A ROUNDTABLE DISCUSSION WITH STEPHEN L. CARTER & MICHAEL J. GERHARDT

Moderated & Edited by
*Thomas E. Baker**

PROFESSOR BAKER: This last segment of our Symposium gives the audience an opportunity to ask questions and perhaps make brief comments. I will serve as moderator. I want to remind you again that we are taping this program. Please queue up behind one of the microphones, identify yourself by name and organization or affiliation, and ask your question of our distinguished speakers. The role of the moderator in this Roundtable Discussion is merely to play a "mouse." All I am going to do is "point and click," so if someone will stand up and approach a microphone, I will point and click.

QUESTION: Professor Carter, my name is Stuart Moritz and I am a law professor at the University of Akron. I loved your talk. It was very interesting. I usually think more about the procedural stuff and more along Professor Gerhardt's line of analysis. You elevated the discussion to a higher level of thought. But I wonder about the problem—I know you have thought about it—about the lowest common denominator and the fact that there are sides in these political battles and, if one side is intent on grabbing as much power as possible, that power brings with it a capacity to do real harm to real people right now. I wonder what we can do about it, other than having an elevated discussion. Or, perhaps, is the only reason we can elevate the discussion is because there are these other people down there in the trenches fighting each other over who will be on the Court to chose who will deal with our rights?

PROFESSOR CARTER: Well, plainly that is an important question at such a contested time as the present. But as some of you may know from my writings and lectures, I am a believer in the "Just War theory," so I think sometimes you simply must lose. I think sometimes you decide there are some things you do not do in order to win, because they are immoral. And so you lose.

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* James Madison Chair in Constitutional Law and Director, Constitutional Law Center at Drake University Law School. This transciption of the sound recording of the Roundtable Discussion has been edited and modified by the Moderator to improve readability and understanding in this printed format. Every effort has been made to preserve the content and the spontaneity of the Roundtable Discussion. *Cf.* Masson v. New Yorker Mag., Inc., 501 U.S. 496 (1991).

And if the other side wants to be immoral, then the other side wins. I believe that is part of leading a moral life. Other people have a very different view. I am telling you my view of the matter. That is my first point. Secondly, the reason, of course, that we see the sides as grabbing so much power is because we give the Supreme Court so much to do in the first place. The less the Court does, the less that we will fight over who gets to be on it. So my view is the more the Court as an institution recedes in importance in our lives—the less the Supreme Court tries to do—the better off we will be because these battles will be lessened. Third, in any case, if we are going to have the battles—if one side or the other or both insist on it—the thing about processes is there are some structural changes that I would favor. I am not sure whether Professor Gerhardt would favor all of them. He will have to speak for himself. But I would favor some reforms of the Supreme Court selection process. Some I have mentioned in my book[1] and others have occurred to me since, and I will just mention a few. First, I think the nominee should not testify. I think this is a very bad thing. There is no evidence that it gives any information of any kind. In all the times nominees have testified only one hearing had really extensive discussions of judicial philosophy and ideology, and so on. That of course was Robert Bork, and you saw what happened to him. Everyone else since learned from his example. The people who fought in the 1950s against the Dixiecrats, who then dominated the Senate, and who argued that having the nominee appear and testify was a violation of the separation of powers were exactly right. So one of the first things is that the nominee should not testify. Now that of course will not keep the various groups from testifying and posturing, and campaigning and so on. But this is still very important because, whatever is going to be said about people in public life, there is no reason for the nominee to have to sit through it. What happens now very often is that the nominee sits there and has to listen to the members of the Judiciary Commission simply make speeches about how awful he is or would be as a Justice, or they hide those kinds of attacks inside questions which the nominee is not going to answer anyway. Everybody knows the nominee is not going to answer those kind of questions. Some of the nominees talk about some subjects and not other subjects. Both Clarence Thomas and Ruth Bader Ginsburg engaged in this process of "I will talk about some of my views but not others of my views." That approach, of course, is enormously frustrating to the Senate. I think it is not the principled way to go about it. Either you talk about nothing, which I think is the better, more correct answer, and which was kind of the consistent answer up until Robert Bork, or you talk about everything, which Bork, in an act of rather foolish generosity, decided to do. I do not have a brief

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1. STEPHEN L. CARTER, THE CONFIRMATION MESS—CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994).

