



[Search Results](#) > Full Document from Senate Section (June 25,)

[Modify Search](#) | [New Search](#)

[Help](#) | [Contact Us](#)

This Document: [Contents](#)

Printer Friendly: [HTML](#)

[Print](#) [Subscribe](#) [Email/Save](#) [Share from THOMAS](#)

REFORM OF THE CONFIRMATION PROCESS (Senate - June 25, 1992)

[Page: S8853]

Mr. BIDEN. Mr. President, I would like to apologize in advance for trespassing 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, been asked by the Senate to spend some considerable time thinking about, and it is extremely controversial. And 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 propitious, although I know of no Justice who intends to resign--I do not mean to imply that--my speech this morning is about reforming the confirmation process and the need for a new dawn with regard to how we 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 this 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 forecasts.

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 most votes cast against him of any judge to the Supreme 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 fierce fight in 1991, 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 few years, has already 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 1996, 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 want to offer four 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 18 nominations, of which 14 were 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.

Presidents 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 eras to which I pointed--Washington-Adams, Lincoln-Grant, Roosevelt-Truman.

Since 1968, Republicans have controlled the White House for 20 of 24 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 should finally, honestly admit 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 a 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 shared the same party, Presidents commonly have taken the Constitution at its word and asked for the Senate's advice--advice--as well as its consent. These Presidents have consulted with the Senate about their choices for the Court and/or chose nominees with balanced 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 Cardozo; the latter, Benjamin Cardozo, 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.

Put another way: This is not the first time that a tandem of Presidents have sought to remake the Supreme Court, nor is it the first time that divided Government has had to fill a number of seats in that body.

But it is 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 move the Court ideologically into a 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 uncertainty.

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 light within their own administration.

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**.

There being no objection, the material was ordered to be printed in the **Record**, as follows:

[Page: S8854]

Advice and Consent: The Right and Duty of the Senate To Protect the Integrity of the Supreme Court

Mr. **Biden**. Mr. President, on July 1, 1987, President Reagan nominated Judge Robert Bork to be 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. Arguing 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 narrow standards of legal distinction, high moral character, and judicial temperament is entitled to be confirmed in the Senate without further question. A leading exponent of this view was President Richard Nixon, who declared in 1970 that the President is 'the only person entrusted by the Constitution with the power of appointment to the Supreme Court.' Apparently, there are some in this body and outside this body who share that view.

I stand here today to argue the opposite proposition. Article II, section 2, of the Constitution clearly states that the President 'shall nominate, and by and with the advice and consent of the Senate, shall appoint * * * Judges of the Supreme Court. * * *' I will argue that the Framers intended the Senate to take the broadest view of its constitutional responsibility. I will argue that the Senate historically has taken such a view. I will argue that, in case after case, it has scrutinized the political, legal, and constitutional views of nominees. I will argue that, in case after case, it has rejected professionally qualified nominees because of the perceived effect of their views on the Court and the country. And I will argue that, in certain cases, the Senate has performed a constitutional function in attempting to resist the President's efforts to remake the Supreme Court in his own image.

THE INTENT OF THE FRAMERS

How can we be sure of the scope of the Senate's constitutional rights and duties under the 'advice and consent' clause? We should begin--but not end--our investigation by considering the intent of the Framers. Based on the debates of the Constitutional Convention, it is clear that the delegates intended the Senate to set into play a broad role in the appointment of judges.

In fact, they originally intended even more. At the beginning of the Constitutional Convention, they intended to give the Congress exclusive control over the selection process and to leave the President out entirely. On May 29, 1787, the Constitutional Convention began to deliberate in Philadelphia. It adopted as a working paper the Virginia Plan, which provided that 'a National Judiciary be established * * * to be chosen by the National Legislature.'

A few weeks after debate began, some delegates questioned the wisdom of entrusting the selection of judges to Congress alone. They feared that Congress was large and lumbering and might have some trouble making up its mind. James Wilson of Pennsylvania was an advocate of strong Executive power, so he proposed an obvious alternative: giving the President exclusive power to choose the judges. This proposal found no support whatsoever. If one concern united the delegates from large States and small States, North and South, it was a determination to keep the President from amassing too much power. After all, they had fought a war to rid themselves of tyranny and the royal prerogative in any form. John Rutledge of South Carolina opposed giving the President free rein to appoint the judiciary since 'the people will think we are leaning too much toward monarchy.'

