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BOOK REVIEWS

The Confirmation Mystery

THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS. By Stephen L. Carter. (New York: Basic Books, 1994). Pp. xii, 252. \$21.00.

REVIEWED BY MICHAEL J. GERHARDT*

The confirmation process is like the weather: everyone complains, but no one seems able to do anything about it. In fact, there has been a lot about which to complain. Within the past decade, the Reagan, Bush, and Clinton administrations have each had confirmation mishaps that have been the subject of countless commentaries, including President Reagan's failed Supreme Court nominees Robert Bork and Judge Douglas Ginsburg; President Bush's barely successful nomination of Justice Clarence Thomas, whose confirmation hearings were dominated by fierce racial and sexual politics; and President Clinton's protracted, leak-ridden searches for two Supreme Court nominees and forced withdrawals of his nominations of Zoe Baird as Attorney General, Bobby Inman as Secretary of Defense, and Lani Guinier as head of the Civil Rights Division of the Department of Justice.

Even though each of these incidents and many other troubled nominations¹ may make sense in retrospect, the confirmation process still mysti-

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1. The past three administrations have each had many other confirmation difficulties. For instance, President Reagan's other failed nominees include Brad Reynolds as Associate Attorney General, see Aaron Freiwald, *William Bradford Reynolds*, AM. LAW., Mar. 1989, at 147; Robert Gates as Director of the Central Intelligence Agency, see David Hoffman, *CIA Post Declined by Tower*, WASH. POST, Mar. 3, 1987, at A1; and nineteen other people nominated for federal district and appellate court judgeships, see Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (Apr./May 1989). President Reagan's narrowest confirmation victory was Daniel Manion's Seventh

fies many people. No administration has ever been able to predict infallibly which factors will undo which of its nominees. Moreover, the American people watch confirmation proceedings in the hopes of ascertaining the character and views of presidential nominees, hoping to gauge the President's agenda and better understand federal institutions that are not usually open to close public scrutiny. The public is especially fascinated with Supreme Court confirmation hearings, which provide the only chance for most people to get to know the Justices, who subsequently disappear from public view only to re-emerge later as the faceless authors of rulings in politically or socially significant disputes.

Hence, the time is ripe for Professor Stephen Carter's book, *The Confirmation Mess: Cleaning Up the Federal Appointments Process*.² Drawing on many recent confirmation contests that have confounded the public, legal scholars, and the media, Carter promises to explain "what is wrong with our confirmation process, how it got this way, and what we can do to fix it."³

For Carter, the major problem with the confirmation process is its focus on disqualifying factors. He finds the root cause of this focus in the American people's penchant for punishment, reluctance to forgive, and inability to appreciate "sin as something ever-present in all of us."⁴ Thus, Carter believes that reforming the appointment process requires us to incorporate "the more complex metaphorical possibilities of contrition, redemption, and forgiveness" into "our national dialogues" about confirmation.⁵ Carter further argues that the Senate should examine a judicial

Circuit appointment, which the Senate approved by a single vote. Karen Tumulty, *Senate Confirms Manion 50 to 49*, L.A. TIMES, July 24, 1986, at 1. President Bush's failed nominees include William Lucas as Assistant Attorney General for the Civil Rights Division, see John Flinn, *Career Objective: To Obtain Job by Using Bogus Resume*, ST. PETERSBURG TIMES, Mar. 5, 1992, at 1E; Kenneth Ryskamp for the Eleventh Circuit; and several other people on whose nominations for federal district and appellate judgeships the Senate Judiciary Committee refused to act near the end of President Bush's term. See Gail Appleson, *U.S. Court Cases Hit Judicial Vacancy Bottleneck*, REUTER LIBR. REP., July 21, 1992, at 1. President Clinton's failed nominees include Gerald Torres as Assistant Attorney General for the Lands Division. See Ronald J. Ostron, *As Support Wanes, 2 Justice Dept. Nominees Withdraw*, L.A. TIMES, Dec. 18, 1993, at N8.

2. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

3. *Id.* at 5. The book expands upon Professor Carter's academic writings on the subject of confirmation. For a sampling of these, see Stephen L. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988); Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962 (1990); Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759 (1991); Stephen L. Carter, *The Confirmation Mess, Continued*, 62 U. CIN. L. REV. 75 (1993); Stephen L. Carter, *Why the Confirmation Process Can't Be Fixed*, 1993 U. ILL. L. REV. 1; see also *A Litmus Test for the Court?*, N.Y. TIMES, Apr. 28, 1993, at A21; *The Candidate*, NEW REPUBLIC, Feb. 22, 1993, at 29.

4. CARTER, *supra* note 2, at 184.

5. *Id.* This argument dovetails with the main thesis of Carter's other recent book. See

nominee's "moral instincts."⁶ This focus would better enable the Senate to reflect on "the enduring and fundamental values that shape the specialness of the American people,"⁷ as well as enhancing the Court's credibility, and safeguarding judicial independence more effectively than the current practice of treating the nominee's ideology as a potential disqualifier.

In response, this review maintains that Carter's critique of the confirmation process conflicts with constitutional history, structure, and practice. It is surprising that Carter, one of the nation's most respected scholars on original understanding and separation of powers, presents a caricature of the appointment system as it was originally conceived and designed. He tries to describe the confirmation process without giving sufficiently serious attention to its central component—politics. If by "politics," one means the weighing of each nomination's and confirmation's implications for federalism, the institutional relationships among the branches of the federal government, personal fealty to the nominee, and public accountability, then politics drives the confirmation process by constitutional design. To be sure, these factors may cut differently in different cases and depend a great deal on context or circumstances, but, as a general matter, the Appointments Clause gives the President an advantage over the Senate by giving him the nomination power, and thus the chance to take a proactive stance on nominations with the Senate largely confined to exercising a veto. Carter, however, adopts a myopic view of politics as being short-sighted, mean-spirited, self-aggrandizing, and purely partisan. By adopting this less sophisticated understanding of politics, Carter makes the system appear to be more of a mess than it is. For Carter, politics distracts the confirmation process from achieving the nobler objectives of making quality appointments and preserving judicial integrity and independence. But in practice, the system, though it does not always operate in refined or pretty ways, rarely reaches distorted or unjust outcomes, as reflected by Carter's ultimate failure to denounce the results of any of the confirmation battles he surveys.

Part I of this review describes the book's major themes. Part II discusses two major problems that cut across specific arguments in the book and undermine the reliability of Carter's critique: (1) by most harshly criticizing the hearings that have involved his friends—Zoe Baird, Lani Guinier, and Anita Hill—he undermines the impartiality of those criticisms; and (2) he fails to fulfill his promise to clarify the roles performed in the confirma-

STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) (lamenting the disappearance of religion from American political discourse).

6. CARTER, *supra* note 2, at 152.

7. *Id.* at 146.

tion process by the President, the media, and the public.⁸

Part III critiques the book's major themes. Carter attacks the preoccupation with disqualifying factors that marks the confirmation process. This focus, however, is compelled by constitutional design and the political reality that the President and the Senate each have limited capital to expend on confirmation battles. The main flaw with Carter's critique of Supreme Court confirmations is that the Constitution deliberately conditions judicial appointments on the political branches' unrestricted discretion and, thus, does not immunize judicial independence from political reprisal in the confirmation process.⁹ Furthermore, focusing on a Supreme Court nominee's morals would not achieve Carter's aims of reducing the friction in judicial confirmations, separating personal preference and principled constitutional interpretation, and enhancing the Court's credibility.

Finally, Part IV discusses three problems with Carter's analyses of proposals for improving judicial confirmations. First, Carter ignores the relevance of the nominee search process. Second, the most attractive constitutional amendment to him—requiring a two-thirds supermajority for Supreme Court confirmations—is problematic because it creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of special interests. Third, the confirmation process provides the solution to its errors by making the President, the Senate, and the nominee politically accountable and thus subject to political incentives—including public pressure—to do better.

I. CARTER'S CONFIRMATION MESS

Although Carter's *The Confirmation Mess* features lucid writing and fascinating details about many confirmation conflicts, it is frustrating to read and describe because it is repetitious and filled with digressions. It is fair to say that, stripped to its essence, Carter's main concern is with the "messy" process through which the confirmation system has reached its results¹⁰—a process with which he never expressly disagrees. He rejects

8. Carter generally does an excellent job, however, in surveying other important aspects of the confirmation process, including the significance of the nominee's testimony before the relevant Senate committee; the contributions of interest groups and other concerned parties, such as the American Bar Association, to the confirmation process; the strengths and weaknesses of alternative judicial selection systems, particularly those used in the states and during the Carter administration; and the need for life tenure for federal judges.

9. Besides the confirmation process, the Constitution authorizes only a few means for political reprisals against the Court, including impeachment (to be conducted by the House of Representatives and the Senate), congressional control of federal court jurisdiction, and constitutional amendment. Although Carter does not discuss impeachment in his book, he suggests that the problem with each of these other mechanisms is that "in a power struggle mediated by democratic politics, the unpopular Court would lose." CARTER, *supra* note 2, at 111.

10. *Id.* at 15.

the notion that “the end justifies the means” in the confirmation process; instead, he suggests “we are better than that.”¹¹ At stake for Carter is the honor and quality of the nominees subjected to the process and the promise that its proper administration would have for preserving the public’s respect for democratic institutions.

With these values in mind, Carter analyzes two major topics. First, he complains about the focus on “disqualifying factors,” rather than on a nominee’s competence to serve in the post to which he or she has been nominated.¹² He finds this focus problematic because we lack consensus on what suffices to disqualify judicial nominees, and thus the confirmation process is left with “no rules whatever.”¹³ According to Carter, this absence of consensus produces a vacuum into which personal and partisan animosity, distortions, negative portrayals, and confusion creep. This scenario is “bad” because it “is likely to weaken [democratic] institutions.”¹⁴

According to Carter, this focus on disqualifying factors derives in part from the confirmation process’ reliance on a “presumption in favor of confirmation,” which invites a “search for that single tantalizing disqualifier with which one hopes to spark a firestorm of criticism.”¹⁵ He criticizes this presumption as conflicting with the Framers’ intention that the confirmation process would check presidential discretion in making appointments and policy, and with the dominant practice during the nineteenth century of presidential consultation with the Senate about federal appointments.¹⁶ Carter tells us that the turning point—at least for cabinet posts—was in 1877 during President Rutherford B. Hayes’ administration. By insisting on the unfettered right to name his cabinet without significant Congressional consultation, President Hayes “established the principle of presidential autonomy in staffing the executive branch, and thereby set the tone for the modern confirmation process.”¹⁷

According to Carter, a second source of the focus on disqualifying

11. *Id.* at 52.

12. *Id.* at 159.

13. *Id.* at 29.

14. *Id.* at 30-31.

15. *Id.* at 159.

16. *Id.* at 35.

17. *Id.* at 34. Carter explains, for example, that, “[e]ven including the rather chaotic first six months of the Clinton administration, only 7 of over 250 cabinet-level nominees have been defeated or withdrawn since World War II.” *Id.* at 32. He notes that five of the seven defeats “involved, at some level or other, a scandal They have to: based on the record, there is simply no other way to defeat a President’s cabinet choice except to make the case that the individual has done something terrible in previous life.” *Id.* at 34. One of the other two rejected nominees was Theodore Sorenson, “whom President Carter nominated in 1977 to be Director of Central Intelligence, and who faced a variety of attacks from his enemies, among them that he lacked relevant background in intelligence work.” *Id.* at 33. The other defeated nominee was President Eisenhower’s first choice as Secretary of Commerce, Lewis Strauss, who was rejected because “the Senate simply got fed up with [his] arrogance and self-promotion.” *Id.* at 34.

factors is the American psyche. He condemns the American public's penchant, to which the media caters, for "digging up dirt" on public officials.¹⁸ He suggests the American people prefer "to gossip"¹⁹ than to discuss "policies and qualifications."²⁰

In addition, "the reason that opponents try to paint controversial nominees as sinners . . . is that they know the American people . . . like to see the sinful destroyed . . . [and] do not like to forgive."²¹ Carter views the problem as the public's "puritanical streak," which hinders its appreciation of an individual's inherent propensity to sin and "makes redemption, even of the penitent, all but impossible."²² Once we recognize, as Christian theology teaches, "our shared sinfulness, we might instead have the moral obligation to listen for the possibility of genuine contrition, which might in turn demand of us a degree of forgiveness."²³ At present, though, "we do not reward contrition. Zoe Baird, who was the one who brought up her [failure to pay Social Security taxes on her nanny] in the first place, apologized for it and was thrown overboard."²⁴

Carter describes yet another source of the focus on disqualifiers as the public's failure "to treat public service as a calling rather than a reward."²⁵ This view tends to attract people to work for the government for selfish reasons and to increase the chances for special interests to contest nominations as if they were trophies. Carter proposes that we should think of government service as a chance

to labor on behalf of the country, to offer a fair return for what the nation has given. The question, then, should not be whether the nominee "deserves" the position, as though the job is a quid pro quo for years of moral rectitude. The question should be whether this person is capable of honorable service of which [the nation] will be glad.²⁶

18. *Id.* at 16.