for Robert Bork. The point I am making is merely that he was the only one who engaged in those detailed discussions. So the first thing is I think it would be better if the nominee did not testify. Second, I agree with Professor Gerhardt that we could spare a lot of pain if Presidents were more careful to pick nominees they thought were going to sail through. Now, sometimes I think that Presidents just make mistakes. Sometimes they do not realize how bad a nomination is going to be, as I think Professor Gerhardt suggested was the case with Clement Haynsworth. I think that President Nixon just messed up, in a sense. If the Harold Carswell nomination was mendacity, then the Haynsworth nomination was simply incompetence. Incompetence by the White House I mean, not by Judge Haynsworth, who was a very eminent federal judge. So the second reform is that Presidents should see themselves as doing more consultation and less confrontation. Professor Gerhardt is exactly right about this. So we can also avoid some of the harm in that way. Now, the only way the President will have the incentive to consult more is if Supreme Court nominations are seen as less important by various important constituencies in the President's party. Part of the problem now is that so many activists on the left and the right see Court seats as such a big prize. Presidents in the primaries have to run either in the Democratic party to the left or in the Republican party to the right of the general electorate. They have to make a variety of commitments, some public, some not public, about what they will do with respect to Supreme Court appointments, and that causes a lot of the mess. I admire Professor Gerhardt for what he said earlier. I think the most important thing about these "battles" is to try not to get involved in them. That is really important as a matter of protecting the people we are, about protecting something special about our humanness. The ability to see others in attitudes of charity is enormously difficult to do given the way these battles currently take place. That very well might mean then that other side wins sometimes. Well, at least they win one thing and lose another. They win a battle and lose their humanity. I believe we, as individuals at least, should not want to have a part in that process.

QUESTION: I am Keith Miller, on the law faculty here at Drake. I wanted to ask both the professors whether, in light of the election controversy of the year 2000—and the Supreme Court's role in resolving the election—whether there has ever been a time in United States history when it has been more difficult to persuade people that they have a moral obligation to be indifferent, if you will, to the personnel of the Supreme Court of the United States?

PROFESSOR GERHARDT: Let me begin my answer by going back to the first question that was asked. I would basically agree with Professor Carter and everything he said. I think that there may be just a couple of small qualifications I would add, starting with his last point. You do have to wonder sometimes why it is people are getting involved, and what it is they themselves think they are going to get out of it. For better or for worse, I did make a

judgment for myself that one merely lowers oneself, for lack of a better way of putting it, by getting "down in the dirt" or by trying to "duke it out" with the other side, whether it is over impeachment of the President or whether it is over a Supreme Court nomination. So you have to decide what your personal values are and what your own priorities are. That is one way—it may be a small thing, but it is all I have got as an individual. When you are looking at a Supreme Court hearing, you must recognize that this is really mostly just a show. You have to come to terms with that fact. You have to realize that probably nothing you say is going to make any difference to anybody there. That is just the harsh reality of it. Once you accept that fact, it becomes quite liberating. What I think it liberates you to do is to be yourself. Therefore, you have to come to terms with the reality of the situation and the circumstances. If you think you are there because you are going to shape history or move the event, or something that profound, then besides having a big ego I believe you are wrong. So what we should do is recognize that we cannot change the events from inside them so much as perhaps trying to talk about them more and set important standards outside the events. The other point I would like to make is that we should not underestimate the importance of history as a means by which to hold some people accountable and to judge events. So while one side may win a short term victory, it does not necessarily mean that in the long run they will escape judgment. Now that brings me to the bigger question about the moral obligations. After the 2000 election I am not sure what obligations are put on people as a result of that election. I certainly think the Supreme Court made a mistake,[2] but I do not believe it is a mistake that we can redress through the appointments process. Instead, I think we should think more systemically about how we might try to correct that mistake, but I would say I do not think you can correct it through the appointments process.

PROFESSOR CARTER: I also want to say something just about that last part of the question. Here again I agree with everything that Michael said, so there is not much debate between us. No, I do not think that this is the most upset people have ever been by a court decision, not even close. The *Dred Scott* decision[3] easily at the time, and the school prayer cases,[4] due to the anger they caused and continue to cause, easily dwarfs the 2000 election case. *Roe v. Wade*[5] probably dwarfs it, as well. So it is not as though this is a unique moment in history when people are upset. Nor is it even as though this is a uniquely bad decision. There are a lot of decisions the Supreme Court has written that are far worse reasoned than this one, and that are just as stifling to democracy. Bad as

2. Bush v. Gore, 531 U.S. 98 (2000).
3. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
4. Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).
5. Roe v. Wade, 410 U.S. 113 (1973).

this one was—and it was bad—there are some that are worse. There are some that are worse over time. Nevertheless, I was not trying to suggest that there is a moral obligation to be indifferent as to the Court's personnel. Rather, I said that I am indifferent. But I am not somehow proscribing my level of indifference as the recipe that everyone else should follow. It is the way people get involved in the battles over the Court's personnel that concerns me. It is not that nobody should care. It is that if we are going to care I think we have to find ways of being involved that do not turn us into participants in the kind of nastiness and viciousness that occurs. I think that you cannot sometimes. I think that sometimes you cannot separate it. I remember after the Bork hearings Harvard Law Professor Laurence Tribe, who was a very thoughtful and respectful critic of Bork and who did not say anything amiss as far as I know, tried to draw this distinction. He said, in effect, "There were people who said terrible things, I know, but I was not part of that, that was not part of my testimony." I think that is accurate, and I give Tribe a lot of credit for trying to do that separation. But I think in the end the separation simply does not work. In the end, we have political movements on both sides of some of these nominations. And so, for example, if we go back to the Thurgood Marshall nomination, I think it does very little good for those few who testified against him thoughtfully to try to say, "We were not part of the larger smear effort." The separation is very, very hard to make. It is sort of like when you fight a war and deciding with whom you are going to make your alliances. It is that kind of question we are dealing with now and we have had to deal with in the past. It is a similar problem. I think we cannot fully disavow the activities of our allies, no matter what human endeavors are involved.

