June 25, 1992

CONGRESSIONAL RECORD—SENATE

16307

REFORM OF THE CONFIRMATION PROCESS

Mr. BIDEN. Mr. President, I would like to apologize for not passing on the President's time and the time of the Senate. In my over 19 years in the Senate, I have never sought to speak before the Senate for as long a period as I sought today in morning business.

But the subject to which I speak is something that I have given a great deal of thought. I have been asked by the Senate to spend some considerable time thinking about, and it is extremely controversial. In light of the fact that we are within a day of the time that historically the Supreme Court Justices make judgments about whether or not they are going to stay on for another year, it seems somewhat prophetic, although I know of no Justice who intends to resign—"I do not mean to imply that—my speech this morning is about refor ming the confirmation process and the need for a new dawn with regard to the conduct ourselves relative to the confirmation process involving Supreme Court nominees.

Seven years ago, Harvard law professor Laurence Tribe, reflected on what was then the second-oldest Supreme Court in history, and he wrote: A great Supreme Court is a sort of Halley's Comet in our constitutional universe, a rare operation arriving once each lifetime, burning intensely in our legal firmament for a brief period before returning to the deep space of constitutional history.

He added that a quiet period in which there were just two Supreme Court nominations in 15 years was "the calm before the constitutional storm that surely lies ahead," predicting that, sometime in this decade, we will be tossed into the turbulent process that has gripped the nation in the past.

And, today, after the naming of seven men to fill five vacancies on the Supreme Court in just 5 years, we find ourselves in the midst of the storm Professor Tribe foresees.

In these past 5 years, the U.S. Senate has endured three of the most contentious confirmation fights in the history of the United States:

The 1986 nomination of William Rehnquist, who was confirmed by the majority of the Senate for his position on the Court in our history up to that point.

The 1987 rejection of Robert Bork at the end of an epic conflict between competing constitutional visions.

The subsequent withdrawal of Douglas Ginsburg just days after President Reagan had selected him to succeed Bork as his nominee.

The floor vote of June 1981, which none of us, I suspect, will ever forget, over Clarence Thomas' confirmation to the Court, which broke Chief Justice Rehnquist's record for receiving the most negative votes in Senate history.

The immediate product of these conflicts, the change in the Court over the past two decades, has been dramatic. But as Duke professor, Walter Dellinger, pointed out, there is every reason to believe we may see as many as five more Justices retire within the next 4 years. In all likelihood, Mr. President, we stand at only the halfway point in the remaking of the Supreme Court, with as many confirmation controversies in the coming Presidential term as we saw over the past two terms combined.

By the time we arrive at the next election year in 1986, there is a substantial chance that no member of the Court who was serving on the Court in June of 1986 will remain on the bench. Such a complete replacement of the Court in just 10 years has only one precedent since the Court was permanently expanded to nine members over 100 years ago. Today, as we stand at the midpoint in this dramatic change, I would like to discuss what has transpired over the past few years with respect to the confirmation process.

Mr. President, I also want to discuss the question of what should be done if a Supreme Court vacancy occurs this summer. Finally, I wish to present general proposals for how I believe the nomination and confirmation process should be changed for future nominations.

Let me start first with a consideration of the confirmation process of the past decade. As I mentioned earlier, Presidents Reagan and Bush have named eight nominees for six positions on the Court during their Presidential terms. This is not the first time in our history that a strong ideological President and his loyal successor have combined to shape the Court.

Presidents Washington and Adams made 10 nominations, all confirmed, and served among the Court's 6 Justices.

Presidents Lincoln and Grant nominated 13 candidates for the Court, of whom 9 were confirmed and served.

President Roosevelt and Truman named 13 Justices, all confirmed, in their combined terms in the White House.

What distinguished the Reagan-Bush Justices from these historical parallels, however, is that half of them have been nominated in a period of a divided Government. In each of these previous times, a sweeping nationwide consensus existed, as reflected by the election of both political branches of like-minded officials, which justified the sweeping changes that took place at the Supreme Court.

But over the past two decades, Mr. President, no such consensus has existed, unlike the era to which I pointed—Washington-Adams, Lincoln-Grant, Roosevelt-Truman.

Since 1988, Republicans have controlled the White House for 20 of 21
years. Democrats have controlled the Senate for 18 years of this period. The public has not given either party a mandate to remake the Court into a body reflective of a strong vision of our respective philosophies, and both of our parties have, built finally, honestly admitted to that fact. Both of our parties should honestly have conceded this fact. But neither has, thus far.

Of course, this is not the first period when divided Government has been required to fill the third branch of Government. About one-fifth of all Supreme Court Justices have been confirmed by a party different from the President. One-third of all Justices confirmed since 1930 have been approved under these circumstances. It was a Senate controlled by progressive Republicans and Democrats that confirmed three of President Hoover's four nominees for the Court, and a Democratic Senate reviewed and approved Eisenhower nominees. Yet, in these previous periods of divided Government, Mr. President, indeed in some periods where a President and the Senate of the same party, Presidents common have taken the Constitution at its word and asked for the Senate's consent. These Presidents have consulted with the Senate about their choices for the Court and/or chosen nominees in balance. These Presidents have commonly taken the Constitution at its word and asked for the Senate's advice—advisor as well as its consent. These Presidents have consulted with the Senate about their choices for the Court and/or chosen nominees in balance or diverse ideologies. Thus, the conservative Republican, Hoover, named conservative Chief Justice Charles Evan Hughes, but also named a moderate, Owen Roberts, and a liberal, Benjamin Cardoza, after heated executive-Senate consultations.

Similarly, President Eisenhower's choices for the Court included conservative John Harlan and Charles Whittaker, moderate Potter Stewart, and liberals Earl Warren and William Brennan. Even President Nixon, who showed no reluctance to take full advantage of Presidential prerogatives, balanced his choices of conservatives Warren Burger and William Rehnquist with those of moderate Republican Harry Blackmun and conservative Democrat Lewis Powell. This, of course, has not been the model that Presidents Reagan and Bush have followed. Indeed, even lacking the broad support for their vision of the Court which Presidents Washington and Adams, Lincoln and Grant, and Roosevelt and Truman had, Presidents Reagan and Bush have tried to recast the Court in their ideological image, as these Presidents did.

But the first time that both have been attempted simultaneously and that, more than anything else, has been at the root of the current controversy surrounding the selection of the Supreme Court Justices. It was to cope with this stress, a stress created by the decision of Presidents Reagan and Bush to attempt to take the Court into a new, radical, new direction which this country does not support, it was to cope with this stress that the modern confirmation process was created. And on this point, there should be no doubt and no need for the Senate to take the broadest view of its constitutional rights and duties under these circumstances. The use that Presidents Reagan and Bush made of the Supreme Court nominating process in a period of divided Government is without parallel in our Nation's history. It is this power grab that has unleashed the powerful and diverse forces that have ravaged the confirmation process. If the American people are dissatisfied with where they find the process today, they must understand where the discord that has come to characterize it began: With Presidents Reagan and Bush and their decision to cede power in the nominating process to the radical right within their own party.

It was in the face of this unprecedented challenge to the Supreme Court's selection process that we in the Senate developed an unprecedented confirmation process. The centerpiece of this new process was a frank recognition of the legitimacy of Senate consideration of a nominee's judicial philosophy as part of the confirmation review. I ask unanimous consent at this point that a previous speech I have made on the Senate's right to look at and obligation to look at the ideology of the nominees be printed in the Record.

Thence being no objection, the material was ordered to be printed in the RECORD, as follows:

**ADVICE AND CONSENT: THE RIGHT AND DUTY OF THE SENATE TO PROTECT THE INTEGRITY OF THE SUPREME COURT.**

Mr. BENN. Mr. President, on July 1, 1997, President Reagan nominated Judge Robert Bork to an Associate Justice of the Supreme Court. I am delivering today the first of several speeches on questions the Senate will face in considering the nomination.

In future speeches, I will set out my views on the substance of the debate—and there is room for principled disagreement. But in this speech, I want to focus on the terms of the debate—and I hope to put an end to disagreement on the terms of the debate. Arising from constitutional history and Senate precedent, I want to address one question and one question only: What are the rights and duties of the Senate in considering nominees to the Supreme Court?

Some argue that the Senate should defer to the President in the selection process. They argue that any nominee who meets the "advice and consent" clause must be confirmed, regardless of his judicial philosophy. But the Constitution says nothing of this view. What the Framers intended was "the only person entrusted by the Constitu-
widely agreed that the Senate “would be composed of men nearly equal to the Executive and would of course have on the whole more wisdom.” Moreover, “it would be less easy for candidates to intrigue with them, than with the Executive.”