19. *Id.* at 18.

20. *Id.* at 16.

21. *Id.* at 11.

22. *Id.* at 11. Carter explains that Americans "often show so little patience with wrongdoing by those who are in public life," because they are "unable to get [their] minds around such abstractions as the concept of sin." *Id.* at 183.

23. *Id.* at 184.

24. *Id.* at 185.

25. *Id.*

26. *Id.* at 186; *see also id.* at 205 (arguing that the confirmation process for Justices and, by analogy, for other confirmable posts, works best "when we learn once more to treat the role of Justice as simply a job. Not a prize, but a job—a job not everybody wants—and a job that, if done well, will mean working without a scintilla of loyalty to movement or cause."). If the Senate must persist, however, in focusing on a nominee's disqualifications in confirmation proceedings, Carter suggests a "spectrum of disqualifying factors" for the Senate to follow. *Id.* at 160. He would find a nominee's lack of basic job qualifications completely disqualifying, and so too, usually, a lack of the public's respect. For this reason he thinks President Clinton was probably right to withdraw Lani Guinier's nomination to be the Assistant

The second major theme of Carter's book consists of his complaints about Supreme Court confirmations. He suggests that after the Warren Court's decision in *Brown v. Board of Education*,²⁷ confirmations became contentious because of the popular belief that the Court is a "national policymaker," and therefore controlling its composition is an effective way to direct its policymaking.²⁸ *Brown* changed the confirmation process because

once the Court signaled its willingness to be one of the engines of social change, the battleground shifted, both for those who wanted to make society different and for those who wanted to make sure it stayed the same. [It] is only since *Brown* that the Court has become a prize worth spending immense political capital to win.²⁹

In Carter's opinion, the obsessive concern in confirmations with a judicial nominee's ideology as a potential disqualifier seriously threatens judicial independence. It turns hearings into the functional equivalent of popular elections to pick the Justices whose approaches to enforcing the countermajoritarian values of the Constitution are most acceptable to the majority. The danger is that, "if presidents and senators are encouraged to exercise the prerogative of appointing Justices who will do what the public wants, we can safely predict that the era of the Court as an important bulwark against majority tyranny will end."³⁰

In the mid to late 1950s and throughout the 1960s, for example, senators

Attorney General for civil rights because "the vicious campaign against her had made it impossible for her to do the job effectively." *Id.* at 167. Deeply immoral conduct provides a somewhat weaker case for disqualification; it is "rarely curable," *id.* at 178, but probably not for nominees who have been members of racially discriminatory clubs, because "it is the habit of mind that makes membership possible and comfortable, not the fact that the membership exists, that is the problem." *Id.* at 172. Illegal conduct, however, need not be disqualifying; the critical question is "whether the law involved is related to the task for which the individual has been nominated, whether those violations are consequential or inconsequential, how those who violate the laws in question are generally treated . . . and whether the nominee has made appropriate amends for the illegality." *Id.* at 173. Carter suggests that curable lapses might include, for example, a minor traffic infraction or even the failure to pay Social Security taxes on domestic help, though that lapse undermined Zoe Baird's nomination as Attorney General, "as long as [the nominees] pay the taxes and penalties due . . ." *Id.* at 174; *see also id.* (suggesting that drug use is a more difficult case, because it is "dangerous" but "it blinks at reality to deny, given the self-indulgence of the baby-boom generation, that our government is likely chock-full of people who tried drugs as teens or even as adults").

27. 347 U.S. 483 (1954).

28. CARTER, *supra* note 2, at 205-06; *see also id.* at 57 (referring to the persistent "desire to nudge [the Court's] power, that independent, mystical force, in one direction or another—or, better still, to give it a hard shove. Yielding to that splendid temptation, we have no choice but to ask the nominees questions that will help us predict their votes.").

29. *Id.* at 77.

30. *Id.* at 117.

questioned Supreme Court nominees—including William Brennan, John Marshall Harlan, Potter Stewart, and Thurgood Marshall—about their respective support for *Brown* and other activist rulings by the Warren Court.³¹ Carter notes further that, after *Brown*, presidents have tried to control the Court's policymaking through the appointment process. This tendency culminated with Presidents Reagan and Bush, who turned judicial selection into a science for the purpose of "structuring the membership of the courts in ways that would turn back what was seen as a roiling tide of liberal activism."³²

Carter's proposed solution is to focus our attention on a Supreme Court nominee's "strongest moral commitments"³³ because a "judge's background moral vision and degree of moral reflectiveness [shape] her interpretive conclusions."³⁴ He explains that constitutional interpretation always involves "a crucial moment when the interpreter's own experience and values become the most important data."³⁵ Thus, what matters most in picking a Supreme Court Justice and enhancing the Court's credibility is the "sort of moral philosophers" on the Court.³⁶

In the final part of his book, Carter considers various proposals for reforming Supreme Court confirmations. He rejects several proposals that do not require constitutional amendment, such as eliminating television coverage of the hearings or preventing the nominee or interest groups from testifying, because such changes would not prompt the Senate or the President to improve their respective confirmation performances. Carter praises the idea of requiring a supermajority Senate vote for Supreme Court confirmation because such a process would pressure the President into "find[ing] a potential Justice [who was] not strongly identified with an ideological movement[; it] would screen out nominees who were perceived, rightly or wrongly, as narrow-minded[; and] it would not screen out quality."³⁷ If the pressure to pick Justices on the basis of ideology were to persist, Carter believes that the most "honest" solution would then be to have judicial elections.³⁸

31. *Id.* at 58, 62-63, 67, 68.

32. *Id.* at 71.

33. *Id.* at 114.

34. *Id.* at 152.

35. *Id.* at 151.

36. *Id.* at 152; *see also id.* at 153 ("The popular sense should come to be one of a good, trusted, upstanding individual sitting on the bench, so that even when the people dislike her work, they will obey her—not simply because of her legal authority but because she is someone held in respect.").

37. *Id.* at 197.

38. *Id.* at 203. He explains further that judicial selection as well as a public referendum would "be doing directly what we now do indirectly: using all means, fair or foul, to influence public opinion. The difference would be that we would suddenly be honest about what we are doing—and that the public opinion itself would be decisive rather than merely influential." *Id.*

Carter concludes, however, that we should not amend the Constitution because such a change might irreparably damage the Constitution and because

the true solution to the Supreme Court confirmation mess lies in our ability to develop a public rhetoric about the Constitution that does not treat the Court as though the results it reaches are all that matters. [T]hat change would require that we rethink our attitude about the Court and its place in our society.³⁹

The appropriate attitudes, Carter suggests, are to “think of [public service] as a calling; . . . to ask whether [our nominees] will be good at the job; [and] to envision [the Court] as a check on what the democratically elected branches do”⁴⁰

II. THE MAJOR GAPS IN CARTER’S CONFIRMATION MESS

A. CARTER’S LACK OF IMPARTIALITY

Rather than focus on the specific problems with particular arguments in the book, this Part examines the major gaps in Carter’s discussion that preclude the book from being comprehensive or providing an accurate picture of the federal appointments process. The first such problem is that his personal ties to Zoe Baird, Lani Guinier, and Anita Hill cast doubt on the objectivity of his criticisms of the confirmation battles involving each of them. This proximity gives Carter valuable insights into those proceedings, but it also undermines his credibility as a neutral judge of those events.

For instance, in assessing the second phase of Justice Thomas’ confirmation hearings in which Anita Hill charged him with having sexually harassed her during his tenure as the Chairman of the Equal Employment Opportunity Commission, Carter laudably admits his “bias: I believe the charges. Anita Hill is a personal friend of long standing, and, to me, the notion that she would invent such a story is ludicrous.”⁴¹ He further

39. *Id.* at 204. He explains that the specific problems with our perception of the Court are that we rely on the Court “to correct what we often view as the errors of the [elected] branches of government;” we believe that the Constitution provides an answer to every tough moral question; and we think that reforming society is more easily achieved by having the Court make policy because it requires influencing at most five Justices, rather than by using “the principal means through which change must come in a democracy, if the change is to have lasting effect: the persuasion of our fellow citizens.” *Id.*

40. *Id.* at 206.

41. *Id.* at 140. Carter also wonders why, if Hill were part of a conspiracy to frustrate the nomination of then-Judge Thomas, no one has

come up with a reason why [Hill’s] fabrication should be so meager: if you are going to tell a lie, runs the wisdom, tell a big one Why manufacture a story of continued abuse over time, which led some to wonder why Hill would remain in Thomas’ employ, when one could instead claim that the harassment came suddenly and late?

acknowledges that he "provided the Judiciary Committee with a sworn declaration attesting to Hill's veracity."⁴² Although a person involved in an event is free to analyze it, Carter leaves his readers with no choice but to figure that their agreement with Carter's final judgment on the Thomas hearings—that Thomas committed perjury and that his only principled out was to apologize for harassing Professor Hill⁴³—turns on whether they trust Carter personally, because his conclusion rests primarily on information to which the readers are not privy. Carter's argument on this point is hardly convincing because it essentially restates the affidavit he submitted on Hill's behalf in the hearings.

Carter is also to be commended for noting that Zoe Baird's "husband, Paul Gewirtz, is a colleague of mine at Yale Law School."⁴⁴ He further admits that President Clinton could have reasonably decided not to expend any of his limited political capital on Baird's behalf.⁴⁵ Yet Carter never considers how Baird might have contributed to her own downfall.⁴⁶ Indeed, three factors related to Baird's conduct help to explain her failed nomination. First, Baird's lapse of judgment caused her nomination to fall short of the public's expectations, which had been raised as a result of President Clinton's insistence that he would hold his cabinet nominees to the highest ethical standards and that the appointment process would proceed without "politics as usual."⁴⁷ Second, it is reasonable for the Senate and the American people to expect the Attorney General to meet a higher standard of conduct than other citizens, especially if the nominee had been notified of the applicability of a law prior to her breach of it and

Id. He concludes that "Hill's testimony was simply too unadorned to be either a vengeful falsification or the result of a bizarre erotomaniacal fantasy." *Id.*

42. *Id.* at 139.

43. *See id.* at 184.

44. *Id.* at 27.

45. *Id.* at 167.

46. In contrast, Carter criticizes another Clinton nominee, Admiral Bobby Inman, for contributing to his own downfall. Carter notes that Inman "withdrew his name [for consideration as Secretary of Defense] and accused a syndicated columnist of conspiring with Senate Republicans to sabotage his candidacy. . . . [Inman's] defensive, accusatory attitude during his [final] press conference convinced many observers that he would in any case not have been a successful defense secretary." *Id.* at 8 n.*.

47. Steve Berg, *Clinton Gets Serious Message About Higher Ethics*, STAR TRIB., Jan. 23, 1993, at 1A; *see also* Editorial, N.Y. TIMES, Jan. 23, 1993, at A20. This is a variation of a problem identified by Carter in which presidents raise unreasonable expectations for the public by describing their nominees as the "best qualified" persons for the posts to which they are nominated. CARTER, *supra* note 2, at 30. To be sure, it is possible that no one pays much attention to such remarks because they are so commonplace. Nevertheless, the problem for nominees already wounded by some other problem is that their nominations might be further weakened by the gap between their actual credentials and the President's representations.

would have been, upon confirmation, responsible for its administration.⁴⁸ Third, Baird's background did little to counterbalance the attacks made against her.⁴⁹ She had no national reputation, and liberal interest and women's groups gave little, if any, support to her nomination because it was unclear how her primary professional experience as an insurance defense counsel qualified her as Attorney General.⁵⁰

Similarly, Carter's eagerness to defend Lani Guinier, for whose new book he writes the foreword,⁵¹ leads him to spend seven pages explaining her views on voting rights,⁵² while failing to assess the President's reasons for not vigorously defending her. In fact, a major reason for her failed

48. See Sidney Blumenthal, *Adventures in Babysitting*, NEW YORKER, Feb. 15, 1993, at 53-61; see also Robert Green, *Clinton Gets Painful Lesson from Baird Nomination*, Reuters, Jan. 23, 1993. Rather than acknowledge the public's legitimate expectations, Carter launches into a four page critique of the constitutionality of Social Security laws that require people to pay certain taxes on their domestic help. See CARTER, *supra* note 2, at 179-82. It is also unlikely that, if the Social Security laws were as silly as Carter contends, Baird would have had the moral authority as Attorney General to do anything about them.