James Madison, the principal architect of the Constitution, agreed. He shared Wilson's fear that the legislature was too large to choose, but stated that he was 'not satisfied with referring the appointment to the Executive.' He was 'rather inclined to give it to the Senatorial branch' of the legislature, which he envisioned as a group 'sufficiently stable and independent' to provide 'deliberate judgments.' Accordingly, on June 13, Madison formally moved that the power of appointment be given exclusively to the Senate. His motion passed without objection.

On July 18, 200 years ago last Saturday, James Wilson again moved 'that the Judges be appointed by the Executive.' His motion was defeated, by six States to two. It was 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 was that respective nominees would be able to intrigue with a single individual, the President, but not the Senate as a whole. So Mr. Ghorum 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 failed 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 Alexander Hamilton. But in Federalist Papers 76 and 77, Hamilton stressed that even the Federalists intended an active and independent role for the Senate.

In Federalist 76, Hamilton wrote that Senatorial review would prevent the President from appointing justices to be 'the obsequious instruments of his pleasure.' And in Federalist 77, he responded to the argument that the Senate's power to refuse confirmation would give it an improper influence over the President by using the following words: 'If by influencing the President, be meant restraining him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary. * * *'

Now, this is the fellow, Hamilton, who argued throughout this entire process that we needed a very strong executive, making the case as to why the Senate was intended to restrain the President and play a very important role.

Most of all, the Founders were determined to protect the integrity of the courts. In Federalist 78, Hamilton expressed a common concern: 'The complete independence of the courts of justice,' he said, 'is peculiarly essential in a limited Constitution. * * * Limitations of this kind can be preserved in practice no other way than 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 salary and, most important, a self-correcting method of selection. As they relied on the Court to check legislative encroachments, so they relied on the Legislature to check Executive encroachments. In dividing responsibility for the appointment of judges, the Framers were entrusting the Senate with a solemn task: preventing the President from undermining judicial independence and from remaking the Court in his own image. That in the end is why the Framers intended a broad role for the Senate. I think it is beyond dispute from an historical perspective.

[Page: S8855]

THE SENATE PRECEDENTS

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 to stop there. But there is much more. Two centuries of Senate precedent, always evolving and always changing with the challenges of the moment, point to the same conclusion: The Senate has historically taken seriously its 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.

There being no objection, the list was ordered to be printed in the **Record**, as follows:

I. SUPREME COURT NOMINATIONS REJECTED OR WITHDRAWN, 1795-1970

Supreme Court nominee	Nominating president	President's party	Senate party	Rejected (R)/postponed (P)/wit
John Rutledge (1795)	Washington	Federalist	F	R
Alexander Wolcott (1811)	Madison	Dem.-Repub.	DR	R
John Crittenden (1829)	J.Q. Adams	DR	DR	P
Roger Brooke Taney (1835)	Jackson	Dem	Whig	P, Later confirmed as Chief Ju
John Spencer (1844)	Tyler	W/D	W	RD
Reuben Walworth (1844)	Tyler	W/D	W	P
Edward King (1844)	Tyler	W/D	W	P
Edward King (1845)	Tyler	W/D	W	W
John Read (1845)	Tyler	W/D	W	No action
George Woodward (1846)	Polk	D	W	R
Edward Bradford (1852)	Fillmore	W	D	W, No action
George Badger (1852)	Fillmor	W	D	P
William Micou (1853)	Fillmore	W	D	No action
Jeremiah Black (1861)	Buchanan	D	Some Dems. had quit Senate after secession	R
Henry Stanbury (1866)	A. Johnson	D	R	Court seat eliminated
Ebenezer Hoar (1870)	Grant	R	R	R

George Williams (1874)	Grant	R	R	W
Caleb Cushing (1874)	Grant	R	R	W
Stanley Matthews (1881)	Hayes	R	D	No judiciary Comm. action; ren
William Hornblower (1893)	Cleveland	D	D	R
Wheeler Peckham (1893)	Cleveland	D	D	R
John J. Parker (1930)	Hoover	R	R	R
Abe Fortas (1968)	L. Johnson	D	D	W
Homer Thornberry (1968)	L. Johnson	D	D	W
Clement Haynsworth (1969)	Nixon	R	D	R
G. Harrold Carswell (1970)	Nixon	R	D	R

[Footnote] 1 Henry J. Abraham, *Justices and Presidents* (New York: Penguin Books, 1975).