Obviously, we can see here the fear that was growing on the part of those at the Convention that the courts would be powerful and most judges would be able to intrigue with a single individual, the President, but not the Senate as a whole. So Mr. Gorham of Massachusetts suggested a compromise proposal: to provide for appointment by the Executive “by and with the advice and consent” of the Senate. Without much debate, the “advice and consent” proposal passed on a tie vote.

Up until now, no one, no single vote at the Convention, gave the Executive any role to play in this process.

All told, there were four different attempts to include the President in the selection process, and four times he was excluded. Until the closing days of the Convention, the draft provision stood: “The Senate of the U.S. shall have power to * * * * * appoint * * * Judges of the Supreme Court.” But the controversy would not die, and between August 25 and September 4, the advice and consent compromise was proposed once again. On September 4, the Special Committee on Postponed Matters reported the compromise, and 3 days later, the Convention adopted it unanimously.

What can explain this 11th hour compromise? Well, historians have debated it for years.

Gouverneur Morris of Pennsylvania offered the following paraphrase. The advice and consent clause, he said, would give the Senate the power “to appoint Judges nominated to them by the President.” Was his interpretation correct? Well, we can never know for sure, but it seems to be the overwhelming point of view among the scholars. But it is difficult to imagine that after four attempts to exclude the President from the selection process, the Framers intended anything less than the broadest role for the Senate—in choosing the Court and checking the President in every way.

The ratification debates confirm this conclusion. No one was keener for a strong Executive than with the President from undermining Judicial Independence and from remaking the Court in his own image. That is the whole point is why the Framers intended a broad role for the Senate. We think it is beyond dispute from an historical perspective.

The Senate has historically taken seriously it's responsibility to restrain the President. Over and over, it has scrutinized the political views and the constitutional philosophy of nominees, in addition to their judicial competence.

I ask unanimous consent to insert in the Record a list of all nominations rejected or withdrawn over the last 200 years.

The bills being objected to, the list was ordered to be printed in the Record, as follows:

<table>
<thead>
<tr>
<th>Supreme Court nominees</th>
<th>President's party</th>
<th>Senate party</th>
<th>Rejected (D)</th>
<th>Withdrawn (W)</th>
<th>Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Rutledge (1755)</td>
<td>Washington</td>
<td>F</td>
<td>R</td>
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<tr>
<td>Alexander Maltz (1811)</td>
<td>Madison</td>
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<td>John Crittenden (1821)</td>
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<td>Roger Brooke Taney (1835)</td>
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<td>John Spencer (1844)</td>
<td>Tyler</td>
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<tr>
<td>Reuben Walworth (1844)</td>
<td>Tyler</td>
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<td>Edward King (1844)</td>
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<td>Edward Doug (1845)</td>
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<tr>
<td>John Paul (1845)</td>
<td>Tyler</td>
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<td>No action</td>
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<tr>
<td>George Woodward (1846)</td>
<td>Polk</td>
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<tr>
<td>Edward Bates (1852)</td>
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<td>Jeremew Stack (1861)</td>
<td>Buchanan</td>
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<td>Some Dems</td>
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<td>Henry Stanbury (1860)</td>
<td>A. Johnson</td>
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<tr>
<td>Ebenezer Hazard (1870)</td>
<td>Grant</td>
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<tr>
<td>George Williams (1874)</td>
<td>Grant</td>
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dominated by 24-23 vote |      |

The debates and the Federalist Papers are our only keys to the minds of the Founders. Confining our investigation to "original intent," you would have them rule there. But there is much more. Two centuries of Senate precedent, always evolving and always changing, provided by the Framers, the Senate's role in the selection process is essential to a balanced Constitution. * * * Limitations of the kind can be preserved in practice no other way through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.

So, in order to preserve an independent Judiciary, the Framers devised three important checks: life tenure, prohibition on reduction in salaries, and most important, the willingness of the Senate to exercise its role in choosing the Court and checking the President in every way. In divided responsibility for the appointment of judges, the Framers were entrusting the Senate with a solemn task: preventing the President from undermaking Judicial Independence and from remaking the Court in his own image. That is the whole point is why the Framers intended a broad role for the Senate. We think it is beyond dispute from an historical perspective.

The Senate has historically taken seriously it's responsibility to restrain the President. Over and over, it has scrutinized the political views and the constitutional philosophy of nominees, in addition to their judicial competence.

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</tr>
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</table>
| Stanley Matthews (1881) | Hayes           | R           | D           | No prejudice on Court, recommended by Caswell and con
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Mr. BIDEN. In many cases, the Senate rejected technically competent candidates whose views it perceived to clash with the national interest. The chart lists 26 nominations rejected or withdrawn since 1789. In only one case, George Williams—a Grant nominee whose nomination was withdrawn in 1874—does it appear that substantive questions played no role whatsoever. The rest were, in whole or in part, rejected for political or philosophical reasons.

The precedent was set as early as 1789, in the first administration of George Washington, and the precedent setter was no less than John Rutledge who I quoted earlier. Remember Rutledge? He was the one who argued at the Constitutional Convention that Congress should have complete control over the Supreme Court would be "leaning too much toward monarchy." Well Old John would come to wish he had not uttered those words.

Rutledge was first nominated to the Court in 1790, and he had little trouble being confirmed. As one of the principal authors of the first draft of the Constitution, he was clearly qualified to judge original intent. In 1791, however, he resigned his seat to become chief justice of South Carolina, which—as our two South Carolina Senators probably still think—he considered a far more important post. But then, Chief Justice John Jay re-nominated from the Supreme Court in 1792, and Washington nominated Rutledge to take his seat. The President was so confident of a confirmation that he had the nomination papers drawn up in advance and gave him a recess appointment.

But that was not to be. A few weeks after his appointment, Rutledge attacked the Jay Treaty, which Washington had negotiated to ease the last tensions of the Revolutionary War and to resolve a host of trade issues. Because of the violent opposition of the anti-British faction, support of the treaty was regarded as the touchstone of true federalism. One newspaper reported that Rutledge had declared "he had rather the President should die (dearly as he loved him) than he should sign that treaty." Another paper reported that Rutledge had intimated "that Mr. Jay and the Senate were fools or knaves, duped by British sophistry or bribed by British gold ... prostituting the dearest rights of freemen and laying them at the feet of royalty."

Debate raged for 8 months, and Rutledge was ultimately rejected, 14 to 10. To the minds of many Senators, Rutledge's opposition to the treaty called into question his judgment in taking such a strong position on an issue that polarized the Nation and even forced his mental stability. But make no mistake: the first Supreme Court nominee to be rejected by the Senate—one of the framers, no less—was rejected specifically on political grounds. And the precedent was firmly established that inquiry into a nominee's substantive views is a proper and an essential part of the confirmation process.

Since Washington's time, the precedent has been frequently reinforced and extended—often at turning points in our history. In 1881, Alexander McClernand, a Lincoln nominee, was rejected at least in part because of his vigorous enforcement of emancipation and civil rights laws. His rejection was fortunate for our legal history, since he later endorsed the view that any judge deciding a law unconstitutional should be immediately expelled from the Court.

In 1835, Roger Taney, a Jackson nominee, was opposed for much more serious and substantive reasons. I will discuss the historic details of the Taney case later. But, for now, though, a sketch will suffice. Jackson was attempting to undermine the Bank of the United States. Taney had been a crucial ally in his crusade, so Jackson nominated him to the Court. These favoring confirmation urged the Senate to consider Taney's constitutional philosophy on its own merits. "It would indeed be strange," said a lending paper in the South, "if, in selecting the members of so august a tribunal, no weight should be attached to the views entertained by its members of the Constitution, or their acquiescence or opposition to acts in its relations to the forms of government under which we live." Thus opposing confirmation had no reservation about doing so on the ground that Taney's views did not belong on the Court. In the end, the Whigs succeeded in defeating the nomination by postponement, but Jackson bided his time and resubmitted the following year—this time for the seat of retiring Chief Justice Marshall.

Between the Jackson and Lincoln Presidents, only 10 of 18 Supreme Court nominees failed to win confirmation. Whigs and Democrats were equally divided in the Senate. While the issue of States rights versus a nationalist philosophy infirmed some of the debates, most of the struggles were strictly partisan. John Tyler not a Presidential record: the Senate refused to confirm him on 26 points, after the resignation of Justice Baldwin in 1844, the struggle became so intense that a seat remained vacant for 24 months. Twenty-six justices have been on the whole more civil but no less political. The last nominee to be rejected on exclusively political or philosophical grounds was John J. Parker, a Herbert Hoover nominee, in 1930. And in Parker's case, debate focused as much on the net impact of adding a conservative to the Court as on the opinions of the nominee himself. Parker's scholarly credentials were beyond reproach. But Republicans, disturbed by the highly conservative direction taken by the Court under President Taft, began to organize the opposition.