49. Blumenthal, *supra* note 48, at 58.

50. Zoe Baird should be credited, however, with notifying transition officials prior to her nomination of her and her husband's failure to pay certain Social Security taxes. See *supra* note 25 and accompanying text. Ironically, she probably would have been confirmed if she had not been so forthright; indeed, an important reason for the widespread perception of the unfairness of Baird's forced withdrawal is that the Senate confirmed several of President Clinton's other nominees who had a similar problem, including Justice Stephen Breyer, see CARTER, *supra* note 2, at 6, Secretary of Commerce Ron Brown and Assistant Attorneys General Eleanor Acheson and Walter Dellinger, see Michael Isikoff, *Clinton Nominates 7 to Justice; Housekeeper Issue Raised*, WASH. POST, Apr. 30, 1993, at A20 (describing Clinton nominees' efforts to comply with the Social Security tax, and citing administration officials' argument that failure to pay the tax should not be a bar to government service). Even so, as reflected in numerous editorials calling for the withdrawal of Baird's nomination, several factors justified the disparate treatment accorded Baird, including her dubious credentials, President Clinton's heightened expectations about the Attorney General's ethics, the relationship between the position of Attorney General and the legal violation at issue, and Baird's failure to comply with the law in spite of her awareness of the legal violation involved and in spite of her undeniable ability to pay for domestic help without the same legal problems. See, e.g., *Baird's Hiring of Illegal Immigrants*, L.A. TIMES, Jan. 21, 1993, at B6; *Baird's Law-Breaking Should Disqualify Her*, STAR TRIB., Jan. 21, 1993, at A18 (suggesting that Baird forfeited the moral authority to provide leadership and set an example as Attorney General because she knowingly violated the law); Richard Cohen, *Special Privileges . . .*, WASH. POST, Jan. 22, 1993, at A21 (suggesting that Baird's awareness of the legal violation would have weakened her moral authority as Attorney General); Richard Estrada, *Zoe Baird and the Rule of Law*, DALLAS MORNING NEWS, Jan. 22, 1993, at A21; Patricia King, *She Broke the Law*, WASH. POST, Jan. 19, 1993 at A21 (discounting Baird's reasons for violating the law and suggesting that her acts left her tainted and unable to supervise immigration and other laws); Otis Pike, *Baird Withdrawal Sent the Right Message*, CHI. SUN-TIMES, Jan. 23, 1993, at 17; *Zoe Baird Deserves Hard Scrutiny*, ATLANTA CONST., Jan. 21, 1993, at A14 (discounting Baird's reasons for violating the law and suggesting that Baird's acts left her unable to restore integrity to the Justice Department).

51. See Stephen L. Carter, *Foreword* to LANI GUINIER, *TYRANNY OF THE MAJORITY*, at vii-xx (1994).

52. See CARTER, *supra* note 2, at 38-44.

nomination was its timing.⁵³ Guinier's difficulties coincided with four other troubled Justice Department nominations (only one of which Carter discusses),⁵⁴ President Clinton's search for his first Supreme Court nominee, and a fall in the President's popularity among conservative and moderate Southern Democrats disconcerted by his early support for such notoriously liberal causes as removing the ban against gays in the military.⁵⁵ Guinier's fate was sealed by the White House's judgment that it could achieve its civil rights objectives with a less controversial nominee and that continuing the fight over her nomination would further damage the rest of the President's agenda by enmeshing him in a public debate on voting rights—a divisive subject far afield from his domestic policy priorities.⁵⁶

53. Yet another conceivable reason for Guinier's failed nomination was her arguably inadequate defense of her views. For example, she often suggested that her position on voting rights was similar to her four-year-old son Nikolas' suggested resolution of a situation in which six children disagreed over which game to play, with four wanting to play tag and two wishing to play hide-and-seek. As she explains in her book:

Nikolas . . . replied, "They will play both. First they will play tag. Then they will play hide-and-seek." [He] was right. To children, it's natural to take turns. The winner may get to play first or more often, but even the 'loser' gets something. His was a positive-sum solution that many adult rule-makers ignore.

GUINIER, *supra* note 51, at 2. The problem with this story is that it suggests that it is permissible to guarantee the losers in a popular election a substantive outcome no matter the reason for their preference or loss. Even if the story could somehow be construed to make a point about the need to redraw voting districts with a history of past discrimination to ensure minority voters a fairer process rather than a substantive outcome, it is hard to see why people concerned about Guinier's voting rights stance would find this tale reassuring.

54. See *infra* notes 91-92, 94-96, and accompanying text.

55. See DeWayne Wickham, *Black Caucus Must Stand Up to Clinton*, USA TODAY, June 7, 1993, at A12 (suggesting that "Clinton sacrificed Guinier at the altar of political expediency" in light of his own poor ratings and difficulty in passing his budget).

56. See Al From, *Guinier Had to Go. Now.*, N.Y. TIMES, June 5, 1993, at 21 (arguing that Guinier's views on voting rights were inconsistent with views previously expressed by Clinton); see also Linda P. Campbell & Michael Tackett, *Race Issue, Not Radicalism, Scuttled Guinier Nomination*, CHI. TRIB., June 6, 1993, at C1 (implying that Clinton's withdrawal of Guinier's nomination was influenced by senators who feared a difficult vote). Guinier's forced withdrawal also leads Carter into a self-serving discussion of the reasons for hesitating to disqualify law professors from government service based on their scholarship. Carter argues, for instance, that the Guinier episode (as well as Robert Bork's fate) might lead legal scholars not to take "risks" in their scholarship in order to preserve their chances for government service. CARTER, *supra* note 2, at 38. He concludes that "it [is] absolutely vital [to] consider [legal scholarship in a confirmation] with care and, in particular, to remember that a work of scholarship, in the law or any other field, is not an op-ed article." *Id.* However, it is ultimately for others, such as senators and presidents, to determine the relevance of a nominee's legal scholarship to her confirmation. Furthermore, legal scholars are not entitled to have it both ways: they cannot critique the legal work of others, particularly judges, and expect that, because they are engaging in acts of academic freedom, others in an appropriate setting may not do the same to them. At present, people seeking to become public servants are held accountable for their public acts, including their clubs, speeches, and prior public service, as well as some private conduct such as drug use or beating a spouse or child. The "habit of mind" that Carter condemns, for instance, in people

B. CONFIRMATION POLITICS AND RELATIONSHIPS

Carter laments that “we are not quite sure what anybody’s role [in the confirmation process] is—the President’s, the Senate’s, or the public’s.”⁵⁷ This uncertainty, however, results not from flaws in the process itself, but from shortcomings in Carter’s appreciation of these roles and their interrelationships. First, Carter does not fully explore the implications of the driving force—politics—that, along with the Constitution, shapes and explains much about the interactions between key confirmation participants. Second, he fails to identify any positive contributions made by the three central players—the media, the public, and the Senate—in each important confirmation battle.

1. The Original Understanding and Structure of the Confirmation Process

Carter acknowledges the political factors that presidents have considered in nominating judges or deciding whether to attempt to save a troubled nominee,⁵⁸ but he never considers the full implications of this admission, or of the political aspects of the confirmation process. A more sophisticated depiction of this system would have recognized that senators, like the President, have limited political coinage to spend on confirmation fights. It is unrealistic to assume that if a president makes nominations based in significant part on political factors, including a judicial nominee’s ideology, senators can or should ignore those considerations in their deliberations on a nomination.

Nor is there anything wrong with understanding the confirmation process in political terms. Carter’s analysis of the role of politics gives short shrift to its benefits; broadly understood, politics encompasses not just partisan maneuverings to secure power or influence policy, but also the nobler efforts by the nation’s leadership and the citizenry to comprehend and put into practice the ideals that ultimately animate and make our

who belong to racially discriminatory clubs, *id.* at 172, could also be evident in one’s legal scholarship. There is no obvious reason why an academic’s article should be treated differently than a brief written by a law professor, a judge, a legislator, or a practitioner. At the very least, a legal scholar’s publications are public acts, presumably undertaken for the purpose of persuading, stimulating, or informing others. Accordingly, legal scholars interested in government service should be prepared to explain, like any other nominee, their public records.

57. *Id.*

58. *See, e.g., id.* at 70 (observing that throughout American history presidents have appointed federal judges, particularly Justices, based on various political factors, including “achieving regional balance or rewarding party loyalty or punishing executive branch policies or finding a spot for a crony”); *id.* at 168 (recognizing that a president only has “scarce political capital” to expend on defending embattled nominees and, thus, might often allow a nomination to languish or be withdrawn for the sake of saving his “energies for other battles”); *id.* at 68 (conceding that “political considerations have entered into judicial appointments since the start, and sometimes, even in the early years of the Republic, the politics were about the nominee’s likely votes”).

system of government worthwhile, including such principles as equal justice, freedom, public accountability, and individual responsibility. His discussion also ignores the constitutional structure of the process, which ties nominations and confirmations to politics, for better or worse. In particular, the federal appointments process authorizes the President and the Senate to check each other's judgments. Additionally, Carter does not acknowledge the more practical realities of how presidents and senators are themselves elected and reelected. For example, he never explores the implications for the confirmation process posed by the passage of the Seventeenth Amendment, which altered the process by which Senators are selected from one where they were chosen by state legislatures to one of popular election.⁵⁹

Carter fails to appreciate that the larger political context in which confirmation battles occur provides plausible explanations for many Senate confirmation actions. For instance, most of the twenty-nine Supreme Court nominations that have failed did so because of political factors, including presidential unpopularity.⁶⁰ The most extreme example of this trend is the Senate's rejection of five of President Tyler's six nominees for two Supreme Court seats because the Whig majority in the Senate viewed him as a weak president destined to serve one-term, doubted his loyalty to the Whigs, and preferred to save at least one of the appointments for the Whig—Henry Clay—whom they wanted to be the next president.⁶¹

This dynamic persists today. Carter suggests that the Senate's unanimous consent to Justice Scalia's confirmation reflected the absence of a "modern-day litmus test" for judicial appointments⁶² and indicated the then-existing ability of the President "to seek a nominee respected on all sides, able to garner votes even from those who disagree sharply on philosophy"⁶³ This is revisionist history. In fact, political factors do explain Justice Scalia's unanimous confirmation: he was nominated by a popular Republican president at a time when the Republicans controlled the Senate; he was nominated to fill the seat that would be vacated if William Rehnquist's concurrent nomination to the position of Chief Justice succeeded, and Scalia's likely opponents had to spend their limited political capital fighting Rehnquist's nomination, which they had figured

59. U.S. CONST. amend. XVII.

60. Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 1 (1991) (observing that "[t]welve of the 29 failed nominations were rejected outright by the Senate" and the remaining seventeen "either withdrew or their nominations were postponed by Senate parliamentary maneuvers until a new President assumed office").

61. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 106-07 (3d ed. 1992).