[Footnote] 2 Philip B. Kurland, 'The Appointment and Disappointment of Supreme Court Justices,' in *Law and the Social Order* (1972 Arizona State Univ. Law Journal), No. 2, p. 183.

[Footnote] 3 Richard D. Friedman, 'The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond,' 5 *Cardozo Law Review* 1 (1983).

[Footnote] 4 Donald E. Lively, 'The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities,' 59 *Southern California Law Review* 551 (1986).

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 1795, in the first administration of George Washington. And the precedent setter was none other than poor John Rutledge who I quoted earlier. Remember Rutledge? He was the one who argued at the Constitutional Convention that to give the President 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 resigned from the Supreme Court in 1795, and Washington nominated Rutledge to take his seat. The President was so confident to a speedy confirmation that he had the commission papers drawn up in advance and gave him a recess appointment.

But that was not to be. A few weeks after his nomination, 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 insinuated '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 5 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. Some even feared for 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 1811, Alexander Wolcott, a Madison nominee, was rejected at least in large part because of his vigorous enforcement of embargo legislation and nonintercourse 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. Those favoring confirmation urged the Senate to consider Taney's constitutional philosophy on its own merits. 'It would indeed be strange,' said a leading 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 acquirements in the science of politics in its relations to the forms of government under which we live.' Those 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 it the following year—this time for the seat of retiring Chief Justice Marshall.

Between the Jackson and Lincoln Presidencies, no fewer than 10 out 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 inflamed some of the debates, most of the struggles were strictly partisan. John Tyler set a Presidential record: the Senate refused to confirm five of his six nominees. At one point, after the resignation of Justice Baldwin in 1844, the struggle became so intense that a seat remained vacant for 28 months.

Twentieth century debates 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 Republicans; and Republicans in those days were much more progressive in these matters, 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--and I admit that this nominee possesses both of those qualifications--but we ought to know how he approaches these great questions of human liberty.'

Parker was denied a seat on the Court by a vote of 41 to 39. Justice Owen Roberts, the man appointed in his place, was less wedded to the wisdom of the past: his 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--Abe Fortas, Clement Haynsworth and G. Harrold Carswell--and, although there were 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 views.

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

There being no objection, the material was ordered to be printed in the **Record**, as follows:

[Page: S8856]

II. Statements of Senators Concerning Relevance of Nominee's Substantive Views--Fortas Hearings and Debates

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

Senator Baker, 114 Cong. Rec. 28258 (1968).

Senator Byrd (Va.), 114 Cong. Rec. 26142 (1968).

Senator Curtis, 114 Cong. Rec. 26148 (1968).

Senator Ervin, Hearings on the Nomination of Abe Fortas and Homer Thornberry Before the Senate Comm. on the Judiciary, 90th Cong., 2nd Sess., at 107 (1968) [hereinafter cited as 1968 Hearings].

Senator Fannin, 114 Cong. Rec. 26704, 28755 (1968).

Senator Fong, 114 Cong. Rec. 28167 (1968).

Senator Gore, 114 Cong. Rec. 28780 (1968).

Senator Griffin, 1968 Hearings at 44.

Senator Holland, 114 Cong. Rec. 26146 (1968).

Senator Hollings, 114 Cong. Rec. 28153 (1968).

Senator McClellan, 114 Cong. Rec. 26145 (1968).

Senator Miller, 114 Cong. Rec. 23489 (1968).

Senator Thurmond, 1968 Hearings at 180.

[Page: S8857]

B. SENATORS WHO DEBATED THE NOMINEE'S VIEWS

Senator Byrd (W. Va.), 114 Cong. Rec. 28785 (1968).

Senator Eastland, 114 Cong. Rec. 28759 (1968).

Senator Hart, 1968 Hearings at 276.

Senator Javits, 114 Cong. Rec. 28268 (1968).

Senator Lausche, 114 Cong. Rec. 28928 (1968).

Senator Montoya, 114 Cong. Rec. 20143 (1968).

Senator Murphy, 114 Cong. Rec. 28254 (1968).