Their case rested on three contentions—I have this right, by the way; it is Republican; and Republicans in those days were much more progressive than we are in my perspective—first, that Parker was unfriendly to labor; second, that he was opposed to voting rights and political participation for blacks; and third, that his appointment was dictated by political considerations.

Parker's opinions on the Court of appeals drew attention to his stand on labor activism. He had upheld a "yellow dog" contract that set as a condition of employment a worker's pledge never to join a union.

But the case for the opposition was put most eloquently by Senator Borah of Idaho, in a speech that would be quoted for years to come:

"[Our Justices] pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters."

And Senator Norris of Nebraska added, in stirring words that we would do well to remember today:

"When we are passing on a judge ** we ought not only to know whether he is a good lawyer, not only whether he is honest—but I admit that this nominee possesses both of these qualifications, but I want to know now how he approaches these great questions of human liberty." Parker was denied a seat on the Court by a vote of 41 to 20. Justice Owen Roberts, the man appointed in his place, was less wedded to the wisdom of the past; he was the famous "switch in time" that helped defuse the Court-packing crisis in 1937—more on that later.

But what of our own times? In the past two decades, three nominees have been rejected by the Senate—Abbe Fortas, Clement Haynsworth and G. Harrold Carswell—although there are other issues at stake, debate in all three cases centered on their constitutional views as well as their professional competence. I am inserting into the CONGRESSIONAL RECORD a list of the statements of Senators during the Fortas and Haynsworth hearings and debates concerning the relevance of a nominee's substantive philosophy.

I ask unanimous consent that they be printed in the RECORD.

For the initial nomination, the material was ordered to be printed in the RECORD, as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Party</th>
<th>Vote</th>
<th>Reasons for Rejection</th>
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<tbody>
<tr>
<td>Samuel Chase</td>
<td>D</td>
<td>30-11</td>
<td>Violation of public interest by New England Senators.</td>
</tr>
<tr>
<td>John Rutledge</td>
<td>D</td>
<td>10-31</td>
<td>Approval of WhigIsolette and the WhigIsolette movement.</td>
</tr>
<tr>
<td>Roger Taney</td>
<td>D</td>
<td>18-25</td>
<td>Violation of public interest by Southern Senators.</td>
</tr>
<tr>
<td>John J. Parker</td>
<td>D</td>
<td>41-20</td>
<td>Violation of civil rights, voting rights, and political participation for blacks.</td>
</tr>
<tr>
<td>Abbe Fortas</td>
<td>D</td>
<td>51-45</td>
<td>Violation of civil rights, voting rights, and political participation for blacks.</td>
</tr>
</tbody>
</table>

June 25, 1992

CONGRESSIONAL RECORD—SENATE

VI. STATEMENTS OF SENATORS CONCERNING RELEVANCE OF NOMINEE'S SUBSTANTIWE VIEWS: VIEWS OF THE NOMINEE ARE RELEVANT

A. SENATORS WHO ARGUED DIRECTLY THAT THE VIEWS OF THE NOMINEE ARE RELEVANT

Senator Ervin, Hearings on the Nomination of Abe Fortas and Homer Thornberry Before the Select Comm. on the Judiciary, 95th Cong, 2nd Sess., at 75 (1968) [hereinafter cited as 1968 Hearings].
Senator Hruska, 1969 Hearings at 463.

Senator Kennedy, 1969 Hearings at 327.

B. SENATORS WHO ARGUED THAT THE NOMINEE'S VIEWS ARE NOT RELEVANT


Mr. BRIDEN, Mr. President, the list was compiled by three law professors in a memorandum prepared for several members of the Judiciary Committee in order to address the proper scope of the Senate's inquiry into the political and constitutional philosophies of nominees. The tone of the recent debates was established during the hearings for Justice Thurgood Marshall in 1967. Senator Ervin summarized the viewpoint of several Senators. "I believe that the duty which that [advice and consent] provision of the Constitution imposes upon a Senator requires him to ascertain as far as he can humanly can the constitutional philosophy of any nominee to the Supreme Court." When Justice Marshall's nomination reached the floor, the Senators who spoke against confirmation rested their case on what they saw as his activist views. Senator Sennett said: "The nominee must be measured against the balance of the court as a whole. Senator Stennis said: "The nominee must be measured by..."

In the subsequent debate over O. Harrold Carswell, his views about racial equality received less attention than his ability on the bench. Of particular concern was his alleged restlessness. In the view of the scope of the 14th amendment, Senator Inouye took particular exception to the nominee's "philosophy on one of the most critical issues facing our Nation today—civil rights." And Senator Brooke of Massachusetts argued the general proposition: "The Senate," he said, "bears no less responsibility than the President in the process of selecting members of the Supreme Court. * * * (Judicial competence) could not be sufficient (qualification) for a man who began his public career with a profound and far-reaching commitment to an anticonstitutional doctrine, a denial of the very pillar of our legal system, that all citizens are equal before the law."

DEVELOPING THE PROPER STANDARDS

This, then, is the history of the Senate debate. It is a rich and fractious history—all of which might be said with the passage of time, the moment and the questions of the day. But although the issues under review have changed, the terms of review have not. Until
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recent times, few have questioned the Senate's right to consider the judicial philosophy, as well as the judicial competence, of nominees. The Founders intended it and the Senate has exercised it. Over and over, the Senate has rejected nominees whose judicial philosophies were out of step with the times or viewed as tipping the balance in the Court.

It is easy to see why the Senate has subjected the Supreme Court to more exacting standards than nominees to the lower courts, for as the highest court in the land, the Supreme Court dictates the judicial philosophy of the nation. There are obvious circumstances can this narrow standard not, to name only a few recent examples.

And I endorsed a modern convention that would require nominees to be more than the product of their training. To say, of course, that a nominee's views should be considered, that he or she has the knowledge and experience to make decisions, to have a commitment to the Constitution of the United States? To say that a nominee has the intellectual capacity, competence and temperament to be a Supreme Court Justice:

Judge Learned Hand wrote of the necessity for detachment. He said that a Supreme Court Justice: "* * * must have the historical capacity to reconstruct the whole setting which evoked the law by one and in which it resolved the objects which it sought; the events which led up to it. But all this is only the beginning, for he must possess the far more exceptable * * * of detached insight, cast into the purpose beyond its expression, and to bring to fruition that which lay only in flow.* * * he must approach his problems with a little practical intelligence about what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity to be practical. And Justice Felix Franklin wrote of the necessity for statesmanship: "Of course a Justice should be an outstanding professional and accept the term, but that is the merest beginning. With the great men of the Court, constitutional adjudication has always been the responsibility of the Court, trying the Con- stitution as the living framework within which the nation and the States could freely move through the inevitable changes wrought by the passage of time and by new, or original, judges. Our successors whose labor history has validated have been men who brought to their vast insights into the problems of their generation * * * of detached insight, cast into the purpose beyond its expression, and to bring to fruition that which lay only in flow. * * * he must approach his problems with a little practical intelligence about what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity to be practical. And Justice Felix Franklin wrote of the necessity for statesmanship: "Of course a Justice should be an outstanding professional and accept the term, but that is the merest beginning. 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change would not be in our country's best interests."

This, in sort, are some of the circumstances when the Senate's right to consider judicial philosophy becomes a duty to constitute. When President Adams felt the need to use the power of the Court to remove a chief justice who was obstructing his legislative agenda, he moved to change the composition of the Court itself.

But the case of Andrew Jackson's decision to fire Roger Taney, the Chief Justice of the Supreme Court, is one of the most significant instances of this phenomenon. Jackson fired Taney in 1833, after Taney had upheld the Bank of the United States in the case of McCulloch v. Maryland.

Jackson, who was determined to remove the Chief Justice from the Court, had his second Secretary, William H. Crawford, fire Taney. The Senate, which was controlled by Jackson's Democratic party, confirmed the appointment of利亚d J. Johnson to the Court, replacing Taney. This was one of the first instances of a president using his power to shape the federal judiciary.

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substantially committed to the same action. One can only assume that the President is bent on...

The formal verdict was delivered on the Senate floor on July 22, 1997. Though a meaning-

less rollcall vote lay ahead, it was clear that Roosevelt's effort to pack the Court, which for some time appeared destined to succeed, had come to an end. At a press confer-

tence held that day in the Senate wing, with the

President's eyes fixed on the galleries, Senator Hiram Johnson cried, "Glory be to God!"

Let me conclude by saying that my case today has been rooted in history, precedent, and

common sense. I have argued that the future depends on a confrontation with a popular Prez-

dent's determined attempt to bend the Su-

preme Court to his political ends. No one should lose sight of the fact that nominees are

the single issue to dominate the confirmation process. And here is the recognition of the right to privacy, a right that, if you recall, Mr. President, prior to the Bork fight, the ideological right in this country thought was not supported by Americans.