PROFESSOR GERHARDT: I might just add one more thing, just by way of clarification. Certainly, the 2000 election case does remind us that it makes a difference who sits on the Court. There is no question about that. But as Stephen just said, I think that there are so many instances that remind us of that fact that I do not think that case in and of itself is going to make a new point or give us any new insights into the importance of who sits on the Court. How you do these things is the ultimate question. They probably are going to be done because the Constitution authorizes people to make those choices. But how you go about making those choices I think is the ultimate challenge.

QUESTION: My name is Dennis Barnum. I am retired, speaking as an individual. It is interesting to hear you agree with each other, but I disagree with each and both of you in this regard. It bothers me a bit to hear you register "heartburn" about the selection process and how worried you are about becoming sullied, or how we somehow denigrate ourselves if we are a bit combative, if we are advocates for or against a nominee or if we are interested in the ideology or the politics of these future decision makers. I think that the end result, that is, who gets on the Court and the resulting quality of Supreme Court decisions is at

least as important—and considerably more far-reaching—than the quality of the process in selection. You are talking about how we might perhaps "dirty ourselves" or "diminish ourselves" in the selection process. But the fact is that the selection process itself is political. All the actors are political. And the consequences of the decision making, once a nominee gets on the Court, profoundly affects society. Everyone is affected in one way or another by the Supreme Court and its decisions. That is why I have no apologies whatsoever for being adversarial or combative. I think the process is important. I am not worried about somehow "dirtying myself," however, because the stakes are so very high in terms of the Court's decision making into the future.

PROFESSOR CARTER: I certainly agree that the stakes are high. I think it is unfortunate, but it is true. But if that is the case, then I can go on with my other proposals that I mentioned. We should either endorse what we are doing or try to avoid it. If we really want to endorse what we are doing, we should elect the Supreme Court. Basically, we use all the same kinds of political techniques. In my book, I actually talk about some ways we might think of having Supreme Court Justices stand for election. There is no obvious reason that the selection process should be limited to the President and the Senate, if the important thing is for us to be involved in ways that allow us to express our views and have some effect over this institution. But as you say, the Supreme Court is going to wield enormous authority and influence. It is not at all clear why the members of an institution so powerful—one that generates so much activism and so much passion, often in very good and important causes—should be selected the way we currently select them. It is a bizarre holdover from the framers' vision of popular mistrust, a mistrust that Jacksonian Democracy began to drag into the ground and that other movements in the twentieth century drove the rest of the way. So it is not clear to me, if you are right and if it is very important to be involved in this kind of public way, it is not clear why this nomination and confirmation process is a good process. The current process distorts our energies. Now I am saying that electing Supreme Court Justices is not a good idea for the same reason the current process is not a good idea. That is, I think that in both cases the energy is badly spent energy. Therefore, I suggest still another possibility which I think would improve the quality of the entire federal bench. We could select Supreme Court Justices at random from sitting federal appellate judges, or possibly federal and state appellate judges, for a set term. That takes all the pressure off the selection process of Supreme Court Justices. It would put more pressure on the selection of good appellate court judges. But since there is no possibility with all the many hundreds of appellate court judges there are for us to put this kind of energy into every campaign for them or against them, it creates incentives to be selective in opposition as well as in enthusiastic support. It also creates incentives for Presidents to select appellate court judges who are going to be confirmed quickly and easily, since

Presidents cannot afford to be spending all of their political energy fighting one confirmation battle after the other for the courts of appeals. So we could simply say that the Supreme Court would be composed of nine justices who would serve fifteen years staggered terms, or nine years staggered terms, or eighteen years—something to make the numbers work—and they would be selected at random from this larger pool. That would help us to avoid some of the pitfalls of the current process, as well. And that would also be fun.

PROFESSOR GERHARDT: I would just add another clarification. I was not saying that one should not become an advocate. What I am saying is that one should think about how one performs as an advocate. That is my concern. I have had the opportunity and privilege of being involved to some extent in some of these recent confirmation events. I think public service is enormously important. One of my watchwords is that I think about myself as a "teacher." Whether I am involved testifying before the Senate or whether I am doing background work, as I did sometimes during the Clinton Administration, or even appearing in the media, I think of my function as playing the role of a teacher, a public educator. I think about how my students will perceive what I say and how I say it. I think about how they might react sometimes when they see their professors lower themselves. So I just try and remember that. It does not mean that I should not speak. It does not mean that I should not perform as an advocate. But it does mean that I need to be responsible for the things I say and how I say them.

QUESTION: Randall Wilson. I am the legal director at the Iowa Civil Liberties Union. We have been wrestling with this issue, of course, in the Civil Liberties Union for years and we have been on both sides, being too detached or too involved. It continues to be a debate within our organization as to how we should approach Supreme Court nominations. My question is for Professor Gerhardt. You mentioned in your presentation a case when there was a contentious nomination, the Carswell nomination. You said that in hindsight it turned out that we were all the winners for it. I am wondering whether some of these contentious nominations—in which people did behave poorly—actually resulted in poor Supreme Court choices or has the process actually benefited us in some cases? How would you evaluate in terms of the actual outcomes, whether a contentious nomination process serves us poorly or not? Besides perhaps denigrating ourselves morally, do they actually result in some overall benefit to achieve better nominations?

