructive effect on the Court and the country" (p 153).

But focusing the confirmation process on moral character (even in conjunction with legal ability) would prove a terrible error. For one thing, such a focus would aggravate, rather than ease, the meanness that Carter rightly sees as marring the confirmation process (and, one might add, much of our politics). The "second" hearing on Clarence Thomas ought to have taught at least that lesson. When the subject is personal character, rather than legal principle, the probability, on all sides, of using gutter tactics exponentially increases. There are natural limits on the extent to which debate over legal positions can become vicious, hurtful, or sordid—but few on the extent to which discussion of personal conduct can descend to this level.

More important, an investigation of moral character will reveal very little about the values that matter most in the enterprise of judging. What makes the Richard Posner different from the Stephen Breyer different from the Laurence Tribe is not moral character or behavior, in the sense meant by Carter; I am reasonably sure that each of these persons is, in his personal life and according to Carter's standard, a morally exemplary individual. What causes them to differ as constitutional interpreters is

something if not completely, then at least partly, severable from personal morality: divergent understandings of the values embodied in the Constitution and the proper role of judges in giving effect to those values. Disagreement on these matters can cause (and has caused), among the most personally upright of judges, disagreement on every concrete question of constitutional law, including (or especially) the most important. It is therefore difficult to understand why we would make personal moral standards the focal point of a decision either to nominate or to confirm a person as a Supreme Court Justice.²⁶

What must guide any such decision, stated most broadly, is a vision of the Court and an understanding of the way a nominee would influence its behavior. This vision largely consists of a view as to the kinds of decisions the Court should issue. The critical inquiry as to any individual similarly concerns the votes she would cast, the perspective she would add (or augment), and the direction in which she would move the institution.²⁷ I do not mean to say that the promotion of "craft values"—the building of a Court highly skilled in legal writing and reasoning and also finely attuned to pertinent theoretical issues—is at all unimportant. Justice Scalia by now has challenged and amused a decade's worth of law professors, which is no small thing if that is your profession; more seriously, the quality and intelligence (even if ultimate wrong-headedness) of much of Justice Scalia's work has instigated a debate that in the long run can only advance legal inquiry. But the bottom-line issue in the appointments process must concern the kinds of judicial decisions that will serve the country and, correlatively, the effect the nominee will have on the Court's decisions. If that is too results oriented

²⁶ It is also true that a person may engage in immoral behavior without allowing that immorality to influence his judicial decision making. Our government is replete with womanizers who always vote in sympathy with the goal of sexual equality; our Court has seen a former Ku Klux Klan member who well understood the constitutional evil of state-imposed racism. Perhaps the (im)moral conduct in these cases is all that matters; perhaps, in any event, we ought to rely on the (im)moral conduct as a solid, even if not a foolproof, indicator of future judicial behavior. But consideration of these cases may increase further our reluctance to make moral character the critical determinant of confirmation decisions.

²⁷ The President and Senate thus ought to evaluate the nominee (or potential nominee) in the context of the larger institution she would join if confirmed. They are not choosing a judge who will staff the Supreme Court alone; they are choosing a judge who will act and interact with eight other members. The qualities desirable in a nominee may take on a different cast when this fact is remembered. Most obviously, the benefits of diversity of viewpoint become visible only when the nominee is viewed as just one member of a larger body.

in Carter's schema, so be it—though even he notes that a critical question is whether the Court's decisions will have a "salutary" or a "destructive" impact on the country (p 153). It is indeed hard to know how to evaluate a governmental institution, or the individuals who compose it, except by the effect of their actions (or their refusals to take action) on the welfare of society.

If this is so, then the Senate's consideration of a nominee, and particularly the Senate's confirmation hearings, ought to focus on substantive issues; the Senate ought to view the hearings as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct. Like other kinds of legislative fact-finding, this inquiry serves both to educate members of the Senate and public and to enhance their ability to make reasoned choices. Open exploration of the nominee's substantive views, that is, enables senators and their constituents to engage in a focused discussion of constitutional values, to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires. These are the issues of greatest consequence surrounding any Supreme Court nomination (not the objective qualifications or personal morality of the nominee); and the process used in the Senate to serve the intertwined aims of education and evaluation ought to reflect what most greatly matters.²³ At least this is true in the absence of any compelling reasons, of prudence or propriety, to the contrary; later I will argue, as against Carter, that such reasons are nowhere evident.

The kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues. By "judicial philosophy" (a phrase Carter berates without explanation), I mean such things as the judge's understanding of the role of courts in our society, of the nature of and values embodied in our Constitution, and of the proper tools and techniques of interpretation, both constitutional and statutory. A nominee's views on these matters could prove quite revealing: contrast, for example, how Antonin Scalia and Thurgood Marshall would have answered these queries, had either decided (which neither did) to

²³ To structure the process to avoid these issues would be akin to enacting a piece of legislation without trying to figure out or explain the legislation's principal consequences. I presume that no one would commend such an approach generally to Congress.

share his thoughts with the Senate. But responses to such questions can—and have—become platitudinous, especially given the interrogators' scant familiarity with jurisprudential matters.²⁹ And even when a nominee avoids this vice, her statements of judicial philosophy may be so abstract as to leave uncertain, especially to the public, much about their real-world consequences. Hence the second aspect of the inquiry: the insistence on seeing how theory works in practice by evoking a nominee's comments on particular issues—involving privacy rights, free speech, race and gender discrimination, and so forth—that the Court regularly faces. It is, after all, how the Court functions with respect to such issues that makes it, in Carter's words, either a "salutary" or a "destructive" institution.

A focus on substance in fact would cure some of the deficiencies in the confirmation process that Carter pinpoints. Carter says that the process turns "tiny ethical molehills into vast mountains of outrage" (p 8)—and he is right that we have seen these transformations. To note but one example, the amount of heat generated by a few senators (and the *New York Times*) concerning Justice Breyer's recusal practices far exceeded the significance of the issue. But this occurs precisely because we have left ourselves with nothing else to talk about. Rather than feeling able to confront directly the question whether Justice Breyer was too moderate, Senator Metzenbaum (and likewise the *New York Times*) fumed about an issue not nearly so important, either to them or to the public. Carter also says that participants in the process have attempted to paint nominees (particularly Judge Bork) as "radical monster[s]—far outside the mainstream of both morality and law" (p 127). But assuming, as seems true, that senators and others at times have engaged in distortion—it would be surprising if they hadn't—the marginalization of substantive inquiry that Carter favors only would encourage this practice. If evaluating (and perhaps rejecting) a nominee on the

²⁹ Carter often takes senators to task for failing to question nominees on constitutional theory with the appropriate level of sophistication and nuance. Although there is some truth to this criticism, it is mixed in Carter's account with a healthy measure of professorial condescension. Given the need to explain matters of constitutional theory to the public, at least a few senators do quite well. To the extent Carter's criticism has merit, the real problem is that senators now can expect answers only to high-blown questions of constitutional theory. Senators wander in the unfamiliar ground of constitutional theory because they cannot gain access to the real, and very familiar, world of decisions and consequences. See Robert F. Nagel, *Advice, Consent, and Influence*, 84 *Nw U L Rev* 858, 863 (1990) ("Senators are certainly qualified to consider the impact of the law's abstractions.").

basis of her substantive positions is appropriate only in the most exceptional cases, then the natural opponents of a nomination will have every incentive to—indeed, will need to—characterize the nominee as a “radical monster.” The way to promote reasoned debate thus lies not in submerging substantive issues, but in making them the centerpiece of the confirmation process.

Further, a commitment to address substantive issues need not especially disadvantage scholars and others who have left a “paper trail,” as the received wisdom intones and Carter accepts (p 38). The conventional view is that substantive inquiry promotes substantive ciphers; hence the hearings on Robert Bork led to the nomination of David Souter. But this occurs only because the cipher is allowed to remain so—only because substantive questioning is reserved for nominees who somehow have “opened the door” to it by once having committed a thought to paper. If questioning on substantive positions ever were to become the norm, the nominee lacking a publication record would have no automatic advantage over a highly prolific author. The success of a nomination in each case would depend on the nominee’s views, whether or not previously expressed in a law review or federal reporter. Indeed, a confirmation process devoted to substantive inquiry might favor nominees with a paper trail, all else being equal. If there was any reason for the Senate to have permitted the testimonial demurrals of Justices Breyer and Ginsburg, it was that their views already were widely known, in large part through scholarship and reported opinions—and that those views were widely perceived as falling within the appropriate range. When this is so, extended questioning on legal issues may seem hardly worth the time and effort.³⁰ More available writing thus might lead to less required testimony in a confirmation process committed to substantive inquiry.

Finally, a confirmation process focused on substantive views usually will not violate, in the way Carter claims, norms of judi-

³⁰ The value of questioning in such circumstances is almost purely educative; the inquiry is a means not of discovering what the nominee thinks, in order to decide whether confirmation is warranted, but instead of conveying to members of the public what the nominee thinks, in order to give them both an understanding of the Court and a sense of participating in its composition. This function is itself important, see text accompanying note 28; it may provide a reason for holding substantive hearings even when senators can make, and have made, a decision as to a nominee’s views prior to asking a single question (as senators could have and, for the most part, did about the views of Justices Breyer and Ginsburg). The need for such hearings, however, is much greater when (as was true for Justices Souter and Thomas) the prior record and writings of the nominee leave real uncertainty as to the nominee’s legal philosophy.