62. CARTER, *supra* note 2, at 79.

63. *Id.* at 197.

was easier to defeat than Scalia's;⁶⁴ Scalia made himself a small target in his confirmation hearing by saying as little as possible about his ideology;⁶⁵ and he was the first Italian-American ever to be nominated to the Court and thus enjoyed a status no senator was eager to threaten.⁶⁶

Carter's blindness towards the politics of the confirmation process is further reflected in his failure to consider the costs associated with consultation between the President and the Senate.⁶⁷ First, consultation can consume an inordinate amount of time that arguably could make a president look weak or indecisive. For example, President Clinton might have paid such a price when his consultations with key senators (and other people) led him to take eighty-seven days—"a modern record"—to nominate Justice Ginsburg⁶⁸ and over five weeks to nominate Justice Breyer, who had already been vetted as a finalist for the seat to which Justice Ginsburg was nominated one year earlier.⁶⁹ Second, consultation between the President and the Senate has the potential to hurt the reputations of potential nominees. This was true in President Clinton's two prolonged searches for Supreme Court nominees, each of which was riddled with leaks of the names of possible candidates. These rumors made it easy to thwart potential nominees merely through threats of opposition and humiliated such individuals by exposing their vulnerabilities without giving them

64. Carter describes the heated debate in the Senate over Rehnquist's nomination as Chief Justice, which succeeded only after he received (prior to Justice Thomas' confirmation) "the greatest number of negative votes ever cast against a candidate who actually won confirmation." *Id.* at 79. Carter fails, however, to explore the implications of this close confirmation for Justice Scalia's confirmation.

65. Justice Scalia's confirmation performance supports Carter's claim that "the Senate has never rejected a nominee for failing to answer its questions." *Id.* at 59.

66. See ABRAHAM, *supra* note 61, at 351-53.

67. Carter's attitude about consultation is unclear. At one point, he refuses to endorse the practice. *Id.* at 13 (suggesting that in the nineteenth century the President and the Senate "would do their horse trading in advance, and the resulting nominees would all be easily confirmed. . . . [This practice] was not necessarily better than what we have now; it was simply different."). Yet, he complains that after the Hayes administration "the legislative branch lost a good deal of its influence over the appointments process, becoming more like what it is today: a body that reacts to the President's nominees rather than one that is consulted in advance." *Id.* at 35.

68. Conor O'Clery, *Nomination Adds to Image of Disarray*, IR. TIMES, June 16, 1993, at 8.

69. See Kathy Lewis, *Politics, Health Weeded Out Two Court Hopefuls*, DALLAS MORNING NEWS, May 15, 1994, at 1A (describing Clinton's many meetings with advisors that delayed his decision to nominate Justice Breyer). The delay in nominating Justice Breyer is all the more perplexing because the President had notice as early as January 1994 of Justice Blackmun's intention to announce his retirement later in the year. See Ruth Marcus, *Dole Backs Mitchell for High Court*, WASH. POST, Apr. 11, 1994, at A5 (describing frustration within administration over White House's failure to take advantage of advance notice of Blackmun's retirement). The most likely answer for the delay is that the White House was not prepared with a second choice once its first choice, Senate Majority Leader George Mitchell, withdrew from consideration after meeting with the President to discuss the nomination.

a chance to defend themselves publicly.⁷⁰ Third, consultation can force a president to pick a nominee who is not his first choice. For instance, President Clinton has stated a preference to nominate a Justice with substantial "public experience."⁷¹ The problem is that such candidates are the likeliest to have political enemies and thus the most vulnerable to attack in a public search process.

Carter's failure to explore adequately the political dynamics of the confirmation process also causes him to miss the ability of the system to correct its own errors. For example, Carter praises President Clinton's narrowing of his choice to replace Justice White to Ruth Bader Ginsburg or Stephen Breyer as a change from Presidents Reagan's and Bush's practice of acceding to "the pressure to select someone who could be counted on more reliably to vote into constitutional law his party's platform"⁷² Yet, Carter fails to note that this change came about as the result of a presidential election—the appropriate correction mechanism in the political system—in which candidate Clinton had expressed (and presumably received approval of) his agenda for Supreme Court appointments.⁷³

2. Positive Contributions of the Senate, the Public, and the Media

In addition to ignoring the politics behind the confirmation process, Carter also fails to point to any positive contributions made to the confirmation process by the Senate, the media, or the public. He also neglects to define the roles he would prefer to see the public and the media perform

70. See Howard Kurtz, *Reporters Feast on Leaks, Then Bite the Hand that Feeds Them*, WASH. POST, June 19, 1993, at B1, B5 (describing media's eagerness to speculate about potential Supreme Court nominees).

71. Leo Rennert, *Nominee Emerged after Two Other Candidates Fell from Race*, SACRAMENTO BEE, June 15, 1993, at A12.

72. CARTER, *supra* note 2, at 188; see also *id.* at 96 (praising the nomination of Justice Ginsburg "who had nothing going for her but the fact that she is a brilliant jurist whom everybody respects"). Similarly, in the midst of a speaking tour on behalf of his book, Professor Carter praised President Clinton's nomination of Justice Breyer for "calling a stop" to the practices of Presidents Reagan and Bush "to screen nominees for their votes." Marcia Coyle, *Carter on Breyer: Three Views*, NAT'L L.J., June 6, 1994, at A22.

73. See CARTER, *supra* note 2, at 56 (describing candidate Clinton's promise to appoint only Justices who believed in the right to privacy). Moreover, Carter's failure to explore the sophisticated political aspects of the confirmation process precludes him from asking an especially troublesome question about the recent confirmation process: why was it that President Clinton, within the first eighteen months of his term, has had over half a dozen troubled nominations even though his own political party controlled the Senate during that same period? The answer, ignored by Carter, is that many of the pivotal votes cast in proceedings then were from Southern Democrats, who tend to be less liberal than their northeastern colleagues, particularly with respect to such issues as affirmative action, abortion, and crime. Cf. Erwin Chemerinsky, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: October Tragedy*, 65 S. CAL. L. REV. 1497, 1498-99 (1992) (explaining how Southern Democrats accounted for Senate's rejection of Robert Bork and confirmation of Clarence Thomas).

in the confirmation process, much less any standard by which to measure either's performance.

For instance, instead of praising the Senate for confirming Roberta Achtenberg as an Assistant Secretary of Housing and Urban Development regardless of her homosexuality, he laments that complaints about her sexuality "say[] something unhappy about our society[, i.e.,] we still cherish our discriminatory impulses against people who are different, and we often do it by calling difference a moral issue."⁷⁴ Moreover, Carter notes that Janet Reno's confirmation hearings were marred by "scurrilous rumors of [her] drunken driving . . . [that] turned out to be false . . ."⁷⁵ Yet, given the outcome of these hearings, someone obviously did something right, but Carter does not say who or what should receive the credit.

With respect to the public's involvement in the confirmation process, Carter refers to "our uncertainty as a polity about how to exercise the power of self-governance, which is why we so often behave as commonwealth *subjects*, waiting for government to make things better, rather than as American *citizens* whose task is to go out and run things."⁷⁶ Given Carter's resistance to public pressure to confirm Justices based on their ideologies, a reasonable inference is that he expects the public to adopt a larger role in keeping the President and the Senate focused on a nominee's credentials and in preventing senators from punishing nominees for their innocuous sins. Yet, the problem with these expectations (other than Carter's failure to spell them out) is that he never suggests nor explores what a reasonable expectation would be regarding the public's ability to become involved in the details of a confirmation dispute.⁷⁷

Moreover, although Carter does not give the public or the media credit for positively influencing the confirmation process, each has done so. For instance, much of the opposition to Zoe Baird's nomination came from the middle class, which resented her inability to comply with the law even though she had the financial means to provide her hired help with all of the mandated benefits and thus avoid breaching the Social Security laws.⁷⁸

74. CARTER, *supra* note 2, at 171.

75. *Id.* at 8.

76. *Id.* at 15.

77. For example, it is reasonable to expect the public to ensure that the President and the Senate each try to be as honest as possible in, and to do their respective homework prior to, making public statements about a nominee. Hence, it is the public's duty to keep the President's feet to the fire to ensure that he make informed judgments about policy and nominations, but it is not the public's fault that President Clinton failed to read Lani Guinier's writings prior to nominating her and thus later had to admit that this failure accounts for his mistake in nominating her. *See id.* at 9.

78. *See Baird is Ko'd By the Punch of Populism*, CLEV. PLAIN DEALER, Jan. 24, 1993, at 2C (suggesting Baird's nomination was destroyed by populist sentiment that people with less money could not get away with breaking the same law); *The Baird Nomination*, WASH. POST, Jan. 24, 1993, at C6 (maintaining that average Americans who are forced to comply with

President Clinton's withdrawal of Baird's nomination was partly motivated by his recognition of the key role played by the middle class in his election and the necessity of retaining that group's support for the sake of reelection and the success of his legislative agenda.

Another example of such contributions occurred during the second phase of Justice Thomas' confirmation hearings, which were not planned until the media discovered that the Senate Judiciary Committee had failed to schedule a hearing when it first learned of Anita Hill's charges against Thomas.⁷⁹ The public immediately responded with calls, faxes, and telegrams to the Judiciary Committee that led it (and the nominee and his sponsor, Senator Jack Danforth) in less than a day to agree to a public hearing on Hill's charges. Despite Carter's expression of agreement with the Committee's scheduling of the hearing,⁸⁰ he fails to appreciate the public's and media's responsibility for arranging that proceeding.

III. THE SPECIFIC PROBLEMS WITH CARTER'S MAJOR THEMES

A. THE ORIGINS OF THE CONFIRMATION PROCESS' FOCUS ON DISQUALIFYING FACTORS

This section examines the difficulties with Carter's claims about the two principal sources of the confirmation process' focus on disqualifying factors. The first source is the presumption of confirmation. The second is the American public, which Carter condemns for its intolerance of sin and corresponding penchant for punishment, as well as for its view of government service as a reward rather than a calling.

1. The Presumption of Confirmation

The most serious problem with Carter's charge that a presumption of confirmation has produced an undue emphasis on disqualifying factors is that this presumption is part of the constitutional structure. Carter admits the Framers' assumption that the Senate would be likelier than the House of Representatives to "reflect on the fundamental values of the nation."⁸¹ However, he does not acknowledge the Framers' related belief that in the context of confirmations, the Senate should therefore reject nominees for publicly compelling reasons.⁸² The Framers understood that because the

government regulations had little sympathy for the plight of two wealthy lawyers who ignored these rules).

79. See Susan Page, *Thomas Case Subpoenas; Senate Wants to Question Reporters on Leaks*, NEWSDAY, Feb. 4, 1992, at 15. To be sure, the media has made mistakes (as it obviously did in reporting Robert Bork's private video rentals). CARTER, *supra* note 2, at 138. That, however, is the price we pay for the First Amendment.

80. CARTER, *supra* note 2, at 138.

81. *Id.* at 152.

82. See THE FEDERALIST No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 77, at 461 (Alexander Hamilton); Joseph Story, *Commentaries on the Constitution of the United States*, § 791 (John E. Nowak & Ronald D. Rotunda eds., 1987); see also

Appointment Clause fixes the power to nominate in a single person who has a mandate of national scope and includes within that power the ability to make successive nominations, it gives a substantial political advantage to the President over a diffuse legislative body like the Senate in disagreements over appointments. Because of this institutional balance of power, the Senate, regardless of which party controls it, is generally forced to cut through the chaos of a confirmation to find compelling reasons for rejection.⁸³

Given Carter's acceptance of the basic structure for confirmations, he is stuck with the presumption that nominees will be confirmed. Furthermore, the President and the Senate each have reasons to prefer that the system remain as it is presently structured. As Carter recognizes, it is not possible for the Senate to closely inspect each person nominated to a confirmable position, because "[t]here is far more for Congress to oversee, and far less time for the Senate to give all nominees [numbering over a thousand] the scrutiny that their positions deserve."⁸⁴ In other words, the presumption helps to ensure that the administration of the federal government will not become bogged down in confirmation squabbles.⁸⁵

Carter's own historiography supports this conclusion. Even though he suggests that the presumption of confirmation initially took hold for cabinet appointments during the Hayes administration, he observes that the dominant practice prior to this period was for "[t]he leading members of Congress and the President [to] negotiate[] the cabinet before anybody was nominated. One result of this system is that only four cabinet nominees were apparently withdrawn in the entire nineteenth century."⁸⁶ This statement implies that a presumption of confirmation was at work prior to

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, 651-56 (1993) (arguing that Framers' intent allows for Senate rejection of nominees only for "special reasons" rather than reasons of partisanship or likely votes on particular issues).

83. No doubt, Carter would respond that the confirmation process is a mess partly because the Senate will either find or make up those compelling reasons as it sees fit. Yet, even if it were true that the debate in a confirmation hearing is not always as focused or as elevated as a Yale Law School seminar, this argument misses the point because it is the structure of the Constitution that gives rise to the initial focus on disqualifying factors. The Appointments Clause itself puts a "political burden on the Senate [that] makes it difficult [for the Senate] to successfully oppose a President of ordinary political strength for narrow or partisan reasons" McGinnis, *supra* note 82, at 653.