PROFESSOR GERHARDT: That is a great question and I meant to suggest that sometimes in spite of the lowerings that occur, we can see outcomes and even, perhaps, portions of the process that are exemplary. One example is President Johnson's nomination of Thurgood Marshall. There were obviously some reprehensible things that Southern Democrats did. But just as obviously it was a great nomination and there were people who took what I would describe as

the right side of that fight. So in that sense you can think of it as justice prevailing. But that does not excuse the bad things that happened, it just means that those bad things did not manage to completely undermine that particular appointment. The general lesson I would draw is that we can look back on some of these contentious nominations and perhaps not take pride in some of the things that went on, but still see that at least to some extent the contentiousness did ultimately produce a benign outcome. But I do not mean to suggest by that the racism and the horrible things that happened were in any way, shape or form justified. If anything, President Johnson was trying to squelch that and rise above it.

QUESTION: I am John Sprole. I am in private practice here in Des Moines. Let us pretend for a moment that this is a Senate hearing room and you two have been called to testify. Pretend that I am Senator Anonymous from Idaho. I am troubled because I have been visited several times by some little guy who claims to be an advocate for the devil. I do not know exactly who this guy is and I cannot check his credentials. But I am not getting any advice from upstairs. So I am troubled by what the nomination confirmation standards should be. I have a great-grandfather who was one of the first judges in Iowa, who was a fine and upstanding man and noncontroversial, but who would make a horrible Supreme Court Justice if nominated now, because he is a hundred and some years out of his time. I have known good nominees such as the one just mentioned, Thurgood Marshall, who were certainly controversial, and if the goal is to get somebody to slide through we would have missed a great Supreme Court Justice. So I reject the idea that every judge who is nominated should be somebody who is noncontroversial. I am a member of the Senate where we stand up and call our colleagues amoral idiots and then go to lunch with them, so I am used to a political environment. I am not quite sure how to get out of that, particularly when I am bombarded by mail from my constituents about nominations. I do have some feelings of my own about what sort of person should be on the Supreme Court. For example, I am very concerned about rights of privacy and the role of the government in people's lives. Now, you two have been called to testify and to tell us what the standards should be and who should apply them and how. Thank you.

PROFESSOR CARTER: One of the things I love about being an American is that it is hard for the Senate to force me to come if I do not want to go. [Laughter] I suspect Michael will have more to say about the standards than I will. I am interested in hearing what he has to say. I am at a bit of a disadvantage because of my skepticism about the Supreme Court as an institution. I am not at all sure what I think is the right kind of person to be there. I really liked Alexander Bickel's comment, quoted by Robert Bork, that a judge should have the temperament and the leisure time to follow the ways of the scholar. That does not mean a judge should be a scholar, by the way. I actually

am of the view that on the Supreme Court, with some important exceptions, the record of law professors appointed to be Justices has been pretty dismal and the reason that has made them dismal is their noncollegiality. They want to go it alone. They want to be right. This is me. Here is the "right view," as opposed to "let's find a way to put a court together." But I think it is important to have nominees who are of the right temperament. One of the things that Bork was attacked for saying, I think he was right to say: he said that Justices should be people who found the work of the Court an intellectual feast. I think that is correct. I think that we make a mistake if we nominate to the Court people who see themselves as being on a mission—a mission to set things right somehow. That is almost always going to end in a Justice who over time does not do a good job, and does not do a good job precisely because he or she is deeply persuaded that the purpose of the appointment is to go up there and do whatever the heck I want to do. So the temperament that says that we are collegial, the temperament that says the reason to have nine Justices is not so my side can win 5-4, but so we can try to craft opinions that command the adherence of many, many different people. That practice that was widely followed by the Supreme Court in the nineteenth century, with some important exceptions. We want someone from whose background we can conclude has a kind of openness, not the openness that comes from having an empty mind, but the openness of a person who does not go into important cases with fixed views. That is the very openness we try to sabotage in the way that we select and then vet Supreme Court nominees. But there is something else also. I wrote this in my book and then I retracted it later, and now I again think it may be true. But maybe I do not think it again and that sounds wishy-washy and I apologize. But if there is a special kind of scrutiny the Senate can give that other institutions will not give, it is not figuring out a nominee's judicial philosophy or ideology, which are just code words for, "Is this guy going to vote my way." It is rather, I think, trying to get a larger sense of the kind of person this nominee is. And that takes into account a lot of different aspects. It takes into account temperament, as I mentioned, and of course experience, but also it looks for something that we often describe as wisdom, which is a very hard thing to identify in the abstract, or to define, and yet I think ought to be a crucial characteristic of those who sit on our highest court if we are going to go through all of this process. I do not actually think it is necessary that Supreme Court nominees be people who have been judges for many years. I do not think we have to have a professional judiciary in that sense. If we do, then I think my other idea of random selection is much better than what we now do. So I think that where President Clinton was right was in saying that you can do great things on a court with different kinds of experience other than the experience of having been a judge—though I agree with Professor Gerhardt that Clinton was wrong in the way he went about it. And so his thought that sometimes someone who has been a governor who has run something, in effect, and who has had to