This could not have been said before the Bork confirmation fight. And yet it can be safely proclaimed today that Americans—Americans—strongly support the right to privacy, and find that there is such a right protected in the Constitution. For if I limit the success of this process to the Bork rejection only, I am equally satisfied, albeit for different reasons, as to how the process functioned in approving Justices Ken-

nedy and Souter.

In my view, the contemporary con-

firmation process functioned well in re-
jecting Judge Bork and approving Justices Kennedy and Souter. And yet, sadly, even in so succeeding, one could see within the process the seeds of an explosion that was to come with the Reagan-Bush nomination and the destructi-

ve forces that were going to tear it apart.

As I said earlier, the root of the cur-

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cess is the administration's campaign to make the Senate into an independent third branch of the United States, a view that has been clearly charted in the progress of an ultraright conservative social agenda which lacks support in the Congress and in the country.

I would just point out again, par-

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ministration has yet to be able to gain a majority support in the U.S. Senate or the U.S. House of Representatives, or among the American people over the past ten years. So why did we do that, both Presidents have con-

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selves to be divided as single-issue participants.

This has given rise to even more frustration about the process from both participants and observers, and was one cause for the schism that emerged in the Thomas confirmation debate. Moreover, the focus on Roe prevents the consideration of legitimate issues in our hearing, because questions about the nominees on many matters, from the cutting-edge issue of the right to privacy to the age-old legal doctrine of stare decisis, are immediately assumed by all those who observed the process to be covert questions about abortion when they have nothing to do with abortion.

Among the most frustrating aspects of the Souter and Thomas hearings was that when I tried to question the nominees on whether they thought individuals had a right to privacy, everyone—the press, the public, the nominees, my colleagues—thought that I was trying to ask about abortion in disguise, no matter how many times I said, truthfully and frankly, and I quote:

No; forget about abortion. To know how you will face the many unknown questions that will confront the Court into the 21st century, I must know whether or not you think individuals have a right to privacy.

No matter how many times I insisted, everyone believed I was asking about abortion. That is how powerfully the issue dominates our process.

(Mr. KOHL assumed the chair.)

Mr. BIDEN, Second, in the period between the Bork and the Thomas nominations, there developed what could be called an unintended "conspiracy of extremism," between the right and the left, to undermine the confirmation process, and question the legitimacy of its outcomes.

Stated differently, the right could not accept that any process which resulted in the rejection of Judge Bork was fair or legitimate. Notwithstanding the contemporaneous declaration of many Republicans that the hearings and process for handling the Bork nomination were fair, a subsequent mythology has developed that claims otherwise.

We are told that the hearings were tilted against Bork, but there were more witnesses who testified for him than appeared in opposition. I have heard his defeat blamed on scheduling of the witnesses. Well, we simply alternated, pro-con, pro-con, pan after panel.

And the list of excuses goes on and on. It was the camera angle, they said, the beard, the lights, the timing—all unfair, all engaged in by those who opposed Bork to bring him down.

In sum, the conservative wing of the Republican Party has never accepted the cold, hard fact that the Senate rejected Judge Bork because his views came to be well understood, and were considered unacceptable. And because this rejection of their core philosophy is inescapable to the legal right, they have been on a hunt for villains ever since.

They have attacked the press, as in a recent, interpenetrate speech by a conservative Federal judge bashing two New York Times reporters who are among the finest to cover Supreme Court hearings. But most of all, these movement conservatives have attacked the confirmation process itself, and the Senate for exercising its constitutional duties to conduct it.

But it does not stop there, Mr. President.

At the same time, the left, too, has cloaked its frustration with its inability to persuade the American public of the wisdom of its agenda, in anger about the confirmation process as well.

The left has refused to accept the fact that when one political branch is controlled by a conservative Republican, and the nomination itself rests on key Southern Democrats, who hold the balance on close votes in the Senate, it is inevitable that the Court is going to grow more conservative. Acceptable candidates must be found among those who straddle this ideological gulf, such as Justices Kennedy and Souter, who were approved by a combined total of 188 to 5 in the Senate.

The left, Mr. President, is frustrated because a conservative President and a Senate, where the fulcrum is held by conservative Southern Democrats, is not going to nominate a Justice Brennan, who, I think, was a great Justice, and we should find people to replace him ideologically. They refuse to accept the reality, Mr. President, just as the right refuses to accept the reality of a Bork defeat.

Bork was defeated because his views of what he thought America should become were different than those held by the vast majority of Americans and an overwhelming majority of Senators in both parties.

On both sides, the advocates have joined in an ad hoc coalition that contributes to undermining public confidence in a process aimed at moderation—hoping, perhaps, to ferment a great social and cultural war in which one or the other will prevail.

So, Mr. President, the confirmation process has thus become a convenient scapegoat for ideological advocates of competing social visions—advocates who have not been able to persuade the generally moderate American public of the wisdom of either of their views when framed in the extreme. In effect, then, Mr. President, these advocates have joined in an ad hoc ad hoc coalition that contributes to undermining public confidence in a process aimed at moderation—hoping, perhaps, to ferment a great social and cultural war in which one or the other will prevail.

The third problem, Mr. President, is the confirmation process has been infected by the general meanness and nastiness that pervades our political process today. While I believe they have little or no role in the the truth, the inaccurate television ads that were run against Judge Bork's confirmation only taunted increasingly cutting responses from the right.

The Thomas nomination included a temporary declaration of many Republican Senators that the hearings were a "conspiracy of evil" directed at exorcising their constitutional duty.

Mr. President, is that we could recognize the cost—if not find the answers—for this nastiness in the context of Presidential elections, but there was the same insight with respect to the confirmation process.

Many of the same voices who have criticized the committee for not going hard enough after allegations that Judge Thomas had improper travel expenses, artfully transferred a whistle-blower at EEOC, or was friends with a proapartheid lobbyist—many of these attacks have been on a hunt for villains instead of the real issues.

We cannot have it both ways.

I, too, believe that the Nation would be better off if the current campaign centered on the future public policy rather than gossip about marital fidelity and marijuana use. But I must say that the same is true about our review of Supreme Court nominees: the Nation has a need and right to explore their jurisprudential views; it is de-based when we plow through their private lives for dirt.

As with Presidential campaigns, the press—perhaps because it is easier, perhaps because it sells papers—has too often focused their coverage of Supreme Court nominees on such gossip and personal matters, rather than on the substantial—but difficult—task of trying to discern their philosophy and record. Mr. President, because ideology and their ideology that will affect how I am able to live my life, how my children will be able to live their lives, whether or not they lived 17 years old, they smoked marijuana, or anything else.

Let me make it clear, here, that I am not now speaking of Professor Hill's allegations against Judge Thomas, which were certainly serious and significant.
enough to merit the full investigation that the committee conducted, both before and after their public disclosure. Rather, I am speaking of the numerous leaks, allegations, and charges against nominees Bork, Kennedy, Souter, and Thomas which the most extreme committee critics say we have done too little to pursue.

Some examples of what these critics wanted to see us delve into come to mind: Judge Bork had his video rental records exhumed and studied for possible rental of pornographic films. Judge Souter has his marital status questioned and felt obligated to produce ex-girlfriends to testify to his virility. Judge Thomas was assaulted by a whispering campaign that spread unsubstantiated rumors of about the cause of the end of his first marriage.

Each time, the airing of these charges enraged Republican allies of these nominees, who considered the charges unfair and a violation of their right to privacy. And each time, when the committee—my committee—refused to explore these tawdry rumors, the more extreme critics of our process grew more and more frustrated with the results.

This was another tension which came to a head during the Thomas nomination, and which exploded when Professor Hill’s charges were made public.

To sum up, then: The confirmation process launched in 1987—when the Reagan-Bush campaign to transform the Supreme Court ideologically at a time when those ideological views lacked public support—has been torn asunder. The process lacks the sort of broad-based support that could make it work, and its credibility has been slowly eroded by the criticism it has received from both liberal and conservative ideologues.

At every stage in a process that was built in good faith to identify and confirm consensus nominees has been destroyed by many of the same corrosive influences that have so devastated our Presidential politics and our national dialogue on public affairs.

Consequently, it is my view that—particularly if the reality of divided government during a time of great change at the Court continues in the next administration—future confirmations must be conducted differently than the preceding ones. The pressures and tensions on the existing process—which exploded during the Thomas nomination fight—make a restoration of the past come before Judge Thomas’ nomination—even if it was desirable—a practical impossibility.

THE UNIQUE HISTORY OF ELECTION YEAR NOMINATIONS

Having said that, we face one immediate question: Can our Supreme Court nomination and confirmation processes, so raked by discord and bitterness, be repaired in a Presidential election year? History teaches us that this is extremely unlikely.