cial impartiality or independence. Carter's "blank slate" notion of impartiality of judgment—"appointing Justices who make up their minds about how to vote before they hear any arguments rather than after is a threat," fusses Carter (p 56)—is an especial red herring. Judges are not partial in deciding cases because they have strong opinions, or previously have expressed strong opinions, on issues involved in those cases. If they were, the Supreme Court would have to place, say, Justice Scalia in a permanent state of recusal, given that in the corpus of his judicial opinions he has stated unequivocal views on every subject of any importance. And the Senate would have had to reject, on this ground alone, the nomination of Justice Ginsburg, who not only had written about abortion rights³¹—perhaps the most contentious issue in contemporary constitutional law—but who testified in even stronger terms as to her current views on that issue.³² That both suggestions are absurd indicates that we do not yet, thankfully enough, consider either the possession or the expression of views on legal issues—even when strongly held and stated—to be a judicial disqualification.

As for "judicial independence," Carter speaks as though the term were self-defining—and as though it meant that in appointing judges to a court, the President and Senate must refrain from considering what they will do once they arrive there. But this would be an odd kind of decision to leave in the hands of elected officials: far better, if such subjects were forbidden, to allow judges to name their own successors—or to cede the appointment power to some ABA committee. In fact, the placement of this decision in the political branches says something about its nature—says something, in particular, about its connection to the real-world consequences of judicial behavior. Indeed, contrary to Carter's view, the President and Senate themselves have a constitutional obligation to consider how an individual, as a judge, will read the Constitution: that is one part of what it means to preserve and protect the founding instrument. The value of judicial independence does not command otherwise, however much Carter tries to convert this concept into a thought-suppressing mantra. The judicial independence that we should focus on protecting resides primarily in the inability of political officials, once having placed a person on a court, to interfere with what she

³¹ See, for example, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *NC L Rev* 375 (1985).

³² See, for example, Confirmation Hearings for Ginsburg at 268-69 (cited in note 5).

does there. That seems a fair amount of independence for any branch of government.

I do not mean to argue here that the President and Senate may ask, and a nominee (or potential nominee) must answer, any question whatsoever. Some kinds of questions, as Carter contends, do pose a threat to the integrity of the judiciary. Suppose, for example, that a senator asked a nominee to commit herself to voting a certain way on a case that the Court had accepted for argument. We would object—and we would be right to object—to this question, on the ground that any commitment of this kind, even though unenforceable, would place pressure on the judge (independent of the merits of the case) to rule in a certain manner. This would impede the judge's ability to make a free and considered decision in the case, as well as undermine the credibility of the decision in the eyes of litigants and the public. And once we accept the impermissibility of such a question, it seems we have to go still further. For there are ways of requesting and making commitments that manage to circumvent the language of pledge and promise, but that convey the same meaning; and these scantily veiled expressions pose dangers almost as grave as those of explicit commitments to the fairness, actual and perceived, of the judicial process.

But we do not have to proceed nearly so far down the road of silence as Carter and recent nominees would take us—to a place where comment of any kind on any issue that might bear in any way on any case that might at any time come before the Court is thought inappropriate.³³ There is a difference between a prohibition on making a commitment (whether explicit or implicit) and a prohibition on stating a current view as to a disputed legal question. The most recent drafters of the Model Code of Judicial Conduct acknowledged just this distinction when they adopted the former prohibition in place of the latter for candidates for judicial office.³⁴ Of course, there will be hard cases—cases in which reasonable people may disagree as to whether a nominee's statement of opinion manifests a settled intent to decide in a

³³ For a similar conclusion, see Steven Lubet, *Advice and Consent: Questions and Answers*, 84 Nw U L Rev 879 (1990).

³⁴ See pp 96-97. Compare Model Code of Judicial Conduct Canon 5(A)(3)(d) (1990), with Code of Judicial Conduct Canon 7(B)(1)(c) (1972). See generally *Buckley v Illinois Judicial Inquiry Board*, 997 F2d 224, 230 (7th Cir 1993) (Judge Posner noting the difference between these two kinds of prohibitions and holding the broader prohibition, on "announc[ing] . . . views on disputed legal or political issues," to violate the First Amendment).

particular manner a particular case likely to come before the Court. But many easy cases precede the hard ones: a nominee can say a great, great deal before making a statement that, under this standard, nears the improper. A nominee, as I have indicated before, usually can comment on judicial methodology, on prior caselaw, on hypothetical cases, on general issues like affirmative action or abortion. To make this more concrete, a nominee can do . . . well, what Robert Bork did. If Carter and recent nominees are right, Judge Bork's testimony violated many times a crucial norm of judicial conduct. In fact, it did no such thing; indeed it should serve as a model.