make political compromises and decisions, and yet still has legal training, that kind of person can be a very good appointment. We have seen some of those appointments in the past and some of them—Earl Warren being perhaps the most famous and the one that people point to—and there are also some others who are rather less successful appointments as well. One other point I want to make about the question. We have a lot of history. One of the things that I think is really useful for members of the Senate—who are going to pass on the fitness of these nominees—and for Presidents—who are going to nominate them in the first place—is to read history, to look at what has actually happened. To think about who has actually been on the Court and think about where they came from and what they did, and how they got there. To recognize that if we allowed one scandal to kill a career we would have lost Hugo Black, for example. Now, some people would say we want to lose Hugo Black. I do not know. In my book, I suggested that Thurgood Marshall would not have been confirmed or even nominated, and I chatted with his widow about it and she agreed with me that he probably could not have been nominated in today's atmosphere. Instead of looking at the whole person in the way that I was suggesting, we tend to look for disqualifications. We tend to search for the scandal. We tend to search for the thing we can blow out of proportion in order to use that individual to make a point. This is terribly, terribly destructive. Abraham Lincoln said that he opposed on principle having nominees take an oath that they have done no wrong, because he said it ignored the possibility of repentance. He would have been satisfied, he said, with an oath that the nominee will do no wrong hereafter.

PROFESSOR GERHARDT: I agree wholeheartedly with everything Professor Carter said, so I am going to add very little. My answer to the question is that I think the standard is very high.[6] This is going to sound like a disagreement—but I think I still come out in the same place where Professor Carter has come out. I do not think a nomination is clothed with what I will call a presumption of confirmation. I do not think that is how it should be treated. When Al Gore was a Senator, and he was approaching Supreme Court nominations, I think he approached them the right way. What he said was in effect, "I think the burden is on the administration to show that this nominee is up to the highest standards required of the Supreme Court." Because the Supreme Court does make decisions, as you said, it performs a function that is going to be important for all people in the United States. So therefore we want to make sure that we have a nominee who has all of those qualities Professor Carter has described. That requires the President to set the sights high. The higher you set your sights as President, then the greater the chances are that you will nominate

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6. *See generally* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS—A CONSTITUTIONAL & HISTORICAL ANALYSIS (2000).

someone who will meet that standard. I do not think it is appropriate for people necessarily to be trying to shoot down or undermine the nominee. Unfortunately, that is a function of the current dynamic that it is likely. Then what you must recognize is that the stronger the nominee, the harder it becomes to bring that nomination down. It does not become a license for people to sort of take potshots or make misrepresentations. What you have to recognize is that once you can get a nomination through that invites some of those untoward things, like Thurgood Marshall's, then the next time another one comes around the Senate will recognize that that those things do not work. So I would just say there are a host of qualities that you would look for. Temperament is among them. Excellence in the endeavors that one has taken is another. I actually think that a public leader, the public statesperson, is a perfectly appropriate nominee to bring to the Supreme Court. Again, I would just say for me the burden is on the administration at the outset to show that this is somebody who is up to the high standards we would expect for the Court.

PROFESSOR CARTER: As I think about it, I do think we agree except for one problem. The more explicit we make the standard, in another sense, then the easier we make it in some sense to gather ammunition. Take the standard of excellence as an example, which we would all agree, I hope, is crucial—in spite of what Senator Roman Hruska thought. That was one of the grounds where Thurgood Marshall was attacked at great length. It was precisely on the question of whether he was sufficiently "excellent." The opposing Senators spent a long time, as did some of the interest groups who were opposed, in particular the Liberty Lobby, pouring over briefs he had signed, opinions he had written, looking for evidence, to put it most gently, that he was not intellectually up to the job. He was the only nominee, as far as I know—and at the time I wrote my book I read all the hearings up through Ginsburg—who was grilled on his knowledge of the Constitution, asked to quote various passages of it, asked if he could name the people who drafted various parts of it, and so on, which was all part of the smear campaign aimed at showing he was not sufficiently intellectually able. In fact, there was a wonderful moment in the *Congressional Record* if you read the debate. I think it was Strom Thurmond who was on the Senate floor saying, "I was surprised to learn that Judge Marshall, who has litigated all these cases under the Fourteenth Amendment, could not cite the names of the people who were on the committee that drafted the Fourteenth Amendment." And Edward Kennedy, bless his heart, said "Will the Senator yield for a question?" and so Thurmond yielded and Kennedy asked, "I have always wondered. Who were the people who drafted the amendment?" Thurmond said, "Well, that is not important." There ought to be standards. I worry that the more explicit we make them, perhaps the more some people will try to shoot someone down. I suppose that whatever the standard is, some people will try to find a way to show that the nominee does not meet it.