Some of our Nation’s most bitter and heated confirmation fights have come in Presidential election years. The bruising confirmation fight over Roger Taney’s nomination in 1836; the Senate’s refusal to confirm four nominations by President Tyler in 1844; the single vote filibuster against Abe Fortas by Dissidents Fillmore and Buchanan, in the mid-19th century; and the narrow approvals of Justices Lamar and Fuller in 1886 are just some examples of these fights in the 19th century.

Overall, while only one in four Supreme Court nominations has been the subject of significant opposition, the figure rises to one out of two when such nominations are acted on in Presidential election years.

In our own century, there are two particularly poignant cases. The 1916 confirmation fight over Louis D. Brandeis, one of America’s great jurists—a fight fueled by anti-Semitic attacks on the nominee—is an example of how election year politics can pollute Senate consideration of a distinguished candidate. And the 1988 filibuster against Abe Fortas’ nomination—an assault that was launched by 19 Republican Senators, before President Johnson had even named Fortas as his selection—is similarly well known by all who follow this.

Indeed, many pandits on both the left and the right questioned our committee’s ability to fairly process the Bork nomination—a year before the 1988 campaign—without becoming ensnared by Presidential politics. While I believe this concern was misplaced, and ultimately disproved, it illustrates how fears of such politicization can undermine confidence in the confirmation process.

Moreover, the tradition against acting on Supreme Court nominations in a Presidential year is particularly strong when the vacancy occurs in the summer or fall of that election season.

Thus, while a few Justices have been confirmed in the summer or fall of a Presidential election season, such confirmations are rare—only five times in our history have summer or fall confirmations been granted, with the latest—Edward Bradley’s nomination in 1970—coming after the August 1946 confirmation of Justice Robert Grier.

In fact, no Justice has ever been confirmed in September or October of an election year—the sort of timing which has become standard in the modern confirmation process. Indeed, in American history, the only attempt to push through a September or October confirmation was the failed campaign to approve Abe Fortas’ nomination in 1968. I cannot believe anyone would want to see that experience in today’s climate.

Moreover, of the five Justices who were confirmed in the summer of an election year, all five were nominated for vacancies that had arisen before the summer began. Indeed, Justice Grier’s August confirmation was for a vacancy on the Court that was more than 2 years old, as was the July confirmation of Justice Samuel Miller, in 1862.

Thus, more relevant for the situation we could be facing in 1992 is this statistic six Supreme Court vacancies have occurred in the summer or fall of a Presidential election year, and never—not once—has the Senate confirmed a nominee for these vacancies before the November election.

In four of these six cases—in 1800, 1826, 1864, and 1958—the President himself, with his own hand, was forced to recognize the need for Senate confirmation until after the election was held. In both of the two instances where the President did insist on naming a nominee under these circumstances, Edward Bradford in 1852 and Abe Fortas in 1968, the Senate refused to confirm these selections.

Thus, as we enter the summer of the potential election year, it is time to consider whether this unbroken string of historical tradition should be broken. In my view, what history supports, common sense dictates in the case of 1992. Given the unusual rancor that prevailed in the Thomas nomination, the need for some serious reevaluation of the nomination and confirmation process and the overall level of bitterness that sadly infects our political system and this Presidential campaign already, it is my view that the prospects for anything but configuration with respect to a Supreme Court nomination this year are remote at best.

Of Presidents Reagan’s and Bush’s last seven selections of the Court, two were not confirmed and two more were approved with the most votes cast against them in the history of the United States of America.

We have seen a President, in my view, politics has played far too large a role in the Reagan-Bush nominations to date. One can only imagine that role becoming overarching if a choice were made this year, assuming a Justice announced tomorrow that he or she was stepping down.

Should a Justice resign this summer and the President move to name a successor, actions that will occur just days before the Democratic Presidential Convention and weeks before the Republican Convention meets, a process that is already in doubt in the minds of many will become distrusted by all. Senate consideration of a nominee under these circumstances is not fair to the President, to the nominee, or to the Senate itself.

Mr. President, where the Nation should be treated to a consideration of constitutional philosophy, all it will get in such circumstances is partisan bickering and political posturing from both parties and from both ends of Pennsylvania Avenue. As a result, it is
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my view that if a Supreme Court Justice resigns tomorrow, or within the next several weeks, or resigns as he did in the summer, President Bush should consider following the practice of a majority of his predecessors and not—name a nominee until after the November election is complete.

The Senate, too, Mr. President, must consider how it would respond to a Supreme Court vacancy that would occur in the full throes of an election year. It is my view that if the President goes the way of Presidents Fillmore and Johnson and presses an election-year nomination, the Senate Judiciary Committee should seriously consider not scheduling confirmation hearings on the nomination until after the political campaign season is over.

I sadly predict, Mr. President, that this is going to be one of the bitterest, dirtiest, Presidential campaigns we will have seen in modern times. I fear that the President, after having uttered these words some will criticize such a decision and say it was nothing more than an attempt to save the seat on the Court in the hopes that a Democrat will be permitted to fill it, but that would not be my intention. Mr. President, if that were the course to choose in the Senate to not consider holding hearings until after the election. Instead, it would be our pragmatic conclusion that once the political season is under way, and it is, action on a Supreme Court nomination must be put off until after the election campaign is over. That is what is fair to the nominee and is central to the process. Otherwise, it seems to me, Mr. President, we will be in deep trouble as an institution.

Others may fret that this approach would leave the Court with only eight members for some time, but as I noted before, Mr. President, the cost of such a result, the need to reargue three or four cases that will divide the Justices four to four are quite minor compared to the cost that a nominee, the President, the Senate, and the Nation would have to pay for what would assuredly be a bitter fight, no matter how good a person is nominated by the President, if that nomination were to take place in the next political season.

In the end, this may be the only course of action that historical practice and practical realism can sustain. Similarly, if Governor Clinton should win this fall, then my views on the need for pragmatic compromise between the branches would not be softened, but rather the prospects for such compromise would be naturally enhanced. With this in mind, let me start with the question of how that process might be changed in the next administration, whether it is a Democrat or a Republican.

It seems clear to me that within the Bush administration, the process of selecting Supreme Court nominees has become dominated by the right intent on using the Court to implement an ultratraditional social agenda that the Congress and the public have rejected. In this way, all the participants in the process can be clear well in advance of how I intend to approach any future nominations.

With this in mind, let me start with the nomination process, how that process might be changed in the next administration, and how I would urge to change it as chairman of the Judiciary Committee were I to be chairman in the next administration.

It seems clear to me that within the Bush administration, as I said, the process has become dominated by the right instead of using the Court and seeking compromise. As I detailed during the hearings and the subsequent nomination debate over Judge Thomas' nomination, this agenda involves changing all three of the pillars of our modern constitutional law. And, I might add, the President has a right to hold these views, Mr. President, and the President has a right to try to make his views prevail, legislatively and otherwise. But let me make one thing clear: we do know, at least from my perspective, what fundamental changes are being sought.

There are three pillars of modern constitutional law that are sought to be changed. First, it proposes to reduce the high degree of protection that the Supreme Court has given individual rights when those rights are threatened by governmental intrusion, imperiling our freedom of religion, speech, and personal liberty—and I am not just talking about abortion.

Second, it proposes, those who share the President's view for this radical change, to vastly increase the protection for property in our society. And when our society seeks to regulate the use of such property, imperiling laws concerned with the environment, worker safety, zoning, and consumer protection.

And the third objective that is sought is to change a third pillar of modern constitutional law. It proposes to radically alter the separation of powers, to move more power in our branches of Government, separated Government, to move more power to the executive branch, imperiling the bipartisan, independent regulatory agencies and the modern regulatory State.

As I noted before, Mr. President, efforts to transform the confirmation process into a good-faith debate over these philosophic matters, as was the Bork confirmation process, have been thwarted by extremists in both parties. These are legitimate issues to debate. Those who hold the view that we should change these three modern pillars of constitutional law have a right to hold these views, to articulate them and have them debated before the American people. But this debate has been threatened by extremists in both parties and cynics who have urged nominees to attempt to conceal their views to the greatest extent possible. And the President, unwilling to concede that his agenda in these three areas is at odds with the will of this democratic Republic, seems determined to continue to try to remake the Court and thereby remove our laws in this direction.

In light of this, I can have only one response, Mr. President. Either we must have a compromise in the selection of future Justices or I must oppose those who are a product of this ideological nominating process, as is the right of others to conclude they should support nominees who are a product of this process.

Put another way, if the President does not restore the historical tradition of genuine consultation between the White House and the Senate on Supreme Court nominations, or instead restore the common practice of Presidents who choose nominees who stifle the middle ground between the divided political branches, then I shall oppose his future nominations, immediately upon nomination.