84. CARTER, *supra* note 2, at 36.

85. Carter also suggests that the President and the Senate could agree on legislation setting forth the qualifications for confirmable positions. CARTER, *supra* note 2, at 166. The President and the Senate have never done so because each prefers to retain discretion to fill positions or oppose nominations as their respective political needs dictate. They also both recognize that such legislation is useless because it would have to be phrased in such amorphous language as to be of no real significance; moreover, both the President and the Senate probably realize that the political capital expended on such an enterprise would be better spent on a case by case basis as each side sees fit.

86. *Id.* at 35.

the Hayes administration. Given that few cabinet nominations have failed both before and after the Hayes administration, it is clear that the presumption of confirmation has been in effect all along and that only the political incentives for consultation have changed.

Additionally, even though Carter proposes "that we should balance what good the candidate might do when serving in the position against the evil that the putatively 'disqualifying' factor represents,"⁸⁷ the presumption of confirmation already allows for a complex balancing of these and other factors, including the President's popularity, the nominee's professional distinction, and the relationship of the misconduct to the responsibilities the nominee is asking to exercise. Although Carter would prefer to restrict the scope of balancing in confirmation proceedings, such narrowing is neither constitutionally mandated nor sufficiently sensitive to the flexibility the President and the Senate each need in order to maneuver through the confirmation process and the business of operating the federal government.

In practice, this means that when a nomination comes before the relevant Senate committee, regardless of the office involved, it rarely fails for just one reason.⁸⁸ Instead, the process always entails a balancing of multiple criteria. For example, Carter notes that President Clinton's nominee for Associate Attorney General, Webster Hubbell, secured confirmation only after having apologized for having been a member of a racially exclusive country club.⁸⁹ Yet, the Senate confirmed Hubbell because he presented no other apparent negatives, calculating that his problematic membership could be cured by an apology and by indicia that he had tried to change the club's discriminatory policy. Whatever damage remained,

87. *Id.* at 177-78.

88. A single disqualifying factor is likelier to undo someone's chances to get nominated in the first place. Once a nomination has been made, the presumption of confirmation provides a structural, public impediment to the nomination's undoing; only one person—the President—has to be convinced to make or not make a nomination, however, and even then could decide for any reason he deems appropriate to go with a different candidate. For example, after Zoe Baird's forced withdrawal, President Clinton had narrowed his choice for Attorney General to Judge Kimba Wood. See Richard Benedetto, *Fallout Continues In and Out of White House: Wood, Baird Cases Different, Most Say*, USA TODAY, Feb. 9, 1993, at 4A (stating that most Americans did not think Clinton should have withdrawn Wood's name). At the last minute, though, he did not nominate her. Her problem was that she had lost the President's confidence when she failed to give a frank answer to an inquiry into whether she had a Zoe Baird problem. Judge Wood answered the question "no." Even though she, unlike Baird, had legally hired an illegal alien, the President and his advisers felt that the Wood nomination should not be made because they figured the public was opposed to Baird's nomination in part because she had hired an illegal alien at a time when the influx of illegal aliens into the country was a problem *and* because the administration thought Judge Wood either should have had sufficient political acumen to know this or should have been open with White House personnel so that they could assess the political ramifications of her nomination. See Carter, *supra* note 2, at 207 n.3.

89. *Id.* at 43-44.

the Senate concluded, could be offset by several other factors, including his close personal friendship with the President (signalling to the Senate that the President would be more disposed to defend this nominee than the garden variety sub-cabinet nominee), and his distinguished past public service.⁹⁰

Carter also fails to discuss how the presumption of confirmation helped to reinforce the positive records and secure the appointment of two other Clinton nominees, despite their potentially disqualifying behavior.⁹¹ The Senate confirmed Walter Dellinger as Assistant Attorney General for the Office of Legal Counsel because his distinguished record as a constitutional law scholar, consultant (sometimes with the Senate Judiciary Committee responsible for forwarding his nomination), and advocate offset the damage caused by both his incomplete payment of Social Security taxes for domestic help and an attempted filibuster by his home state senators from North Carolina.⁹² Concern also arose about Eleanor Acheson's nomination to Assistant Attorney General for the Office of Legal Policy because of her failure to pay Social Security taxes on domestic help and her membership in a racially exclusive club. The presumption of confirmation, however, gave her sufficient opportunity to convince the Senate to confirm

90. Prior to his nomination as Associate Attorney General, Hubbell had served as Mayor of Little Rock, Chief Justice of the Arkansas Supreme Court, and managing partner of one of Little Rock's most distinguished law firms. W. John Moore, *At Justice, A Big Chair Needs Filling*, NAT'L J., Mar. 19, 1994, at 663. The problem with Hubbell's appointment did not arise until later. In December 1994, nine months after resigning his Justice Department post, Hubbell pled guilty to felony charges of mail fraud and income tax evasion in defrauding his old law firm and its clients of \$394,000 and of evading more than \$120,000 in federal income taxes. See Mark Hosenball & Michael Isikoff, *A Clinton Ally Falls Prey to Whitewater*, NEWSWEEK, Dec. 12, 1994, at 37. At least one major issue raised by Hubbell's resignation and subsequent guilty plea is whether the initial background check conducted by the Federal Bureau of Investigation for his appointment as Associate Attorney General disclosed or gave any hints as to impending trouble. Although there is no indication whatsoever that anyone involved in Hubbell's appointment had any inkling of the legal difficulties he would later have, one issue ignored for the most part in the literature on confirmation is how often potentially disqualifying information about a nominee is kept hidden successfully by the President, the Senate, or anyone working on behalf of one or another for the purpose of securing confirmation. To the extent that this is a problem at all in the confirmation process, it reflects on the integrity of the decisionmakers involved and on their paternalistic attitudes with respect to the general public.

91. In contrast, in discussing two other failed nominations, Carter implicitly recognizes the balancing involved. For example, Theodore Sorenson withdrew his nomination by President Carter to head the Central Intelligence Agency because, as Carter explains, "of assertions that he lacked experience, was a pacifist, and had used secret documents in writing about the Kennedy administration." CARTER, *supra* note 2, at 8. In addition, the Senate rejected President Washington's nomination of then-Associate Justice John Rutledge to become Chief Justice because of the nominee's opposition to the Jay Treaty and doubts about his sanity. See *id.* at 16, 69; see also McGinnis, *supra* note 82, at 654 (arguing that issue of insanity rather than political views on the Jay Treaty resulted in the rejection of Rutledge's nomination).

92. See Ellen Silberman, *Dellinger Wins Confirmation Despite Helms and Faircloth Objections*, WASH. POST, Oct. 13, 1993, at 1.

her, based on her long history of pro bono work on civil rights issues and indicia that she joined the club in an effort to diversify it.⁹³

In contrast, some negatives simply overwhelm the presumption of confirmation and a nominee's positive record. For example, Gerald Torres was forced to withdraw his nomination as Assistant Attorney General for the Lands Division, despite his strong record of public service and academic scholarship, because of concerns about an ongoing criminal investigation (in which he was not implicated) of a law firm to which he once belonged and because of his writings about racial justice, including environmental racism—a subject plainly relevant to the post to which he was nominated.⁹⁴ Even more dramatically, Justice Fortas withdrew his nomination as Chief Justice because of four negatives: President Johnson's popularity was low at the time he made the nomination; Fortas' nomination was viewed as an act of cronyism rather than a merit appointment; Fortas' association with the controversial liberal activism of the Warren Court cost him valuable political support; and Fortas' acceptance of a substantial fee for conducting a university seminar while he was serving as a Supreme Court Justice reflected badly on his professional judgment and was viewed by many as an ethical breach.⁹⁵ Similarly, the Senate rejected Robert Bork's nomination as an Associate Justice because, as Carter concedes, Bork "had much to answer for,"⁹⁶ including his opposition to desegregation, his firing of Special Watergate Prosecutor Archibald Cox, his claim that precedents not grounded in original intent, such as *Brown*, lacked "legitimacy,"⁹⁷ and

93. See Michael Wines, *Justice Nominee Defended for Joining Exclusive Club*, N.Y. TIMES, July 3, 1993, § 1, at 7 (describing club's policies and Acheson's efforts to change them); Ana Puga, *Boston Lawyer, Named to US Post, Faces Flap over Club*, BOSTON GLOBE, June 17, 1993, at 3 (describing support for Acheson based on her commitment to civil rights).

94. See Jennifer Corbett, *Concern Over Writings of Nominee Is Reported*, STAR TRIB., July 7, 1993, at A4.

95. See CARTER, *supra* note 2, at 176 (discussing Justice Fortas' ethical breaches, which stalled his nomination as Chief Justice); see also ABRAHAM, *supra* note 61, at 14-15, 287. The perception of Fortas' nomination as cronyism was reinforced by Johnson's nomination of his old friend, Judge Homer Thornberry, to the Supreme Court vacancy that would arise once Fortas was confirmed as Chief Justice. In fact, the double nomination of Fortas and Thornberry could be itself viewed as yet another contributing factor to Fortas' forced withdrawal. Although the double nomination could have been viewed simply as expedient, it could have been perceived as an indication of President Johnson's overconfidence, which could have constituted yet another red flag to his political enemies.

96. CARTER, *supra* note 2, at 48.

97. *Id.* at 48 (quoting GARY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 262 (1990) (quoting from then-Judge Bork's speech before the Federalist Society)). In contrast, Justice Breyer's failure to pay Social Security taxes on his domestic help and his rulings in eight cases involving environmental cleanup costs that could conceivably have helped his investments with Lloyd's of London did not lead the Senate to reject his nomination. His distinguished record as a Harvard Law professor, administrative law scholar, chief counsel to the Senate Judiciary Committee, and his status as a federal appellate judge clearly weighed in favor of his appointment. The major exception to this trend of balancing, therefore, involves egregious misconduct. For example, the Senate rejected one of its own members,

his inconsistent testimony before the Senate.⁹⁸

2. Public Attitudes as a Source of the Confirmation Process' Focus on Disqualifying Factors

Carter's complaints about public opinion regarding sin and the nature of government service are misplaced for four reasons. First, he fails to provide any empirical support for the public attitudes to which he refers. He also does not substantiate the link between these attitudes and actual confirmation results.

Second, the American public is too diverse to have a single attitude about the confirmation process, government service, or religious ideas such as sin and redemption. This diversity of opinion extends to the appropriate reasons for entering into government service: it is unlikely that the American public could agree on which is the most preferred or the likeliest reason for doing so. Moreover, given our religious diversity, we are unlikely to reach a consensus about the propriety of viewing the confirmation process in Christian theological terms or treating the Senate as a forum in which public figures could seek redemption.⁹⁹

Third, even if Carter were right that there is a dominant attitude about government service, the confirmation process, forgiveness, punishment, or sin, it is not likely to be along the lines he supposes. For example, the American people might not be disposed to punish too much or be reluctant to forgive. Instead, they might prefer that the Senate examine the degree to which a nominee's sin is linked to the position for which she seeks confirmation. Hence, it is possible that the American people forgave Zoe Baird for having failed to pay Social Security taxes on her domestic help, but felt that her violation deprived her of the necessary moral authority for demanding that a citizen obey a law that she thinks is silly or wrong. Similarly, many Americans might have forgiven Judge Douglas

John Tower, as President Bush's first choice for Secretary of Defense because his notorious womanizing and drinking demeaned the office. See CARTER, *supra* note 2, at 8.

98. See Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358, 1386-91 (1990) (explaining how Bork's abandonment of his prior positions undermined Senate's confidence in his credibility).

99. Nor are we as bloodthirsty as Carter imagines. See CARTER, *supra* note 2, at 11. If we were, it would be difficult to explain a Los Angeles jury's dividing over but being disposed not to convict the Menendez brothers for killing their parents, a Virginia jury's decision to acquit Lorena Bobbitt for cutting off her husband's penis with criminal intent, the willingness of a majority of the American people to forgive President Clinton's marital infidelities, or even the November 1994 re-election of Marion Barry as the Mayor of the District of Columbia in spite of his imprisonment based on felony convictions. Moreover, this bloodthirstiness would not explain the Senate's overwhelming confirmation of Janet Reno as Attorney General in spite of her opposition to the death penalty. See Martin Dyckman, *Janet Reno/Justice For All*, ST. PETERSBURG TIMES, July 4, 1993, at D1 (remarking on Reno's popularity with Congress and the public, despite her firm opposition to the death penalty).