QUESTION: My name is Brandon Borseth and I am a writer for the *Times Delphic*, Drake University's on campus newspaper.[7] We just talked about standards. My question has to do with the process. What changes do you believe need to be made, or should be made—or if not, why should the process stay the way it is?

PROFESSOR GERHARDT: Clearly the process we have now is hardly exemplary, because there is so much of it that either invites or encourages bad behavior. And so one thing that I would hope for, again, is for nominations that essentially make it hard for people to engage in bad behavior. What that means is that you really seek the best. The highest. I used the word "excellence." Professor Carter is right, even that is going to invite some contests. Though again, I think there is a certain inevitability about this because of the stakes involved. You are not going to be able to convince everyone, of course, about whatever standards you are trying to meet. But again, as I said earlier, you can try and rise above that and you can seek the people who have been a "statesperson." If you find these judicial statespersons or political statespersons for a position like the Supreme Court, then you have gone a pretty good distance in meeting the highest standard of excellence. I have begun to toy with the idea and maybe I will end up changing my views to conclude that we do not serve ourselves well when we put these things on television and we have open hearings, because I think people then play to the crowds and play to the media. I have reached the conclusion that the media has not risen to its responsibilities. In fact, it has just gotten worse over the years with the twenty-four hour news cycle. I am not talking about your paper. [Laughter] But I am talking about other things. What you see is that people figure that in order to get media attention, they must engage in dramatic behavior and then it becomes a vicious cycle. Then you just disintegrate into this cesspool, for lack of a better word. At least one antidote to that is not to have the public hearings. That is risky, however, because then it will become harder to hold certain people accountable. One scene I remember with some fondness, was when then-Judge Ginsburg was nominated and she was at the hearing. It just so happened that she brought as her adviser my best friend from law school, who had clerked for her, and he was sitting behind her, and there is this moment when Senator Biden, I think it was, engaged in a fifteen minute long question, which ate up, by the way, all of his time. So at the end he basically said to her, "Do you have any response?" You see her lean back and she whispers to my friend, and then she comes forward and she says into the microphone, "No, Senator." Sometimes you do not necessarily have to meet every question with an answer.

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7. *See* Brandon Borseth, *Experts Discuss Selection of Justices*, TIMES-DELPHIC, Mar. 5, 2002, at 1 (copy on file with moderator-editor).

PROFESSOR CARTER: Let me say a word about the media since Professor Gerhardt mentioned it. I also would rather see the television cameras out of the room. Let me tell you one story about why that is so. I mentioned earlier, and I still believe it today, that Thurgood Marshall's confirmation hearing featured the most vicious attacks of anyone we have ever had, certainly the most vicious attacks in the hearing room. But most people seem unaware of that fact, and I think one of the reasons is because it was not televised. Not long after I wrote my book, I ran into a retired journalist who had covered the Thurgood Marshall hearings for a newspaper and I told him that I had actually read most of his newspaper coverage of it, and I had also read the transcripts as part of my research. And I told him that it was quite striking to me that a lot of the more memorable accusations that were made in the hearing room did not find their way into his stories. I asked him why that was so. He said it was an exercise of news judgment. He said it was an outgrowth of the McCarthy era. He said that they had developed the sense in the early 1960s that the simple fact that a prominent person made an unsubstantiated charge was not newsworthy. It was newsworthy, however, if you tracked it down and proved it was true or false. You would sit there and Senator Eastland would say "Thurgood Marshall is a communist." He said the fact that Eastland *said* Thurgood Marshall was a communist was not newsworthy. If you tracked it down and it was true that Thurgood Marshall was a communist, then you have a news story—"Thurgood Marshall is a Communist." If you tracked it down and it is false, then you also have a news story—"Eastland Falsely Labels Marshall." But back in those days, the mere fact that he said it, the reporter explained, at least good newspapers felt, it did not create a news story. So you did not report it. Once the television cameras were in the room, this selectivity of course becomes impossible. So precisely because everything is going to be reported, there is almost a premium on saying everything—whether it is true or not. It really is true, as the saying goes, that "a lie gets half way around the world before the truth can get its boots on." Denials and withdrawals later on rarely make as big a splash as the initial assault on character whether it is in fact substantiated or not.

QUESTION: My name is Aaron Charrier and I am a 3L here at Drake. For those of you who my be wondering, Idaho does not have any Senator Anonymous. [Laughter] I have two questions. First, it seems to me that being a public official opens oneself up for public ridicule. With that having been said, to what extent should nominees be responsible for protecting themselves as well as their family by simply not accepting a proffered nomination? Second, by obliging the system to protect nominees or by changing the system to protect nominees from hurtful speech, to what extent would that limit or restrict the right to engage in public debate? What message does it send to the public that if they cannot conduct themselves responsibly, or morally, then we will change the system to take away their voice? Thank you.