This is not a request that the President relinquish any power to the Senate, or that he refrain from exercising any prerogatives he has as President. Rather, it is my statement that unless the President chooses to do so, I will not lend the power that I have in this process to support the confirmation of his selection.

As I noted before, the practice of many Presidents throughout our history supports my call for more Executive-Senate consultations. More fundamentally, the text of the Constitution states clearly that the Senate "by advice and consent" to describe the Senate's role in appointments demands greater inclusion of our views in this process. While this position may seem contentious, I believe it is nothing more than a justified response to the politicizing of the nomination process.

To take a common example, the President is free to submit to Congress any budget that he so chooses. He can submit one that reflects his conservative philosophy or one that straddles the differences between his views and ours. That is his choice. But when the President has taken the former course, no one has been surprised or outraged when Democrats like myself have responded by rejecting the President's budget outright.

If the President works with a philosophically differing Senate or he moderates his choices to reflect the divergence, then his nominees deserve consideration and support by the Senate. But when the President continues to ignore this difference and to pick nominees with views at odds with the
constituents who elected me with an even larger margin than they elected him, then his nominees are not entitled to my support in any shape or form.

I might note parenthetically, Mr. President, and let me be very specific, if in this next election the American people conclude that the majority of this Senate, the Senate today, should be moved on that side of the aisle, there should be 56 Republican Senators instead of 56 Democratic Senators, 44 Democratic Senators instead of 56 or 57 Democratic Senators, and it is not because if they choose to pick Bill Clinton over George Bush, we will have a divided Government and I will say the same thing to Bill Clinton: In a divided Government, he must seek the advice of the Republican Senate and compromise. Otherwise, this Republican Senate would be totally entitled to say we reject the nominee of a Democratic President who is attempting to remake the Court in a way with which I disagree.

As I say, some view this position as contentious, while others, I suspect—in fact, I know, and the Presiding Officer knows as well as I do—will say that I am not being contentious enough. They suggest that since the Court has moved so far to the right already, it is too late for a progressive Senate to accept compromise candidates from a conservative administration. They would argue that the only people we should accept are liberal candidates, which are not going to come, nor is it reasonable to expect them to come, from a conservative Republican President.

But I believe that so long as the public continues to split its confidence between the branches, compromise is the responsible course both for the White House and for the Senate. Therefore, I stand by my position, Mr. President. If the President consults and cooperates with the Senate or moderates his selections absent consultation, then his nominees may enjoy my support as did Justice Kennedy and Justice Souter. But if he does not, as is the President's right, then I will oppose his future nominees as is my right.

Once a nomination is made, the evaluation process begins, Mr. President. And here there has been a dramatic change from the Bork nomination in 1987 to the Thomas nomination in 1991. Let me start with this observation. In retrospect, the actual events surrounding the nomination of Judge Bork have been so misremembered that one of the most overlooked one great feature of these events. That is, in most respects, the Bork nomination served as an excellent model for how the contemporary nomination and confirmation process and debate should be conducted and conducted.

Shortly after Judge Bork was nominated, after studying his records, writings and speeches, I announced my opposition to his confirmation and several other members of the committee did the same. What ensued was, I think, an educational and enlightening summer.

I laid out the basis for my position in two major national speeches and other Senators did likewise. The White House issued, as they should have, a very detailed paper presenting the case for the Judge Bork philosophy; a group of responsive consultants to the committee issued a response to this White House paper; and the administration put out a response to that response. While there were excesses in this debate, I mentioned earlier, by and large, it was an exchange of views and ideas between two major constitutional players in this controversy, the President to the Senate, which the Nation could observe and then evaluate.

The fall hearing then was significant, not as a dramatic spectacle to see how Senators would jockey for position on the nomination but to see the final act of this debate. Unfortunately, those of us who announced our early opposition to Judge Bork were roundly criticized by the media. Major newspapers accused me of rendering the verdict of guilt and, later for the nominee. I say that this was unfortunate because this criticism of our early position on the Bork nomination has resulted in, as I see it, four negative consequences for the confirmation process.

First, it gave rise to a powerful mythology that equates confirmation hearings with something closer to trials than legitimate legislative proceedings. The result has been in the end more criticism for the process when the hearings do not meet this artificial standard of a trial.

Confirmation hearings are not trials. We are not a court; we are a legislative body. They are congressional hearings. Senators are not judges. We are Senators. Our decision on a nominee is not a neutral ruling as a judge would render. It is, as the Constitution designed it, a political choice about values and philosophies.

We should junk, Mr. President, this trial mythology and the attendant matter that go with it. Argue debates over which way the presumption goes in the confirmation process, over what the standard of review is, over which side has the burden of proof, all of these terms and ideas are inapplicable. The public is not here. Here we come to a decision making on confirmation as they are for our decision making on passage of bills or voting on constitutional amendments.

We do not apply a trial mythology in those circumstances, Mr. President.

Second, a second unintended and unfortunate consequence of the criticism of early opposition based on specifically stated reasons: The criticism of taking early stands on nominees has pushed Senators out of the summer debate over confirmation and left that debate to others, most especially the interest groups on the left and the right. Instead of respected Senators on the left and the right, arguing prior to the hearing about the philosophy of the nominee, when we stood back, that vacuum was filled, Mr. President, by left and right interest groups, and I might add. But they are the only voices that we heard in the debate. They shaped the debate, Mr. President.

Instead of an exchange of ideas then, the summer became at its worst. The nominees hunkered down with briefers at the Justice Department preparing for the hearing as a football team prepares for a game, watching films of previous hearings, studying the merrymakings of each Senator, memorizing questions that have been asked, practicing and rehearsing nonanswers. Outside, the two branches' busy efforts are underway to form coalitions, launch TV attack campaigns, issue press releases, and shout loudly past one another.

This transformation hits its peak during the Thomas nomination when by August, there were summer news stories about how interest groups were lining upon the nomination than there were about the nominee's views. As with our Presidential campaigns, public attention in the prehearing period has been turned away from a debate by principles about real issues into a superficial scrutiny of a horse race. Is the nominee up; is the nominee down today? And discussions among spin doctors, insiders, and pundits about what the chances are.

The only way to move the focus from the tactics of the confirmation debate to the substance of it is for Senators to take our position on a nomination, if possible, assuming we know the facts of the philosophy, or believe we know the facts relating to the philosophy of the nominee, and debate them freely and openly before the hearing process begins.

Where Senators remain undecided about the nomination, I hope more will do what I did with the Souter and Thomas nominations, and try to publically address the issues of concern for confirmation before the hearings get underway; to stand on the floor and say I do not know where the nominee stands on such and such but what I want to know as a Senator, what is his or her philosophy on. Whatever it is that is of concern to the individual Member, begin the debate on the issues because, when we do not, we have this town, the press, interest groups, and political parties fill the vacuum. The notion of 3 months of silence in Washington is something that is not able to be tolerated by most who live in Washington, and who work in Washington.

So what happens? The vacuum is filled, Mr. President, by pundits, lobbying groups, interest groups, ideological fringes, to define the debate and dictate the tactics.
Third, Mr. President, the taboo against early opposition to a nominee has created an imbalance in the prehearing debate over the confirmation, for it seems that no similar taboo exists against prehearing support for a nominee.

I have not read a single article, heard a single comment, that when "Senator Smedley" stands up and says I support the nominee that the President named 27 seconds ago, no one says, now, that is outrageous; how can that woman or man make this decision before the hearing begins? They all say, oh, that is OK. It is OK to be for a nominee before the hearing begins, but not to be against the nominee.

In the case of Judge Thomas, while no Senator announced his opposition to confirmation before the hearing started, at least 30 Senators announced their support for the nominee before the committee first met.

No, it is not OK. Thirty Senators said they were for, as is their right, by the way. I am not criticizing that. Thus, my good friend, Senator RUDMAN for Judge Souter, and Senator DANFORTH for Judge Thomas, along with many other Senators became outspoken advocates, as is their right and as they firmly believed became outspoken advocates for the confirmation from day one, while not a single Senator spoke in opposition.

In my view, such an imbalance is unhealthy and again puts too much responsibility for and control over the confirmation debate in the hands of interest groups instead of elected officials.

Fourth, and perhaps least obvious, the taboo against early opposition to a nominee, assuming that a Senator knows enough to be opposed, has contributed to making the confirmation hearing far too significant, making the confirmation hearing a far too significant forum for evaluating the nominee.

Conservative critics of the modern hearing process often note for the first time in history—and they are correct—we reviewed Supreme Court nominations without confirmation hearing. Yet what we ignore is that the rejection rate of nominees in the first 125 years of our history was even higher and the grounds of rejection far more partisan and far less principled than it has been since the hearing process began.