Senator Smathers, 114 Cong. Rec. 28748 (1968).

Senator Stennis, 114 Cong. Rec. 28748 (1968).

C. SENATORS WHO ARGUED THAT THE NOMINEE'S VIEWS ARE NOT RELEVANT OR ONLY marginally RELEVANT

Senator Bayh, 114 Cong. Rec. 19902 (1968).

Senator Mansfield, 114 Cong. Rec. 28113 (1968).

Senator McGee, 114 Cong. Rec. 19638 (1968).

Senator McIntyre, 114 Cong. Rec. 20445 (1968).

Senator Proxmire, 114 Cong. Rec. 20142 (1968).

Senator Randolph, 114 Cong. Rec. 19639 (1968).

Senator Tydings, 114 Cong. Rec. 28164 (1968).

III. Statements of Senators Concerning Relevance of Nominee's Substantive Views--Haynsworth Hearing and Debates

A. SENATORS WHO ARGUED DIRECTLY THAT VIEWS OF THE NOMINEE ARE RELEVANT, OR WHO DEBATED THE NOMINEE'S VIEWS

Senator Baker, 115 Cong. Rec. 34432 (1969).

Senator Bayh, 115 Cong. Rec. 35132 (1969).

Senator Byrd (Va.), 115 Cong. Rec. 30155 (1969).

Senator Case, 115 Cong. Rec. 35130 (1969).

Senator Dole, 115 Cong. Rec. 35142 (1969).

Senator Eagleton, 115 Cong. Rec. 28212 (1969).

Senator Ervin, Hearings on the Nomination of Clement Haynsworth Before the Senate Comm. on the Judiciary, 91st Cong. 1st Sess., at 75 (1969) [hereinafter cited as 1969 Hearings].

Senator Fannin, 115 Cong. Rec. 34606 (1969).

Senator Goodell, 115 Cong. Rec. 32672 (1969).

Senator Gurney, 115 Cong. Rec. 34439 (1969).

Senator Harris, 115 Cong. Rec. 35376 (1969).

Senator Hart, 1969 Hearings at 463.

Senator Hollings, 115 Cong. Rec. 28877 (1969).

Senator Javits, 115 Cong. Rec. 34275 (1969).

Senator Kennedy, 1969 Hearings at 327.

Senator McClellan, 1969 Hearings at 167.

Senator Mathias, 1969 Hearings at 307.

Senator Metcalf, 115 Cong. Rec. 34425 (1969).

Senator Mondale, 115 Cong. Rec. 28211 (1969).

Senator Muskie, 115 Cong. Rec. 35368 (1969).

Senator Percy, 115 Cong. Rec. 35375 (1969).

Senator Stennis, 115 Cong. Rec. 34849 (1969).

Senator Young, 115 Cong. Rec. 28895 (1969).

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

Senator Allott, 115 Cong. Rec. 35126 (1969).

Senator Bellmon, 115 Cong. Rec. 31787 (1969).

Senator Boggs, 115 Cong. Rec. 34847 (1969).

Senator Cook, 115 Cong. Rec. 29557 (1969).

Senator Fong, 115 Cong. Rec. 34862 (1969).

Senator Hruska, 115 Cong. Rec. 28649 (1969).

Senator Mundt, 115 Cong. Rec. 35371 (1969).

Senator Murphy, 115 Cong. Rec. 35138 (1969).

Senator Prouty, 115 Cong. Rec. 34439 (1969).

Senator Spong, 115 Cong. Rec. 34444 (1969).

Senator Stevens, 115 Cong. Rec. 35129 (1969).

Senator Tower, 115 Cong. Rec. 34843 (1969).

Senator Tydings, 1969 Hearings at 57.

Mr. **Biden**. Mr. President, the list was compiled by three law professors in a memorandum prepared for several members of the Judiciary Committee in 1971 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 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 Stennis said: 'The nominee must be measured not only by the ordinary standards of merit, training, and experience, but his basic philosophy must be carefully examined.' And Senator Byrd of West Virginia emphasized not only the nominee's own views but also the effect they would have in shifting the balance of the Court as a whole. Senator Thurmond emphasized the importance of balance: 'This means that it will require the appointment of two additional conservative justices in order to change the tenor of future Supreme Court decisions.' Of the numerous Senators who spoke in favor of Marshall's confirmation, many argued that his record of litigation aimed toward expanding the rights of black Americans was a positive factor in their decisions.