PROFESSOR CARTER: Well, as to the first question, yes, I certainly believe that nominees have that responsibility. Even I have been approached about a couple of offices over the years, and I have said each time, "Not on your Nellie." I would not dream of, even for some minor position, putting my family through what the family might go through. A lot of people do take themselves out. I have a friend who is one of the most influential scholars in a particular field—a very powerful and important scholar—maybe the most important one in the field—who was offered a job in a previous administration. He turned it down because his first child had been born out of wedlock. And it is not that the child did not know it, he and his wife were married subsequently. He said if anybody decides they are going to be against him somehow this was going to be dragged through as though this is relevant and representative. Some try to protect their families and others do not. When they do not I do not think it is because they are so ambitious that they say, "I do not care about my family." Rather, it is that they think, "It is not going to happen to me." Nobody who goes up there and gets excoriated, goes into it thinking, "I am in for a real war. They are going to tear me to pieces." They all tend to think, "I can charm them. I can do this." Bork refused to be coached by the White House because he said, "We will just have a conversation and it will be fine." He was wrong. Others learned a lesson, and took coaching of various kinds. As to your second point, I am not particularly concerned about the "lost voice" question because people always have their voice. There will always be activists who take various positions. I just do not think the voice should connect to the nominee in the sense that my right to speak on the nominee does not mean the nominee is going to sit there and listen to it.

PROFESSOR GERHARDT: First, it is true that many nominees are scared off and that is unfortunate. That is a sign that the process is a bad one. A friend of mine who was a deputy White House counsel in the Clinton Administration tells the story about a mutual friend of ours who was contacted about the possibility of a position, or at least he found out that he might be considered for a position in the White House. So he purposely did not pay taxes on his domestic help. It was like Ulysses strapping himself to the mast. He told our friend, "I was purposely doing something I knew was going to disqualify me because then I could never even be in a position to give into the temptation of public service." [Laughter] That sort of thing may be as unfortunate as the process that takes reputable people and then drags them through the mud. I wish I knew the solution. I am sufficiently naive to still believe that at some point we all might be able to rise above these behaviors. What I think that would require is that you have a President and some Senate leaders who are willing themselves to rise above the negative process. What we end up with instead sometimes is a President who makes an in-your-face nomination knowing that it will trigger conflict. Then you cannot be too surprised by what happens. Now I understand

that sometimes conflict might be necessary, because there is an ideal or an objective that is worth the fight. In general, I believe you find that you can avoid these problems and still can achieve those greater objectives, and without sometimes undergoing the worst aspects of the process. What that requires is a different kind of rhetoric and a different kind of media and a different kind of response from Senate leaders. Those things are possible, but perhaps not very likely. The last thing I would say is that early on in my thinking about this subject I had a lot more confidence in what the media would do with the information that it got. But I think after having been exposed, particularly during the Clinton impeachment process, to so much media, I really began to see the underside of it. Now I think what you see is just how bad things have gotten. There have been numerous studies of the media's coverage of public events and just how attracted the media is to what is called "soft news." Soft news is not reporting information or hard facts; rather, it is engaging in speculation and commentary. We have whole networks dedicated to that now. I regret to say the media organization with which I was once closely engaged is now not as good as it used to be. Just to give you an example of this, if you go back to the presidential election of 2000, which seems so long ago, and if you look at the coverage, the data has been assembled to show: twenty-five percent of the coverage of George W. Bush was positive; twelve percent of the coverage of Al Gore was positive—which meant that twice as much of the coverage on Bush than Gore was positive; less than ten percent of the overall coverage focused on issues. Think about that. That is a presidential election, which is supposed to be one of the most important events in our constitutional system. So other lesser events can be expected to have less hope for good coverage. But until we get a media that can meet better standards, then I think we cannot rely on the media to keep our politicians honest. We have to in fact take more responsibility ourselves.

PROFESSOR BAKER: We have time for one last question.

QUESTION: Professor Greg Sisk, Drake Law School. The question I have is directed toward Professor Carter, but I would invite Professor Gerhardt to comment as well. An important theme in your presentation was that this problem with the nomination and confirmation process is not just a problem that affects the nominees, not just a problem that affects the President and the members of the Senate, but a problem that affects all of us, that brings us all—as a people—down to a lower level. And another subtext of what you were discussing is that the problem exists in part because we have as a people abdicated moral discussion and given over these issues to the Supreme Court, thereby raising the stakes of who sits on the Supreme Court. Looking beyond just this judicial confirmation issue, do you have any thoughts or ideas about how we as a people can do a better job of discussing moral issues other than as legal questions or as

political issues, and thereby perhaps move in the direction of reducing the importance of the Supreme Court?