In my view, Mr. President, confirmation hearings, no matter how long, how fruitful, how thorough, how honest, no matter what—confirmation hearings cannot alone provide a sufficient basis for determining if a nominee merits a seat on our Supreme Court.

Let me say it again. In my view, confirmation hearings, no matter how long, how fruitful, how thorough, cannot alone provide a sufficient basis for determining if a nominee merits a seat on our Supreme Court.

Here again the burden of the trial analogy unfortunately confuses the tail of the hearing process instead of elucidating it. As they did before there were confirmation hearings, Senators and the public should base their determination about a nominee on his or her record. Thus the prehearing debate over the confirmation, a review of the nominee's experience in briefs and the weighing of the views of the nominee's peers and colleagues. Put another way: We have hearings not to prove a case against a nominee but, rather, in an effort to be fair to the nominee, and to give the nominee the chance to explain his or her record and writings before the committee. Thus the hearings can be the crowning jewel of the evaluation process, a final chance to clear up confusion, or firm up soft conclusions, but they cannot be the entire process itself as they have come to be viewed.

Anything we can do to broaden the base upon which Senators make their decisions will be a valuable improvement on the confirmation process. Having urged a lessening in the significance of the hearings, I nonetheless want to suggest some changes for this part of the process as well. And here, in this third area of reform, I have focused on questioning of the nominee as his or her confirmation process. As I talk to people about the confirmation process, Mr. President, one of the questions I am most often asked is: Why do you not make the nominee answer the questions? I am sure the Presiding Officer has been asked that question 100 times himself: Why do you not make the nominee answer the questions? As I have said time and again, the choice about what questions to ask belongs to us on the committee. The choice about what questions to answer belongs to the nominee. Lacking any device of medieval inquisition, we have no way, as Senators, to make someone answer questions.

Having said that, though, I do not want to undercut my strong displeasure with what has happened to this aspect of the confirmation process since the Bork hearings. As most people know, Judge Bork had a full and thorough exchange with the committee. After his defeat, many experts on the confirmation process came to associate this frankness with the outcome. But this is a false lesson of the Bork nomination. I believed then, and I believe now, that Judge Bork would have been rejected by an even larger margin had he been less forthcoming with the committee.

Justices Kennedy and Souter, with some exceptions, particularly in the area of reproductive freedom, were likewise fairly candid in their answers to our questions, and they were overwhelmingly confirmed.

In contrast, Judge Thomas, who had the beginnings of a judicial philosophy that was quite conservative, decided not to be as forthcoming as were Justices Kennedy and Souter. Moreover, because the written record to establish his views was not as fully developed as Judge Bork's, Justice Thomas concluded that he did not need to use the hearings as an opportunity to explain his philosophy, to parry the nominee's withstanding, as Bork did. As a result, we saw in the Thomas hearings what one of my colleagues called a version of a "ritualized, Kabuki theater." Committee members asked increasingly complex and tricky questions in an effort to parry the nominee's increasingly complex and tricky dodges. Perhaps some of the committee asked questions which we knew the nominee would not answer—could not answer—to gain advantage. Perhaps the nominee dodged some questions which we knew he could or should answer, but chose not to because he saw little cost in it.

In the end, each side struggled for advantage in a debate that generated far more heat than light.

The PRESIDING OFFICER. The Chair informs the Senator that the honor and a quarter previously set aside has expired.

Mr. BIDEN. Mr. President, I ask unanimous consent that I be able to proceed for 10 more minutes.

The PRESIDING OFFICER. Is there objection?

Mr. ADAMS. Reserving the right to object, and I shall not object, could the Senator make that until 10:15?

Mr. BIDEN. Yes.

Mr. ADAMS. I thank the Senator.

The PRESIDING OFFICER. Without objection, the time of the Senator from Delaware is extended until the hour of 10:15.

Mr. BIDEN. Mr. President, if we are to refocus the confirmation process so it pivots on the nominee's philosophy instead of questions of his personal conduct, the hearings must be performed for full exploration of that philosophy and a quarter previously set aside has expired.

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following: In the future, I will be particularly rigorous in ensuring that every question I ask will be one that I believe a nominee should answer. And if the nominee declines to do so, I will—unless otherwise assured about a nominee's approach to the area in question—oppose that nominee.

Again, this is not to say that all nominees should have to answer every question directed at them by the committee in the past. Some refusals, such as those by my appointment to the Supreme Court during his confirmation hearing, were wholly proper. I am not saying that I will vote against any nominee who refuses to answer any question by any Senator. But if we are to require them to answer and redeem it, give it clear guidelines and rules that we all know, and make it focus more on philosophy and less on personality, then the basic principle I have laid out must be included, in my view, in any of the future hearings. As a Senator, I cannot make a nominee answer questions that I deem appropriate or important, but I need not vote for one who refuses to do so either.

Fourth, we must address the manner in which the committee handled investigative matters concerning Supreme Court nominees. No aspect of the confirmation process has been more widely discussed than our handling of Professor Hill's allegations against Judge Thomas before those charges became public. Many have questioned whether we took Professor Hill's charges seriously, and I believe they were.

Mr. President, in my view, we did all of these things within the limits that Professor Hill herself placed upon us. I wrestled at length with the difficult decisions we faced. We can debate these anguishing choices over and over again: Should we have overridden Professor Hill's wishes for confidentiality? Should we have pushed her to go public with her charges even if she did not choose to do so?

Well, Mr. President, people of good conscience can differ over these dilemmas we faced. But in my view, the anger of the committee's handling of this matter goes far beyond how we resolve these difficult questions. As I see it, Mr. President, the firestorm surrounding Anita Hill's charges is an understandable rage, fueled by misperception of the facts and ignited by dialogue with the way in which Republican Senators questioned Professor Hill and Judge Thomas at this phase of the hearings.

But even that alone does not explain it, for this approach is rooted, Mr. President, at bottom, in a justified frustration with a lack of representation of women in our political system. Many Americans were, and still are, properly mad that there were no female members of the Judiciary Committee when we heard Professor Hill's charges. I, for one, join these people in the movement to make the 1992 election a watershed on this front.

And, yet, there is still a bigger issue at stake, Mr. President, for the public outcry over these hearings was not about Clarence Thomas and not about Anita Hill, at its root. It was about years of resentment by women for the treatment they have received. They have suffered from men in the workplace, in the schools, and in the streets and at home for too long. It was about a massive power struggle going on in this condition, a power struggle between women and men, between the majority and minorities. These are issues that deeply divide us as a nation—issues of gender, race, and power—issues that were front and center at those dramatic hearings last fall.

I believe our handling of Professor Hill's charges, prior to their public disclosure, was proper. But I also believe that there are some things we should do differently in the future for the purpose of improving public confidence in our handling of investigative matters.

First, the committee has had to place in the awkward position of possessing information about a Supreme Court nominee which it has pledged to keep confidential from other Members of the Senate, as we did with Professor Hill's charges.

In the future, all sources will be notified that any information obtained by the committee will be placed in the FBI file on the nominee, and shared on that confidential basis with all Senators, all 100 Senators, before the Senate votes on a Supreme Court nomination.

Second, to ensure that all Senators are aware of any charges in our possession, the committee will hold closed, confidential briefing sessions concerning all Supreme Court nominees in the future.

All Senators will be invited, under rigorous conditions to protect confidentiality, to inspect all documents and reports that we compile.

Third, because, ultimately, the question with respect to investigations of a Supreme Court nominee is the credibility and character of that nominee, in the future, if, as long as I am chairman, the committee will routinely conduct a closed session with each nominee to ask that nominee—face-to-face, on the record, under oath—about all investigatory charges against that person.

This hearing will be conducted in all cases, even where there are no major investigative issues to be resolved, so that the holding of such hearing cannot be taken to demonstrate that the committee has received adverse confidential information about the nominee. The transcripts of that session will be part of the confidential record of the nomination made available, with the FBI report, to all Senators.

No doubt, these rules, too, can be criticized. Frankly, I have labored over this for the better part of a year, and I think there are no easy answers when questions of fairness, thoroughness, civil liberties, and the future of the branches collide under the blinding lights of television cameras. Other changes, too, may be needed, and I shall consider them as they are proposed.

But I hope that these three steps will increase confidence in our investigative procedures and the seriousness with which we take such matters as part of the confirmation process.

Let me conclude now, Mr. President, with a painful fact: The picture I have painted today about the state of the confirmation process and the future of our Supreme Court is largely negative. I am afraid that my tone is as it must be.

For though my fundamental optimism about this country remains unchanged, I know that the public's confidence in our institutions is not. Americans believe that their President must be above reproach. And, yet, Congress is out of line with their ethical standards; and their Supreme Court is out of sync with their views.