President Johnson's nomination of Abe Fortas to be Chief Justice in 1968 provoked the most protracted confirmation fight of recent times. There were personal as well as philosophical issues involved--particularly the propriety of a lameduck nomination and of the nominee's role as confidential adviser to the President--but his substantive positions were central to the debate. Of the 32 Senators who addressed the question, 14 explicitly stated that the nominee's political and constitutional views were relevant and should be discussed. Another 12 analyzed his views in explaining their own votes, implying that they regarded this consideration to be relevant. Six others seemed to argue that a nominee's constitutional philosophy was either not a proper topic for consideration by the Senate or of only marginal relevance.

Passions were high during that debate, but few disputed the terms of debate. Eloquent voices on both sides of the Senate agreed that the nominee's views, philosophy and past decisions were relevant to the question of his confirmation. Senator Fannin of Arizona quoted Senator Borah's stirring words from the Parker debate. He also quoted a letter from William Rehnquist, then a young lawyer in Arizona. As early as 1959, Mr. Rehnquist had called in the Harvard Law Record for restoring the Senate's practice 'of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him.'

Senator Miller of Iowa endorsed the sentiment:

'For too long, the Senate has rubber-stamped nominations * * *. But a time comes when every Senator should search his conscience to see whether the exercise of the confirming power by the Senate is for the good of the country.'

Then Senator Thurmond rose again: 'It is my contention,' he said to the Chamber, 'that the Supreme Court has assumed such a powerful role as a policymaker in the Government that the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues.'

Since Fortas's time, two more nominees have been rejected by the Senate--nominees for the seat that would come to be occupied by Justice Powell. There is no need to review the unhappy circumstances of the nominations of Clement Haynsworth and G. Harrold Carswell. They are as familiar now as they were then. But although both cases involved questions of ethics and competence, judicial philosophy played a central role. In the case of Judge Haynsworth, apparently 23 Senators argued for the relevance of his substantive views on labor law and race relations, while at least 13 Senators took the opposite position. Senator Case of New Jersey once more looked back to Borah: 'How he approaches these great questions of human liberty--this for me is the essence of the issue in the pending nomination of Judge Haynsworth.'

In the subsequent debate over G. Harrold Carswell, his views about racial equality received no less attention than his ability on the bench. Of particular concern was his always restrained, and often reversed, view of the scope of the 14th amendment. Senator **Inoué** 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 debates. It is a rich and fractious history--always entangled with the passions of the moment and the questions of the day. But although the issues under review have changed, the terms of review have not. Until 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 who possessed otherwise distinguished professional credentials but whose politics clashed with the Senate majority or 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 nominees to 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 precedents that all lower courts are bound to respect. But as the only court of no appeal, the Supreme Court itself is the only court with unreviewable power to change precedents. Thus, only the Senate can guard the guardians--by attempting to engage and gage the philosophies of Justices before placing them on the Court.

But to say that the Senate has an undisputed right to consider the judicial philosophy of Supreme Court nominees does not mean that it has always been prudent in exercising that right. After all, some of our most distinguished Justices--such as Harlan Fiske Stone, Charles Evans Hughes, and Louis Brandeis--have been opposed unsuccessfully on philosophical grounds. To say, furthermore, that political philosophy has often played a role in the past does not mean that nominees' views should always play a role in the present. For there are obvious costs to political fights over judicial nominees. There are only costs to political fights over the Supreme Court seat. As history shows, tempers flare, factions mobilize, and the Court, and the country, wait for a truce.

There are costs that all of us would prefer to avoid. And these are costs that I have discussed before. In supporting the nomination of Justice O'Connor, whose views are more conservative than my own, I warned of the dangers of applying political litmus tests to Presidential nominees. I agreed with Justice O'Connor that to answer questions about specific decisions would jeopardize her independence on the Court. I cautioned that if every Supreme Court nomination became a political battle, then we would run the risk of holding the Court hostage to the internecine wars of the President and Congress. And I endorsed a modern convention that has developed in the Senate--a convention designed to keep the peace. In recent times, under normal circumstances, many Members have preferred not to consider questions of judicial philosophy in discharging their duty to advise and to consent. Instead, they have been inclined to restrict their standards for Presidential nominees to questions of character and of competence. These are the three questions we have preferred to ask:

First. Does the nominee have the intellectual capacity, competence and temperament to be a Supreme Court Justice?