PROFESSOR CARTER: No, Senator. [Laughter] I am flattered that you found a theme in my presentation. That is the first thing I want to say. Just one small comment. I wish I did know the answer to that problem. There are so many very thoughtful people trying to figure out how to improve our public dialogue and our ability to talk across our differences without talking about each other. That is a wonderful project and I hope we can resolve it. I will say one thing. At least, I would like us to be a little more realistic about the Supreme Court itself. That I think would help us a little bit. People tend to look at the Supreme Court as the security for our most fundamental rights. This is not a very plausible view, either historically or as a matter of political science. Over time the only security of fundamental rights is persuading great numbers of the American people that they do and should exist. Otherwise over time they are going to be lost. To the extent that we may like a Supreme Court decision, winning that case is not the end of the road. It is a very early point on the road. The road is quite long. *Brown v. Board of Education*[8] did not successfully desegregate a single school district. As a matter of fact, the data suggests that either zero or very close to zero school districts in the south desegregated until the Civil Rights Act of 1964,[9] which would cut off federal funds to school districts that did not desegregate. Then desegregation came very, very rapid in the South and in the border states—it was still very slow in the North. It was ten years between those two events. What happened in those ten years was the use of *Brown* as a platform, a kind of launching pad for a large movement to change the public's consciousness. In the end, the security for those rights was the change of public consciousness, not the Court decision itself. It is important that we remember to think about rights and other things we value in this way—that we as people are the security for them. Wearing one of my other hats, as some of you may know, I write a little bit about law and religion. Years ago, when the Christian Coalition was founded back in 1989, it announced the goal of training ten political activists in every electoral district in America by the year 2000, which was some millions of political activists who would be trained. Some of my friends and associates who did not like this very much and other people who knew I wrote about law and religion would call me up or come talk to me, or write and say in effect, "Gee, what can we do about this?" meaning how could they prevent this from happening. They seemed to be asking what symposium can we hold, what litigation can we bring, what television program can we go

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8. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955).

9. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000h-6.

on? I said at the time—and I still believe it—that if there is some group with whose goals you disagree that is planning to train ten political activists in every electoral district in America, then your only secure way of defeating them is to train eleven. If you are not willing to do that hard work in a democracy then you are going to lose in the long run, and you probably should. There is a tendency to want to take the shortcut, the easy way out. When we rely so much on the Court, my fear is not so much that it takes decisions away from us—courts can be overruled and time can beat the court back—my concern is that it makes us lazy. It makes us think that it is the end of the road. We begin circling our wagons around the Court and its members. We do that instead of circling the wagons around the right we are trying to protect and then trying to raise people's consciousness and explain to them why it is that the thing itself—the idea behind the Court decision that we so admire—that that is really the valuable and important thing.

PROFESSOR GERHARDT: Again, I want to agree. Let me express my agreement by talking again about *Bush v. Gore*.[10] Here I will become a little bit of a critic or advocate. I think the great tragedy of *Bush v. Gore* is that it is predicated on a loss of faith in the political process. That became the apparent predicate for the decision. The defense of the decision is often in terms to say, "Well, the Court had concluded that it could not have sufficient faith . . . ." In what? In the political branches to reach a peaceful and adequate decision consistent with the Constitution. So when you have the Supreme Court expressing its lack of faith in the political process, I suppose that you cannot hope for the political process to become better or more capable or rise to the occasion in a more exemplary fashion in dealing with constitutional issues. I think that what has happened is precisely what Professor Carter has described. We have become reliant on the Supreme Court for dealing with constitutional questions and we do not expect politicians and our political leaders to deal with them very capably or adequately. I think that is a tragedy. It would be better for us ultimately if we could get back to the circumstances in which we would expect courts to deal less in a final sense with some of these questions and dealing more with process questions. That was what I had hoped for with regards to *Bush v. Gore*. I will describe very briefly my last day at CNN and you will understand why it was my last day. I came in to talk about *Bush v. Gore*. If you remember the first time the case came up for argument in the Supreme Court, no one on either side of the election was predicting that the Court was going to reach the merits. When I showed up at the CNN desk and Frank Sesno asks me, "On a scale of one to ten, how important do you think this decision is going to be?" I said, "I don't know, a three?" And he looked at me and said, "Are you crazy,

10. Bush v. Gore, 531 U.S. 98 (2000).

don't you know what a constitutional crisis this is? Can't you recognize this when you see it?" And of course I have never been on CNN since. [Laughter] For the media the case was a wonderful thing, because by the time the Court got around to deciding the merits, that was the kind of crisis the media was hoping for. I think that was an unfortunate thing. I believe that if anybody was going to be required to resolve that issue, it would be much better if they were politically accountable for the outcome rather than a court that is not politically accountable. Think about it. The one institution that finally resolved the dispute is the one institution that is not politically accountable. Every other institution that dealt with it, the Florida Supreme Court, the state legislature of Florida, Congress, every other body would have been politically accountable. In my view, that would have been better because it would have reminded people that political accountability matters and reminded them of how political accountability does happen. It happens when people go to the polls, but of course they cannot go to the polls because they cannot read the ballots, and we have a lot of problems with that . . . . [Laughter] Even now look how little has been done in Florida to redress the problems with respect to the ballots down there. That was a long way of saying that my hope is not going to be placed in courts, even though I grew up in Alabama and it was ultimately the courts that really had to take the lead down there because of the horrible kinds of state and local governments we had. My hope is going to be placed in the people and the officials that they elect and then hold accountable.

PROFESSOR BAKER: That brings us to the conclusion of our Symposium this morning. I hope that you would agree that we have made good on our promise of an intellectual discussion that was stimulating and informative. Please now help me thank our speakers, Professor Carter and Professor Gerhardt. [Applause] Thank you again to the sponsoring firm of Belin Lamson McCormick Zumbach Flynn, P.C. Thanks to all of you for braving the elements and for attending this wintry morning. I wish each of you safe travel home.