Ginsburg for smoking marijuana as an adult, but his Republican supporters, who wanted a tough law and order Justice, were not so forgiving.

Lastly, even if Carter were correct that the public has the kinds of attitudes to which he has attributed it, such views are not necessarily misguided. This is especially true for the perception of government service as a reward. For one thing, this attitude is consistent with the reality of successful presidential politics. Presidents have rarely won office and even more rarely stayed in office without relying on people whose judgment they (or other influential team members) have come to trust through prior service together. A president needs to depend on the loyalty of his key aides or cabinet officers to implement his perceived mandate.

Perhaps more importantly, Carter's view of government service is flawed in two other respects. First, it rests on the mistaken premise that rewarding people with government jobs somehow means that unqualified people will end up serving in important government posts. However, loyalty, prior government or public service with distinction, and political experience and acumen qualify and justify treating nominations as rewards.¹⁰⁰ Second, Carter overstates the problem. More often than Carter admits, the current system checks rewarding people with government jobs indiscriminately. For instance, public scrutiny and congressional oversight have caused many of the Arkansans who came to Washington as President Clinton's friends in high-profile positions to leave the latter posts under a cloud of controversy or because of dissatisfaction with their performance.¹⁰¹

100. Carter also never clarifies what he means by a "calling." If by that term he refers to someone with impeccable credentials who leaves a lucrative job to take lesser pay to work on behalf of the public good, he ignores that countless individuals have done just that during the Reagan, Bush, and Clinton administrations. Alternatively, a "calling" might refer to altogether foregoing work in the private sector for the sake of spending the better part of one's professional life working for the government or public interest organizations or both—a description that also fits numerous individuals from the Reagan, Bush, and Clinton administrations.

101. President Clinton brought more than 175 friends from Arkansas to join his administration. While the vast majority of these discharged their official responsibilities with great skill and professionalism and without any hint of scandal, many of the Arkansans closest to him in the administration (or as least most closely identified with him) have been less successful. These latter Arkansans include Joycelyn Elders (fired from her post as Surgeon General); Webb Hubbell (resigned from his post as Associate Attorney General amid rumors—later confirmed by his guilty plea—that he had defrauded his former law partners and some of his former firm's clients); William Kennedy III (eventually resigned from the White House Counsel's Office after having been demoted from the number three position in it subsequent to his disclosure that he had failed to pay Social Security taxes for a family nanny); Thomas F. "Mac" McLarty (demoted to presidential adviser from his initial position as presidential Chief of Staff); and David Watkins (fired as White House aide for taking a presidential helicopter on golf outing). See Timothy J. McNulty, *Spotlight Has Been Hard on Little Rock; The Joy in Clinton's Victory A Dim Memory*, CHI. TRIB., Jan. 3, 1995, at 1.

B. CARTER'S ATTITUDES ABOUT SUPREME COURT CONFIRMATION PROCEEDINGS

1. The Threat to Judicial Independence Posed by Examining a Judicial Nominee's Ideology

Carter's argument that questioning judicial nominees about their ideologies poses a threat to judicial independence is problematic for five reasons. These reasons all relate to Carter's failure to recognize that the Constitution strikes a balance between the accountability and independence of the judiciary.

First, the Constitution does not protect judicial independence in the manner (or even to the extent) Carter imagines. In fact, just the opposite is true. The Constitution *limits* judicial independence in critical ways—for instance, by empowering two elected branches of the federal government (the President and the Senate) to make the determinative judgments on judicial composition. Participation by the President and the Senate in judicial confirmation serve as effective majoritarian checks on the counter-majoritarian function performed by the judiciary. Once a Justice is confirmed, he or she is immune from political reprisals except for impeachment, but the one time that the Constitution requires that a judicial nominee to account to the political branches for how he or she has performed or intends to perform as a judge is the confirmation process.

Second, Carter's lack of appreciation for the degree to which the constitutional structure contemplates the politicization of Supreme Court nominations is especially apparent in his failure to acknowledge that presidents and senators have been concerned about the political ramifications of Supreme Court nominations from the Republic's inception.¹⁰² Supreme Court confirmations have invariably turned on political factors, including a judicial nominee's political views as a proxy for how he or she would perform as a Justice;¹⁰³ and every president has made Supreme Court

102. See generally ABRAHAM, *supra* note 61, at 5.

103. A sampling of the effect of political views on a nomination includes John Rutledge (rejected in part for opposing the Jay Treaty), Alexander Wolcott (rejected for vigorously enforcing the Embargo and Nonintercourse Acts as the federal customs collector for Connecticut), George Woodward (rejected for supporting restricted immigration and discrimination against new ethnic groups), Ebenezer Hoar (rejected for opposing political patronage and Andrew Johnson's impeachment), Nathan Clifford (barely confirmed after bitter debate over his support for slavery), Caleb Cushing (rejected for shifting political allegiances too often throughout his lifetime), Louis Brandeis (confirmed but only after being attacked for being too liberal), John Parker (rejected for uttering some racist sentiments as a gubernatorial candidate in North Carolina), Clement Haynesworth (rejected for antiunionist and alleged racist insensitivity), Harold Carswell (rejected in part for racist statements and activities), Abe Fortas (rejected in part for being closely linked to the troubled presidency of Lyndon Johnson), and Robert Bork (rejected in part for opposing the 1964 Civil Rights Act and for firing the first Special Watergate Prosecutor). See Massey, *supra* note 60, at 5-7; see also Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation*

nominations with certain criteria in mind.¹⁰⁴ In this century, a period coinciding roughly with the practice of having a Supreme Court nominee testify, the concern has focused more openly but never solely on a judicial nominee's ideology. Hence, since 1925, most presidents have campaigned on the kinds of judicial appointments they would make¹⁰⁵ and sought information about a likely nominee's approach to constitutional issues in the hopes of covering specific areas of concern to the President (and his advisers) and other issues likely to arise in the future.¹⁰⁶ During this time, three nominees have been rejected in significant part because of their judicial ideologies,¹⁰⁷ and many other nominees have been confirmed only after close scrutiny of their ideologies.¹⁰⁸

Third, Carter's argument that the confirmation process poses a threat to judicial independence rests on the mistaken premise that confirmation hearings operate much as popular judicial elections do.¹⁰⁹ Carter, how-

of Justice Thomas, 60 GEO. WASH. L. REV. 969, 975-76 (1992) (arguing that politically-motivated nominations have led to both distinguished and mediocre Justices).

104. For example, President Washington picked Justices based on their "(1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participation in the political life of state or nation; (4) prior judicial experience on lower tribunals; (5) either a 'favorable reputation with his fellows' or personal ties with Washington himself; (6) geographic suitability; (7) love of our country." ABRAHAM, *supra* note 61, at 72-73. Each of the next five presidents primarily chose Supreme Court nominees on the basis of their party loyalty, public service, and geographic suitability. *See id.* at 80 (Adams); 84-87 (Jefferson); 88-91 (Madison); 91-92 (Monroe); and 93-94 (John Quincy Adams). President Jackson primarily emphasized party loyalty. *See id.* at 95-103. Whereas President Polk considered party loyalty, geographic suitability, and ideological compatibility, *id.* at 107-10, President Fillmore emphasized a nominee's anti-slavery views, political experience, and character, *id.* at 110-12. President Lincoln focused on picking nominees who would be a "partner in the nation's preservation." *Id.* at 116. Presidents Cleveland, Harrison, and McKinley each emphasized economic conservatism in picking their respective Supreme Court nominees. *See id.* at 140-47 (Cleveland), 147-52 (Harrison), 152-55 (McKinley); *see also infra* note 107 and accompanying text.

105. Presidents Franklin Roosevelt, Nixon, Reagan, and Bush each pledged to make certain kinds of judicial appointments. *See* ABRAHAM, *supra* note 61, at 212 (Roosevelt), 298 (Nixon), 337 (Reagan), 365 (Bush); LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 71 (Nixon), 134 (Roosevelt), 77 (Reagan) (1985); *see also* CARTER, *supra* note 2, at 56, 69-71 (describing Presidents Reagan's, Bush's, and Clinton's campaign pledges regarding Supreme Court appointments).

106. This process describes the criteria for the Reagan and Bush administrations' nominations of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas. *See* ADVICE AND CONSENT: THE SELECTION OF UNITED STATES SUPREME COURT JUSTICES 4-9 (remarks of former Solicitor General Kenneth Starr, 41-44, 46 (remarks of former Assistant Attorney General William Bradford Reynolds) (A. Darby Dickinson ed., 1993).

107. Erwin Chemerinsky, *Ideology, Judicial Selection, and Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 643, 646-53 (1989) (discussing the rejections of Supreme Court nominees John Parker, Clement Haynesworth, and Robert Bork).

108. Supreme Court nominees confirmed after close scrutiny of their judicial ideologies include Justices Brandeis, Marshall, Rehnquist, Kennedy, Souter, and Thomas. *See* Gerhardt, *supra* note 103, at 973-76.

109. CARTER, *supra* note 2, at 98-99.

ever, fails to point to a single instance in which the public directed the outcome of a confirmation hearing or, for that matter, a nomination of any sort.¹¹⁰ Nor does he show how, if at all, the public has influenced nominations. Moreover, the consequence of a Senate rejection, as Carter himself describes it, is the same as a public referendum: one nominee is rejected, but the President may choose another.¹¹¹ In contrast, a popular election allows citizens to choose the person they prefer most from among the available candidates. A referendum or confirmation proceeding allows the decisionmakers to decide only if they will accept the nominee. In other words, in a confirmation proceeding the Senate decides whether a Supreme Court nominee is acceptable, not whether the nominee is the top choice of most senators for the Court. Thus, the public's and even the Senate's powers to shape Supreme Court appointments are limited.

Fourth, questioning judicial nominees about their ideologies is unlikely to enable either the President or the Senate to shape and control the judiciary to the extent Carter implies. As Carter observes, the nominee can say something that will be sufficiently pleasing to the President to get the nomination or to the Senate to get confirmed, but then do on the Court whatever he or she wishes.¹¹² This risk has often led presidents and senators to seek insights into a judicial nominee's ideology from other reliable sources, such as his or her political or public service activities.¹¹³ To be sure, the critical question is to what extent the extended inquiry into past judicial performance by the President or the Senate has encouraged ambitious judges to cast votes that might please people who have the power to elevate them. Even though it is conceivable that some judges do decide cases with their own future prospects in mind, Carter does not explore this prospect, which seems potentially endemic to any appointment system, regardless of the people or institutions authorized to make appointments.

Lastly, no nominee has ever made a promise, at least to the Senate, about how he or she will vote in a case likely to come before the Court. Carter himself points out that the Senate has never rejected anyone for

110. Indeed, the Senate has only twice directed the President to choose a specific individual to fill a Supreme Court vacancy: Ulysses Grant, who a large majority of Congress persuaded to nominate Edwin Stanton (who died four days after his confirmation) in exchange for the appointment of Grant's Attorney General, Ebenezer Hoar, to the Court; and Herbert Hoover, whose political unpopularity enabled leading senators to strong-arm him into nominating Benjamin Cardozo. See Massey, *supra* note 60, at 11-12.

111. CARTER, *supra* note 2, at 202-03.

112. *Id.* at 58-59.

113. See *supra* note 105 and accompanying text; cf. Michael J. Gerhardt, *Models to Learn From: Good, Bad, and Ugly*, LEGAL TIMES, Nov. 9, 1992, at 26, 38 (suggesting that one can "accurately measure judicial excellence, philosophy, and temperament by examining the level, nature, and kinds of professional accomplishments, public-service and political activities, sponsors, speeches, and academic writings of a nominee").

saying too little in a confirmation hearing¹¹⁴ and, thus, the most serious part of the threat to judicial independence—the coercion of a vote—has never been realized.