Second. Is the nominee of good moral character and free of conflicts of interest?

Third. Will the nominee faithfully uphold the Constitution of the United States?

These were the questions asked by the Senate when President Eisenhower nominated Justice Brennan, when President Kennedy nominated Justice White, when President Nixon nominated Justice Powell and when President Reagan nominated Justice O'Connor, to name only a few recent examples.

But during what times and under what circumstances can this narrow standard be confidently applied? For obvious reasons, the narrow standard presumes a spirit of bipartisanship between the President and the Senate. It presumes that the President will enlist and heed the advice of the Senate; or it presumes that he will make an honest effort to choose nominees from the mainstream of American legal thought; or it presumes that he will demonstrate his good faith by seeking two qualities, above all, in his nominees--first, detachment and second, statesmanship.

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; the contentions 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 exceptional power of divination which can peer into the purpose beyond its expression, and bring to fruition that which lay only in flower * * * he must approach his problems with as little preconception of 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 for detachment.'

And Justice Felix Frankfurter wrote of the necessity for statesmanship:

'Of course a Justice should be an outstanding lawyer in the ordinary professional acceptance of the term, but that is the merest beginning. With the great men of the Court, constitutional adjudication has always been statecraft. The deepest significance of Marshall's magistracy is his recognition of the practical needs of government, to be realized by treating the Constitution as the living framework within which the nation and the States could freely move through the inevitable changes wrought by time and inventions. Those of his successors whose labors history has validated have been men who brought to their task insight into the problems of their generation * * * Not anointed priests, removed from knowledge of the stress of life, but men with proved grasp of affairs who have developed resilience and vigor of mind through seasoned and diversified experience in a work-a-day world--(these) are the judges who have wrought abidingly on the Supreme Court.'

Detachment and statesmanship--these are demanding standards. But they were standards admirably met by retiring Justice Lewis Powell--a practicing lawyer before his appointment to the Court. During a farewell interview, Justice Powell sought to express his own vision of the responsibilities of a Justice. 'I never think of myself as having a judicial philosophy,' he said. '* * * I try to be careful, to do justice to the particular case, rather than try to write principles that will be new, or original * * *.' And Justice Powell called for 'a consideration of history and the extent to which decisions of this Court reflect an evolving concept of particular provisions of the Constitution.'

When the President selects nominees on the basis of their detachment and their statesmanship, with a sensitivity to the balance of the Court and the concerns of the country, then the Senate should be inclined to respond in kind. Individual Senators are bound to have individual objections. But at least since I have been in the Senate, many of us have made an effort to put aside our personal biases and to support even nominees with whom we were inclined to disagree.

But in recent years, it has struck many of us that the ground rules have been changed. Increasingly, nominees have been selected with more attention to their judicial philosophy and less attention to their detachment and statesmanship. When, and how, should a Senator respond when this happens? Constitutional scholars and Senate precedents agree that, under certain circumstances, a Senator has not only the right but the duty to respond by carefully weighing the nominee's judicial philosophy and the consequences for the country. What are those circumstances?

One circumstance is when a President attempts to remake the Court in his own image by selecting nominees for their judicial philosophy. Alone, Charles Black, a liberal scholar then at Yale Law School, wrote in 1970:

'If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate * * *. A Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court * * *.'

I think that is a very important quote.

Another circumstance is when the President and the Senate are deeply divided, demonstrating a lack of consensus on the great issues of the day. Philip B. Kurland of the University of Chicago, a conservative scholar, wrote in 1972:

'Obviously, when the President and the Senate are closely aligned in their views, there is not likely to be a conflict over appointees. When their views are essentially disparate, suggesting an absence of consensus in the nation--a situation more likely to occur at the time of greatest constitutional change--it will become the obligation of the contending forces to reach appropriate compromise. It should not satisfy the Senate that the nominee is an able barrister with a record of unimpeachable ethical conduct. He who receives a Supreme Court appointment will engage in the governance of this country.'

Let me repeat that. This is not repeated in the quote, but let me repeat that part of the quote.