Return for a moment to those hearings, in which the Senate—and the American people—evaluated Robert Bork's fitness. Carter stresses the distortion, exaggeration, and vilification that occurred during the debate on the nomination. And surely these were present—most notably, as Carter notes, in the misdescription of Bork's opinion in *American Cyanimid*.³⁵ But the most striking aspect of the debate over the Bork nomination was not the depths to which it occasionally descended, but the heights that it repeatedly reached.³⁶ What Carter tongue-in-cheek calls "the famous national seminar on constitutional law" (p 6) was just that. The debate focused not on trivialities (Carter's "ethical molehills") but on essentials: the understanding of the Constitution that the nominee would carry with him to the Court. Senators addressed this complex subject with a degree of seriousness and care not usually present in legislative deliberation; the ratio of posturing and hyperbole to substantive discussion was much lower than that to which the American citizenry has become accustomed. And the debate captivated and involved that citizenry in a way that, given the often arcane nature of the subject matter, could not have been predicted. Constitutional law became, for that brief moment, not a project reserved for judges, but an enterprise to which the general public turned its attention and contributed.

Granted that not all subsequent confirmation hearings could, or even should, follow the pattern set by the Bork hearings, in either their supercharged intensity or their attention to substance. A necessary condition of both was the extreme conservatism of Bork's known views, which made him an object of terror to some

³⁵ *Oil, Chemical & Atomic Workers Intl. Union v American Cyanimid Co.*, 741 F2d 444 (DC Cir 1984).

³⁶ For a similar view, see Strauss, *Am Prospect* at 94 (cited in note 19).

senators and veneration to others. It would be difficult to imagine hearings of the same kind following the nomination of Justice Ginsburg or Justice Breyer—two well-known moderates whose nominations had been proposed by senators on both sides of the aisle. To insist that these hearings take the identical form as the hearings on Judge Bork is not only to blink at political reality, but also to ignore the very real differences in the nature of the nominations.

But that said, the real “confirmation mess” is the gap that has opened between the Bork hearings and all others (not only for Justices Ginsburg and Breyer, but also, and perhaps especially, for Justices Kennedy, Souter, and Thomas). It is the degree to which the Senate has strayed from the Bork model. The Bork hearings presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction. Subsequent hearings have presented to the public a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis. Such hearings serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government. Neither can such hearings contribute toward an evaluation of the Court and a determination whether the nominee would make it a better or worse institution. A process so empty may seem ever so tidy—muted, polite, and restrained—but all that good order comes at great cost.

And what is worse even than the hearings themselves is a necessary condition of them: the evident belief of many senators that serious substantive inquiry of nominees is usually not only inessential, but illegitimate—that their insistent questioning of Judge Bork was justified, if at all, by his overt “radicalism” and that a similar insistence with respect to other nominees, not so obviously “outside the mainstream,” would be improper. This belief is not so often or so clearly stated; but it underlies all that the Judiciary Committee now does with respect to Supreme Court nominations. It is one reason that senators accede to the evasive answers they now have received from five consecutive nominees. It is one reason that senators emphasize, even in posing questions, that they are asking the nominee only about philosophy and not at all about cases—in effect, inviting the nominee to spout legal theory, but to spurn any demonstration of

what that theory might mean in practice. It is one reason that senators often act as if their inquiry were a presumption—as if they, mere politicians, have no right to ask a real lawyer (let alone a real judge) about what the law should look like and how it should work. What has happened is that the Senate has absorbed criticisms like Carter's and, in so doing, has let slip the fundamental lesson of the Bork hearings: the essential rightness—the legitimacy and the desirability—of exploring a Supreme Court nominee's set of constitutional views and commitments.

The real confirmation mess, in short, is the absence of the mess that Carter describes. The problem is not that the Bork hearings have set a pattern for all others; the problem is that they have not. And the problem is not that senators engage in substantive discussion with Supreme Court nominees; the problem is that they do not. Senators effectively have accepted the limits on inquiry Carter proposes; the challenge now is to overthrow them.

In some sense, Carter is right that we will clean up the mess only when we change "our attitudes toward the Court as an institution"—when we change the way we "view the Court" (p 188). But as he misdescribes the mess, so too does Carter misapprehend the needed attitudinal adjustment. We should not persuade ourselves, as Carter urges, to view the Court as a "mundane and lawyerly" institution and to view the position of Justice as "simply a job" (pp 205-06). We must instead remind ourselves to view the Court as the profoundly important governmental institution that, for good or for ill, it has become and, correlatively, to view the position of Justice as both a seat of power and a public trust. It is from this realistic, rather than Carter's nostalgic, vision of the Court that sensible reform of the confirmation process one day will come. And such reform, far from blurring a nominee's judicial philosophy and views, will bring them into greater focus.

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The Regulation of Social Meaning

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