2. The Supreme Court as a National Policymaker

Carter suggests that Supreme Court confirmation hearings have become increasingly contentious because of the growing popular conception of the Supreme Court as a national policymaker whose authority as such can be controlled through the appointments process. Yet this view of the Supreme Court is not new, and for this reason the stakes in Supreme Court confirmation hearings have always been high. For instance, in 1857 the Senate barely confirmed Nathan Clifford as an Associate Justice after debating the propriety of his strong pro-slavery views.¹¹⁵ Surely, the Court's decision a year earlier in *Dred Scott v. Sandford*¹¹⁶ had taught the nation a lasting lesson about the Court's potential to shape society through rulings inextricably linked to its ideological composition.

Of course, the Court does not have to be viewed as a "national policymaker" in order for people to care deeply about what it does. Every decision of the Court can be criticized as either making policy of the sort more properly made by Congress or the states, or as having interfered too much (or too little) with the policymaking authority of the other branches. Condemning a decision of the Court as inappropriate policymaking is as empty as advocating that it is a judge's job to interpret rather than make the law—no one in her right mind would ever advocate that a judge should make policy (at least of the sort a legislature makes). The more important but perhaps unanswerable question is how the Court should undertake this interpretive enterprise or in what way the Court has taken on an inappropriate policymaking function.

It may be more accurate to suggest that a growing concern exists that the selection of Supreme Court Justices has become too partisan or even result-oriented and that not enough attention is paid to a nominee's fitness to serve on the Court. This is not the same complaint as lamenting that the Court has become a national policymaker, nor does this concern imply a desire to move the Court in any particular direction. Instead, it is possible that many people hope that the most experienced even-tempered lawyers, judges, and political leaders are chosen for the Court. This desire rests on the belief that law is not politics in some other guise; that law is a discipline requiring considerable study, reading, training, and practice if it is to be performed well.¹¹⁷ This view encompasses the attitude Carter says

114. CARTER, *supra* note 2, at 59.

115. TRIBE, *supra* note 105, at 88.

116. 60 U.S. (19 How.) 393 (1856).

117. Although some might argue that this conception of law is an illusion and masks what judges, lawmakers, and lawyers really do, *see, e.g.*, Mark V. Tushnet, *Critical Legal Studies:*

we should have about the Court.¹¹⁸ His mistake is that he has mischaracterized the public's discontent with the confirmation process as a focus on inappropriate judicial policymaking rather than as a concern with choosing the best-qualified nominees for the Court.¹¹⁹

C. THE PROPRIETY OF FOCUSING ON A JUDICIAL NOMINEE'S MORAL CHARACTER

There are four problems with Carter's preference for having Supreme Court confirmation proceedings focus on a justice's moral vision and character. First, this focus is bound to make such confirmations messier because it will invite a nominee's opponents to do whatever they can to taint her reputation. One benefit of focusing on a nominee's ideology is that it usually turns on some sort of documentation. If the focus were on a nominee's moral disposition, much of the debate is bound to turn on perceptions or even on swearing contests between conflicting character witnesses about private conduct with arguably public implications—something, say, on the order of the second phase of the Thomas hearings.

Second, no consensus exists on the criteria for selecting Supreme Court Justices, including whether a nominee's "moral vision and the capacity for moral reflection"¹²⁰ are among those ingredients. Few, if any, constitutional scholars agree on the key attributes for a Supreme Court Justice. Although good moral character might seem essential for someone to become a Supreme Court Justice, no agreement on what constitutes good moral character exists, and it is hard to say whether this quality should

An Introduction, 52 GEO. WASH. L. REV. 239, 239-42 (1984), it still may be the popular perception of the Court.

118. See CARTER, *supra* note 2, at 124.

119. It is important to understand that the friction in confirmation hearings also reflects the fundamentally political nature of the Supreme Court. This is true because no one gets to sit on the Court without being approved for that position by the political branches of the federal government; to be confirmed, one must at least be political in the sense of knowing the right people or convincing the right people of one's fitness to sit on the Court. Nor is it an indictment of any Supreme Court Justice to say that one cannot get a seat on the Court without being a successful politician because one has to wind through a special political thicket in order to be nominated and confirmed. Once one is on the Court, politics still matters in how one gets along with one's colleagues (which helps to maintain or preserve coalitions); with the other branches (through testifying before appropriate congressional committees to get more funds for the Court, to modify or block efforts to modify federal jurisdiction, or to provide input on the federal rules of civil or criminal procedure or on the sentencing guidelines, or through trying to get good law clerks or to place one's friends in key governmental positions); or even with the press (in how one tries to preserve the image of the Court or one's own self through interviews or off-the-record comments). Lastly, the Court is a political institution in that its decisions have a great deal of impact on the allocation of policymaking authority among the three branches of the federal government and between the federal government and the states as well as on the general understanding of the nation's most significant political document—the Constitution.

120. CARTER, *supra* note 2, at 152.

displace or take priority over whether the nominee has proven excellence in a relevant area of the law, demonstrated leadership or negotiation skills, or engaged in significant public service. In fact, some of the people who are commonly viewed as great Supreme Court Justices arguably lacked the "right kind of moral instincts."¹²¹ For example, Hugo Black had been a member of the Ku Klux Klan,¹²² and Earl Warren arguably knew that his order to detain Japanese-Americans, given during his tenure as California's Attorney General, had a dubious legal basis.¹²³

Third, confirming Supreme Court nominees on the basis of their "strongest moral commitments"¹²⁴ will, contrary to Carter's hopes,¹²⁵ not make the Court's controversial rulings easier to swallow nor produce greater credibility for the Court. For example, the Warren Court has been vilified for its activism ever since it decided *Brown*, even though most of its members were well-respected men with substantial experience in public service. The morals of the Justices who decided *Brown* did not save the Court from being viciously attacked over the years; today, *Brown* is widely hailed as a courageous and principled decision not because the people who decided it are viewed as great "moral philosophers,"¹²⁶ but rather because the vast majority of Americans accept *Brown* as morally sound. Similarly, many of the Justices in the majority of *Roe v. Wade*¹²⁷ came to the Court with strong moral commitments, which have not (yet) spared *Roe* or the Court from virulent criticism.

Lastly, despite his insistence on the importance of focusing on nominees' qualifications, Carter never suggests any criteria for confirmable positions. All he tells us about what "the right kind of moral instincts" are for Justices is that "the nominee ought to be, in the judgment of the Senate, an individual whose personal moral decisions seem generally sound."¹²⁸ Carter's approach would allow senators to evaluate a nominee

121. *Id.* at 152. Carter quotes approvingly the following passage from Senator Paul Simon's book about the Bork and Thomas hearings: "Supreme Court Justices are not saints any more than Senators." *Id.* at 144 (quoting PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* 145 (1992)). Carter does not, however, appreciate the implications of this citation for his preferred focus in judicial confirmations.

122. CARTER, *supra* note 2, at 144.

123. G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 75-77 (1982) (describing how Chief Justice Warren later expressed regret over his role in the internment of Japanese-Americans).

124. CARTER, *supra* note 2, at 114.

125. *See id.* at 150-55.

126. *Id.* at 152. Indeed, it is unclear how much the public knows about the moral characters of the men who decided *Brown*.

127. 410 U.S. 113 (1973).

128. CARTER, *supra* note 2, at 152. The one significant exception is his statement that a lifelong habit of spending one's leisure time with those who prefer not to associate with people of the wrong color tells something vitally important about the character

based on their agreement with her lifestyle choices, although Carter himself argues that these decisions are constitutionally protected and none of the government's business.¹²⁹ Furthermore, focusing on a nominee's moral character contradicts Carter's stated desire to distinguish constitutional interpretation from personal preference:¹³⁰ if the Senate focuses on the moral implications of a nominee's personal choices, the public may figure that no meaningful distinction between constitutional interpretation and personal preference exists.¹³¹

IV. REFORMING THE CONFIRMATION MESS

A. THE APPROPRIATE SCOPE FOR REFORM OF THE SUPREME COURT NOMINATION PROCESS

In discussing reform proposals for the confirmation process, Carter focuses strictly on the Senate's role, and, even then, only on its performance during Supreme Court confirmation hearings. He ignores an important reality of the process: most nominations for the Court (or other confirmable positions) are won or lost well before the Senate conducts confirmation hearings. In practice, presidents generally do not nominate people without some prior knowledge of the nominee's strengths and weaknesses and a strategy for dealing with potential problems. In searching for candidates to nominate, presidents or their advisers typically weed out the most troublesome prospects.

Perhaps the most critical factor in assuring the success of a nomination is a president's commitment to find a consensus candidate.¹³² This requires achieving some agreement beforehand on the qualifications for such a

and instincts of a would-be constitutional interpreter, something not easily disavowed by so simple an expedient as . . . resigning from [a] club.

Id.

129. *See id.* at 9, 170-71, 180-82.

130. *See id.* at 114-18.

131. It is also hard to tell how much practical difference focusing on a nominee's moral commitments rather than on his or her ideology will make to the confirmation process. In effect, Carter suggests that constitutional interpretation turns on a nominee's moral commitments; hence, we should look at the latter to see how she will perform the former. Yet, if this is Carter's point, he is simply asking us to look at a more reliable guide to how a judicial nominee will rule than what the nominee has told the President or the Senate. Hence, Carter might just be suggesting that, if we are concerned about ideology, we should not rely on just what the nominee tells us she thinks. We should look at other indicia of judicial philosophy, including speeches, articles, and the kinds of public service in which the nominee has engaged. In other words, we should do roughly what we are already doing.

132. Another factor with the potential to complicate a nomination is the president's initial characterization of a nominee. For instance, President Bush's announcement of Clarence Thomas as "the best qualified" person in the country to replace Justice Marshall raised public expectations for the nominee, who, as Carter suggests, "might, in time, have acquired experience needed for service on the high court, [but] did not have it at the time of his nomination." CARTER, *supra* note 2, at 137.

nominee—something presidents can accomplish in various ways. For example, President Ford, who instructed his Attorney General, Edward Levi, to identify possible candidates for the Court without regard to “ideological grounds,”¹³³ provides a prominent example of such consensus building. The White House narrowed Levi’s list to exclude politically troublesome candidates and chose Justice Stevens, who was confirmed by a vote of 98-0.¹³⁴ Similarly, President Clinton’s nominations of Justices Ginsburg and Breyer won quick bipartisan support because he had directed the White House Counsel to find well-qualified, distinguished non-ideologues, and because he had consulted closely with key leaders in Congress and elsewhere about the possible strengths and weaknesses of potential nominees.¹³⁵

133. *Id.* at 187 (citation omitted).

134. President Ford’s nomination of Justice Stevens also shows the importance of an experienced set of advisers with sound legal and political judgment. President Ford divided responsibility for the nomination between the White House and the Justice Department, with the latter charged with finding well-qualified candidates and the former responsible for assessing the political ramifications of potential nominations. See Victor H. Kramer, *The Case of Justice Stevens: How to Select, Nominate, and Confirm a Justice of the United States Supreme Court*, 7 CONST. COMM. 325 (1990). In contrast, the Clinton administration has placed primary authority for finding and assessing the political implications of prospective Supreme Court nominees and to a lesser extent, federal appellate candidates, in the White House Counsel’s Office. At present, President Clinton’s chief counsel is Abner Mikva, who previously served with distinction as a representative from Illinois for eight years, and subsequently as a federal court of appeals judge in the District of Columbia for 15 years. Judge Mikva’s political and judicial experiences qualify him, *inter alia*, to oversee the administration’s judicial selection work.