'He who receives a Supreme Court appointment will engage in the governments of this country. The question for the Senate--no less than the President--is whether he is an appropriate person to wield that authority.'

A final circumstance is when the balance of the Court itself is at stake. When the country and the Court are divided, then a determined President has the greatest opportunity of remaking the Court in his own image. To protect the independence of the Court and the integrity of the Constitution, the Senate should be vigilant against letting him succeed where they disagree. During the debate over the qualifications of Clement Haynsworth, our former distinguished colleague and my former seatmate, Senator Muskie of Maine spoke movingly of the Senate's duty to consider the impact of a nominee's views on the balance of the Court. He said:

'It is the prerogative of the President, of course, to try to shift the direction and the thrust of the Court's opinions in this field by his appointments to the Court. It is my prerogative and my responsibility to disagree with him when I believe, as I do, that such a change would not be in our country's best interests.'

These, in sort, are some of the circumstances when the Senate's right to consider judicial philosophy becomes a duty to consider judicial philosophy: When the President attempts to use the Court for political purposes; when the President and Congress are deeply divided; or when the Court is divided and a single nomination can bend it in the direction of the President's political purposes. These are all times when the Senate has a duty to engage the President.

In future speeches, I will attempt to support my belief that all three circumstances obtain today. But in turning to the future we should be guided by the past. Our predecessors have been met with similar challenges. How have they responded under fire?

[Page: S8858]

A COURAGEOUS SENATE VERSUS A DETERMINED PRESIDENT: TWO FAMOUS PRECEDENTS

Fifty years ago, and 150 years ago, popular Presidents committed themselves to controversial political agendas. In both cases, the Supreme Court had ruled parts of the agenda unconstitutional. In both cases, the President attempted to tilt the balance of the Court by politicizing the appointments process. And in both cases, a courageous Senate attempted to block the President's efforts to bend the Court to his personal ends.

The first case is one I have already outlined--the case of Andrew Jackson's relentless efforts to place Roger Taney on the Supreme Court.

At its heart, the story of Andrew Jackson and Roger Taney versus the Senate and the Bank of the United States was a struggle over the broad ideological issues that split the fledgling Republic--a struggle between debtor and creditor, executive and legislative, States' rights and Federal power. Andrew Jackson arrived in Washington resolved to do battle with the the 'monster' Bank. 'I have it chained,' he crowed after vetoing an attempt to recharter the Bank in 1832. 'The monster must perish,' he said.

To prosecute his vendetta against the Bank, Jackson sought to remove all Federal money from the 'monster's' vaults. In late 1833, Jackson summoned his Cabinet and announced his resolve. By law, only Secretary of the Treasury Louis McLane was authorized to withdraw the funds. So Jackson commanded McLane to act. McLane, understanding the law, refused. So Jackson fired the staunch McLane and appointed William Duane to take his place. As a condition of his appointment, Duane promised to withdraw the funds. But, once in office, his conscience got the better of him. So he went to Jackson, who reminded him of his promise. 'A Secretary, sir,' said Jackson, 'is merely an executive agent, a subordinate, and you may say so in self defense.' 'In this particular case,' responded Duane, 'Congress confers a discretionary power and requires reasons if I exercise it.' Obviously, Duane was right. The law clearly stated that Duane had to report to Congress any decision regarding the deposit, and Congress was in recess. Duane asked for a delay. 'Not a day,' barked Jackson, 'not an hour.'

So Jackson fired his second Secretary. Who would carry out the executive order? In Attorney General Roger Taney, Jackson found a Cabinet member with a less scrupulous view of Executive power. Jackson designated Taney to take the Treasury and execute the order. And Taney wasted no time. Though not yet confirmed by the Senate, he immediately ordered the removal of funds. 'Executive despotism!' cried the Whigs as soon as the Senate reconvened, and refused to confirm his Cabinet appointment.

But the deed was done, and the Bank was bleeding. The victory would not be complete, however, unless Jackson could tilt the balance of the Supreme Court. At first, the Court had leaned toward the Federalists in the battle of the Bank--John Marshall had upheld the Bank against attack by the States as early as 1819. But, after four Jackson appointments, the Court was rapidly shifting in favor of the States. In 1835, another vacancy arose, and Jackson was quick to reward his loyal henchman, Taney. But the Whigs could not forget Taney's earlier performance under fire. One New York paper said that he was 'unworthy of public confidence, a supple, cringing tool of power.'