I cannot predict whether the current political season will be the first step in restoring lost confidence in our institutions or the final act in shattering it. I only know that when this year is over—whoever wins control of the White House and the Senate this November—rebuidling trust between the American people and their Government must be a preeminent goal.

The confirmation process is an important component of such a reform agenda, for three reasons: First, it is a highly visible public act. More people watched the Thomas confirmation hearings than any act of American governance ever in our history. As a result, citizens' perceptions of the confirmation process profoundly color their perceptions of their Government as a whole.

Second, the confirmation process is the one place where all three of our branches come together. The President and the Senate decide jointly whether a particular person will become a member of the Court. Thus, the confirmation process asks the question: Can the branches function together as a government? That is a vital question to the American people, Mr. President, and how the confirmation process does much to shape their sense of the answer to that question.

And third, the confirmation process, at its best, is a debate over the most fundamental issues that shape our society, a debate about the nature of our Constitution, in both the literal and symbolic sense. What kind of country are we, Mr. President? What rights do we repect? What powers do we owe to the Government? These are the ques-
June 25, 1992

RESPONSE TO SENATOR BIDEN'S REMARKS ON THE CONFIRMATION PROCESS OF SUPREME COURT NOMINEES

Mr. THURMOND. Mr. President, I rise today to respond to the statement made earlier by the distinguished Chairman of the Senate Judiciary Committee, my good friend, Senator Biden. Before I begin, however, I would like to thank him for his courtesy in informing me in advance of his plan to make such a statement. As usual, he has worked with me in a spirit of bipartisanship.

At the outset, I want to state that I am unaware of any planned resignation from the Supreme Court of the United States. However, it is not unusual to hear such speculation whenever the Supreme Court nears the end of each term. While I believe commenting upon potential vacancies may give rise to unwarranted speculation, I feel it necessary to respond to the comments of Chairman Biden.

Senator Biden has urged President Bush, should a vacancy arise, not to nominate any candidate for the Supreme Court until after the November election. Were a nominee named, he stated that he would oppose holding hearings on the nomination, and I quote, "no matter how qualified," end of quote. His reason? Senator Biden has argued that the nominee would become a victim of a power struggle over control of the Supreme Court. Also, Senator Biden fears that because there are issues of paramount importance facing the Court, a nominee at this time would be unwise. Now, Mr. President, unfortunately, we do not have the luxury of coordinating vacancies on the Supreme Court with times when there are mundane and nonjusticiable matters before the Nation. The Senate should not shrink from its responsibility to act on a Supreme Court nominee simply because he has confirmed as an Associate Justice there will be tough decisions to make.

Senator Biden has stated previously that he will only consider carrying out the Senate's constitutionally required role if the President chooses to compromise with the Senate before naming a nominee. I believe the Senate should ask itself just what this purported consultation and compromise process really amounts to. Is it supposedly necessary to ensure that the individual nominated is qualified and will be confirmed by the Senate? President Bush has already demonstrated with each of his previous nominations to the High Court, all of whom were qualified and confirmed, that such a consultation is unnecessary. In fact, in the last 10 years, the Senate has confirmed 97 percent of his proposed judicial nominations it has received. Although the chairman has focused his remarks on Supreme Court nominees, I wanted to note that figure for the RECORD. The net result of Senator Biden's recommendation would require President Bush, or any President, to seek and obtain the approval of a small but vocal minority of Senators and special interest groups who have failed to defeat his previous nominations. If followed, the chairman's suggestion would turn the current nomination process on its head.

Article II of the Constitution sets out the powers of the President as head of the executive branch. Section 2 of this article gives the power to the President to fill judicial vacancies and further appoint them following the advice and consent of the Senate. As I read the Constitution, this is a two-step process. The President first nominates an individual to fill a vacancy and then the Senate approves before the official appointment.

I am aware that there have been administrative changes in the past that sought consultation with Members of Congress and party leaders prior to the actual nomination process. That is not clearly mandated by article II, section II of the Constitution. It is my firm belief that the role of the Senate in the confirmation process is to provide its advice and consent following the President's nomination. The Senate, however, this does not preclude a President, who is so inclined, from discussing a potential nominee with Members of the Senate.

It is the President, not the majority leader, the minority leader, chairman or ranking member of the Judiciary Committee who has the responsibility for putting forth a Supreme Court nominee. Following the nomination, it is then the responsibility of the Senate to ensure that the individual possesses the necessary qualifications to serve on the highest Court in the land.

It is this process—a process which should not be changed for election year expediency—which is the bulwark of our constitutional system and underscores the brilliance of our Founding Fathers.

Mr. President, I also want to point out that the senator in question is not the first to propose that the Senate's constitutionally required role if the President's nomination process be changed. In 1976, during the nomination hearings for Associate Justice Thomas, a suggestion was made that the Senate's confirmation process be altered to include a preconfirmation hearing similar to those held for Cabinet nominees. It was a far stretch to suggest that it could have been avoided if President Ford had consulted with the Senate prior to Justice Thomas' nomination.

In closing, Senator Biden has stated that it is a practical impossibility to avoid politicizing the confirmation process of any Supreme Court nominee. I do not share this fatalistic view. I am pleased to hear my colleague express concern about the politicization and victimization of Supreme Court nominees. Yet, his proposed changes to the nomination process—which I have not had an opportunity to study—do recognize that it is within the power of the Senate to minimize the politicization of the nomination process. Each Senator must make the decision whether to abide by his or her duties under the Constitution, with fidelity thereto, or to give in to the extreme political forces which have brought such disdain upon previous Senate confirmations.

Previously, the chairman also stated that the liberals and conservatives are so self-righteous that each side is prepared to use any means necessary to win confirmation battles. Mr. President, I gather from this that the chairman is prepared to take on the role as an arbitrator between the two sides. I am not so sure as to how the conservatives will fare under such an arrangement, but I welcome his willingness to ensure fairness at any possible nomination hearing for the Supreme Court.

The PRESIDING OFFICER (Mr. Biyani). Under the previous order the
Mr. SIMON. Mr. President, a parliamentary inquiry today's Rescue helicopter has airlifted three Bosnian children to a hospital, where the United Nations says they will get for the first time the medical attention they need.

The PRESIDING OFFICER. The Senator from Idaho will state his motion.

Mr. SIMON. Mr. President, I move that the Senate continue pro tempore the previous order, the Senator from Illinois will be recognized for 10 minutes; the Senator from Wyoming [Mr. ADAMS] will be recognized for up to 20 minutes; the Senator from New Hampshire [Mr. RUDMAN] will be recognized for up to 30 minutes; the Senator from Wyoming [Mr. SIMPSON] or his designee will be recognized to speak for up to 10 minutes; and at that point morning business is closed and the Senate will resume consideration of S. 2793.

They now resume discussions.

Mr. SIMON. Mr. President, I ask unanimous consent that morning business be extended for another 5 minutes and I be given 5 minutes at the end of this period.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Record will reflect that the Senator from Illinois will be accorded 5 minutes following the time allocated for the Senator from Wyoming [Mr. SIMPSON] or his designee.

The Senator from Washington [Mr. ADAMS] is recognized.

Mr. ADAMS. Mr. President, I compliment the chairman of the Judiciary Committee for an excellent statement, which I think is very important at this time. (The remarks of Mr. ADAMS pertaining to the introduction of S. 2895 are recorded in today's Record under "Statements on Introduced Bills and Joint Resolutions.")

The PRESIDING OFFICER. Under the previous order, the Senator from Illinois [Mr. Simon] is recognized for a period of 5 minutes.

HELP SOMALIA

Mr. SIMON. Mr. President, we pick up the morning Washington Post and see the tragic picture in Bosnia of two fathers whose 10- or 11-year-old sons have been killed. And you see the fathers grieving, and it tears at our hearts, as it should. I was pleased the day before yesterday when Secretary of State Jim Baker came up and said we are going to have to do more on the Bosnia situation. As many as 30,000 or 40,000 people have been killed in that tragic situation.

But, Mr. President, the world's greatest humanitarian tragedy right now is unfolding without television lights, without the press attention, and that is in Somalia. The International Red Cross has specifically called it the world's greatest humanitarian tragedy today. The Roman Catholic Ambasador Mohammed Sahoun, the former Algerian ambassador to the United States, to Somalia. And last week, he says the situation in Somalia is worse than 1984 to 1986 in Ethiopia, when 1 million people died.

I talked to Ambassador Sahoun by phone last week, and he says the situation in Somalia has stabilized enough so that ships and planes can now get in. One ship has arrived. The International Red Cross, the International Medical Corps, and CARE are all providing assistance. But it is a small amount compared to the desperate need that is there.

They now resume discussions.

The ports of Mogadishu and Kismayo are now open so that shipments can get in, planes can get in, and we have to see that it gets there.

They now resume discussions.

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