135. Of course, the unusual amount of time consumed in nominating Justices Ginsburg and Breyer ultimately cost President Clinton politically. The reasons for the delays in nominating those two Justices, as well as in filling other judicial vacancies, particularly during the first 18 months of the administration, are attributable to excessive consultation, see *supra* note 70 and accompanying text, and other factors. For example, the failed nominations of Zoe Baird and Lani Guinier led the President and his advisers to be much more cautious in nominating people. See Stephen Labaton, *President’s Judicial Appointments: Diverse, but Well in the Mainstream*, N.Y. TIMES, Nov. 17, 1994, at A15. Moreover, the delays in naming a replacement for Baird created a vacuum in the administration that the White House Counsel’s office (as small as it is) had to fill in taking charge of federal district and court of appeals vacancies, many of which extended well back into the days of the Bush administration (which processed them solely in part to make sure its ideological assessments of possible nominees were reliable). Once the Justice Department’s political positions had been filled, the Clinton administration picked up speed in filling some of those vacancies, uniformly with consensus candidates. By the end of 1994, the President had appointed 129 lower court judges. His appointments have been praised for being generally better qualified than those made by Presidents Reagan and Bush and for being more diverse than those made by Presidents Reagan, Bush, and Carter (almost 60% of the Clinton appointees thus far have been women or minorities, compared with 8% for Reagan and 27% for Carter). *Id.* By the end of 1994, though, President Clinton still had to fill 57 judicial vacancies, some of which dated back to before he took office. The price for not filling the latter judicial openings sooner is that President Clinton must have all of the judicial nominations he makes over the next two years processed by the Republican-controlled Senate that took charge after the 1994 mid-term elections. Even though President Clinton’s lower court appointees

In contrast, a nomination is likely to flounder if a president wants to challenge the Senate or to send a signal, regardless of the political costs. For instance, after the Senate rejected his first choice to replace Justice Fortas, President Nixon lost his temper and vowed to shove a nominee down the Senate's throat.¹³⁶ He nominated Harold Carswell, a little-known Florida judge who had only six months of experience on the United States Court of Appeals and had publicly expressed support for white supremacy and opposed desegregation orders as a United States Attorney. The Senate rejected Carswell's nomination 51-45. Similarly, within a few days of the Senate's rejection of Robert Bork, President Reagan tried to nominate a similar ideologue who lacked Bork's paper trail. However, President Reagan's haste, his loss of popularity due to the Iran-Contra scandal, and his insistence on getting even with the Senate backfired when the nominee, Judge Douglas Ginsburg, lost Republican support because he had not disclosed in background interviews that he had smoked marijuana and his spouse had performed abortions in her medical-training.¹³⁷

Once a nomination has encountered serious problems in confirmation hearings, it is not necessarily beyond salvaging if broader political concerns in the Senate that reach beyond the hearing itself favor the nominee's approval. For example, President Bush figured that the Democratic majority in the Senate would not dare to reject Clarence Thomas because, if confirmed, Thomas would become the Court's only African-American Justice. The nomination was designed in part to take the political heat off President Bush for opposing the 1991 Civil Rights Act and shift the spotlight to the Democrats, who claimed a superior commitment to minority concerns, including the need for affirmative action.¹³⁸ In spite of his controversial record and Anita Hill's charges of sexual harassment, Justice Thomas should be credited for saving his nomination through his testimony before the Senate Judiciary Committee. His repeated emphasis on his impoverished youth and the distance he had come,¹³⁹ and especially his characterization of the second phase of his confirmation hearings as a "high-tech lynching," put opposing Democrats on the defensive, forcing

have been widely viewed as moderate, it is likely that those he makes during the remainder of his first term will be more conservative than those he would have made had he acted more quickly in filling judicial vacancies while the Senate was still controlled by his party.

136. Massey, *supra* note 60, at 7-8.

137. See generally ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 334-35 (1989).

138. See generally Gerhardt, *supra* note 103, at 977.

139. Justice Thomas' approach in his confirmation hearings has come to be known as President Bush's "Pin Point strategy," which required Thomas to remind senators whenever possible about his difficult childhood, his grandfather's heroic nurturing, and the helpful Catholic nuns at the Catholic schools he had attended in Pin Point, Georgia. See Richard L. Berke, *The Thomas Hearings: In Thomas' Hearing Room, Spirits of Hearing Past*, N.Y. TIMES, Sept. 11, 1991, at A25.

them to prove that their opposition was not racist.¹⁴⁰

B. THE QUESTIONABLE MERITS OF A SUPERMAJORITY REQUIREMENT FOR SUPREME COURT CONFIRMATIONS

Despite Carter's tentative support for requiring a supermajority Senate vote for the confirmation of Supreme Court Justices, this proposal has two problems.¹⁴¹ First, a supermajority rule would give a small faction—at least one-third of the Senate—veto power over a Supreme Court nomination.¹⁴² A nominee's opponents could more easily defeat a Supreme Court nomination because they would have to persuade fewer people than they have to convince at present.

Second, Carter neglects to consider the Framers' reasons for requiring a supermajority vote for removals and treaty ratifications, but not for confirmations. The Framers reserved a two-thirds supermajority voting requirement as a means of creating a presumption against certain decisions that it expected to arise only infrequently, ensuring greater deliberation on a matter, decreasing the chances for political or partisan reprisals on removals and treaty ratifications, and protecting an unpopular minority from being abused in Senate votes on these questions.¹⁴³ On the other hand, the

140. Gerhardt, *supra* note 103, at 982-83, 989.

141. Carter also speculates about the implications for the confirmation process of eliminating life tenure altogether or replacing it with a constitutional amendment requiring term limits or popular election for federal judges. He explains that life tenure, "along with the immense and frustratingly distant power that it exercises, are what makes the Supreme Court so attractive [a prize] and so frightening." CARTER, *supra* note 2, at 53. Nevertheless, he concludes that, even though each of these measures would make Justices more accountable to the electorate, life tenure should be preserved, because of its "obvious virtues," including the advantages that "[i]t allows the accumulation of wisdom and experience; i]t promotes independence; and] its existence encourages life service, thereby avoiding a variety of potential improprieties." *Id.* at 200. Carter is surely correct that, if the American people really want to make their federal judges politically accountable (and thus eliminate the countermajoritarian difficulty), then they should support whichever of these measures most appeal to them. He is to be commended for forthrightly asserting this point, which all too few critics of the Court or of the confirmation process make. The critical question to ask in response, he acknowledges, is the extent to which life tenure is necessary for ensuring the protection of the countermajoritarian values enshrined in the Constitution. Although Carter argues that the Court has backed down "in every era" when confronted with congressional jurisdiction-stripping efforts or impeachment threats, *id.* at 108-12, he suggests that subjecting federal judges to popular election will rob them, as he maintains it has already robbed most state court judges, of the necessary courage for enforcing countermajoritarian values. *Id.* at 99-108.

142. Carter is mistaken that opponents of this proposal would argue that it may be "useful that we have the occasional Justice who only squeaks by" and that "the proposal would make it harder to pack the Court." *Id.* at 198. Neither of these arguments are directed at the real problems with the proposal. Indeed, one proponent of the two-thirds supermajority vote for Supreme Court confirmations admits that it "would inevitably increase the impact of special interest groups because they would be able to block any nomination if they could garner the support of one third of the Senate's members plus one." Massey, *supra* note 60, at 15.

143. See PETER HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA 102-06 (1984).

Framers required only a simple majority for confirmations to balance the demands of relatively efficient staffing of the government with the need to check the discretion of both the president and the judiciary.

Despite Carter's suggestion that this rule would have changed the results of only a few Supreme Court confirmations in American history,¹⁴⁴ he fails to note that the rule might also change the dynamics of confirmation because each senator would know that her vote would have added weight under such a system. Hence, Carter's claim that a supermajority vote would not have kept a number of well-qualified people off the Court in spite of their ideological diversity is mere speculation.¹⁴⁵

C. REFORMING THE CONFIRMATION PROCESS WITHOUT CONSTITUTIONAL AMENDMENTS

Carter admits that the constitutional structure for Supreme Court appointments is "not really broken, which is why so few of the proposed repairs would make much difference."¹⁴⁶ Although he suggests that the confirmation process could benefit from a change in certain public attitudes,¹⁴⁷ he never tells us how to effect such changes. His book is obviously his most important contribution to that effort.

Yet, if the constitutional structure embodies a presumption of confirmation that results in the focus on disqualifying factors, it is not clear how changing public attitudes will shift that focus. If the current system does not operate in the same manner as popular elections do, then the link between changing public attitudes and correcting the process' specific faults is also unclear.

Furthermore, as long as the President or the Senate is involved in the confirmation process, the system remains subject to political forces. Within such a system, one cannot mandate excellence or eloquence. Distortions and misstatements are the price we pay for open, vigorous debate about important political issues and events. A dispute that arises in a political forum rather than in the pristine environment of a judge's chambers or a classroom is unlikely to be pretty, polite, or linear. But none of this means that the system fails to cut through to the real issues at stake, especially when the President and the Senate can check each other's rhetoric and mistakes. And if neither the President nor the Senate performs at their

144. This rule would have prevented the confirmations of Clarence Thomas, William Rehnquist (for Chief Justice), Mahlon Pitney, Lucius Lamar, Stanley Mathews, Nathan Clifford, John Catron, and Roger Taney (for Chief Justice).

145. CARTER, *supra* note 2, at 196-98. It is conceivable this rule might have prevented the confirmations of other controversial nominees, such as Charles Evans Hughes (for Chief Justice), Louis Brandeis, and Melville Fuller, each of whom was confirmed by barely more than two-thirds of the Senate.

146. *Id.* at 206.

147. *Id.*

respective best, the media and the public each have the means to keep the system honest—the press by what they publish and the American people by how they vote.

With all of this in mind, we should consider the feasibility of three modest proposals for reforming the confirmation process, none of which Carter discusses in his book. First, encouraging a president to choose a consensus candidate (for any confirmable post) could pave the way for a quick, uneventful confirmation. The problem with this proposal is that backroom negotiations between the President and senators might conflict with the value apparently placed by the Constitution in a process open and accountable to the public. It is possible, for example, that consultations could produce deals to keep certain harmful information about the nominee from the public or the media. Yet the eventual reaction to the Senate Judiciary Committee's initial decision not to hold a separate hearing on Anita Hill's sexual harassment allegations against Justice Thomas demonstrates how such deals can be controlled.

The second proposal is to diminish the role of the nominee in confirmation hearings. That nominations are often won or lost early in the process could be taken as some proof (along with the prevailing practice, prior to 1925, of not calling the nominee to testify) that substantial input from the nominee after her nomination is not necessary to make an informed decision on the nominee's fitness to serve on the Court. No doubt, a nominee should be given every opportunity to defend her reputation or integrity in a public forum, but if the way has already been paved for a nomination through good-faith consultation between the President and key senators, then limiting the time for the nominee to testify or restricting questions to a nominee's public record could well reduce the need for that kind of hearing. Valuable information about the nominee could still be produced for the public record through the testimony of people who know the nominee and her record.

A third alternative is for the Senate to consider having professional counsel ask questions for each side so that confirmation hearings could become more efficient. However, there are two problems with this proposal. On the one hand, its premise is that senators may not be adequately discharging their constitutional responsibility, in which case we may consider either electing different people to the Senate or doing away altogether with the Senate's confirmation role. On the other hand, the people hired to ask questions may try to score points in a confirmation proceeding for no better reason than to justify their existence.

VI. CONCLUSION

For those unhappy with the confirmation process, *The Confirmation Mess* is welcome news. The book spreads the fault for confirmation mishaps among the President (for raising unreasonable hopes about his nomi-

nees' credentials and nominating overly ideological judicial nominees), the media (for indulging the public's penchants for gossip and punishment), the nominee (for saying too much), and the Senate (for focusing on disqualifying factors and accepting a presumption of confirmation). Given Carter's sweeping indictment of the confirmation process, it is puzzling that he concludes that the system is not broken and that its improvement requires merely changing the public's attitudes about government service, sin, and the Supreme Court.

Yet the reason for Carter's surprisingly optimistic conclusion is no mystery. His reverence for the Constitution forces him to choose either to stick with the status quo (as he has described it) or to find an agent of change. For Carter, the choice is clear. The status quo means confirmation politics as usual, something for which Carter has little or no taste. The other option allows Carter to acknowledge an individual's, and by extension the confirmation process', capacities for sin and redemption, to forgive the American people for their trespasses, and, through that forgiveness, to set the confirmation process on the path to salvation. In other words, the key to cleaning up the confirmation mess is, for Carter, an act of Christian charity.

However laudable Carter's faith, it ultimately fails to clarify the confirmation process. Virtually everything that happens in the system can be explained in political terms. This recognition is not a bad thing, nor does it entail perverting the process. By constitutional design, the President and the Senate must make decisions on federal appointments based on their respective balancing of every nomination's short-term implications for the advancement of the nominee, the President and his political party, and the balance of power between the Senate and the President. Both actors must also consider a nomination's long-range implications for federalism, the institutional relationships among the branches of the federal government, and the Constitution. Given that under this system the President has the power to nominate and the Senate the authority to confirm or reject the President's nominees, the President can be pro-active in this area, whereas the Senate's posture is more defensive. Understood in this manner, the confirmation process' salvation is political. But for anyone bent on substituting something other than politics as its unifying theme, the confirmation process will remain a mystery.