In the minds of the Whigs--many of them giants of the Senate such as Calhoun and Crittenden, Webster and Clay--Taney's detachment and statesmanship were in serious doubt. And they defeated the nomination by postponing consideration until the last day of the Senate's session. Jackson was furious, and in his fury decided to bide his time. In December, with the resignation of Chief Justice Marshall, yet another vacancy arose. To fill the shoes of the great justice, Jackson resubmitted the name of Taney.

Once again, the lions of the Senate roared to the very end. Henry Clay, the 'great compromiser,' was said to use every 'opprobrious epithet' in his vocabulary to fight the Taney nomination. The Whigs had no reservation about opposing him on the ground that they believed his views did not belong on the Court. As Senator Borah put it, in his classic speech against the Parker nomination in 1930:

'They opposed [Taney] for the same reason some of us now oppose the present nominee, because they believed his views on certain important matters were unsound. They certainly did not oppose him because of his lack of learning, or because of his incapability as a lawyer, for in no sense was he lacking in fitness except, in their opinion, that he did not give proper construction to certain problems that were then obtaining.'

But the Democrats had gained the upper hand in the Senate, and Taney became Chief Justice by a vote of 29 to 15. Unfortunately, the Whig fears proved only too well justified. It would be hard to imagine a more inappropriate successor to Chief Justice Marshall than Chief Justice Taney. Where Marshall's broad reading of the Constitution was indispensable in strengthening the growing Union, Taney's narrow reading played a significant role in weakening the cohesion of the Union. In 1857, Taney wrote the infamous Dred Scott decision for a divided Court. And in refusing to read into the Constitution the power of Congress to limit slavery in newly admitted States, he nullified the Missouri Compromise and helped to precipitate the greatest constitutional crisis in our history--the Civil War.

I prefer to end on a happier note. It is another story of a powerful and popular President who attempted to bend the Court to suit his own ends. But it is a story of courage crowned with success. It unfolded in the Senate 50 years ago, in the summer of 1937.

America 50 years ago was a nation struggling against economic collapse. Under Franklin Roosevelt's inspiring leadership, Congress and the States enacted by overwhelming majorities a series of laws to stimulate recovery.

But by narrow margins--5 to 4 or 6 to 3--the Supreme Court had struck down a series of enactments, from minimum wage laws to agricultural stabilization acts. Representative government seemed paralyzed by the intransigence of the Court.

Moderates and progressives--Republicans and Democrats--searched for a way to thwart the 'nine old men.' They proposed a wide range of constitutional amendments and legislative limits on the Court. But Roosevelt was impatient for a quick remedy, and suspicious of indirect methods. In his view, the only way to save the New Deal was to change the composition of the Court itself.

Fresh from his landslide victory over Alf Landon, FDR sprang his Court-packing proposal: For every Justice over the age of 70 who failed to retire, the President would be able to nominate a new Justice, up to a limit of 15 members on the Court. The plan had been veiled in secrecy, and when Roosevelt announced it in February 1937, it was met with a storm of popular criticism.

Let me be clear. I am not for a moment suggesting that President Reagan is attempting to do what President Roosevelt attempted to do--enacting a constitutional change by enlarging the membership of the Court itself. But there are important similarities as well as important differences between the intentions of the two Presidents.

Both had in mind the same result. Both sought to use their power of appointment to shift the balance of Courts that had repeatedly rejected their social agendas. But there is a crucial difference. While President Reagan has used his nominations to shift the balance of the Court, in Roosevelt's case, the Court shifted on its own. Before the Court packing bill reached the Senate floor, before Justice Van Devanter's timely resignation, Justice Owen Roberts had already made his welcome 'switch in time that saved nine'--giving Roosevelt the 5 to 4 majority that he sought.

But in May 1937, the outcome in the Senate was anything but certain. The Judiciary Committee was controlled by the Democrats--loyal New Dealers. Although they supported Roosevelt's political ends, they refused to allow him to pursue them through judicial means. In their minds, the integrity of the Court meant more than the agenda of the President. On June 14, they issued a report condemning the Court-packing plan. The President's legislation, they concluded, demonstrated, 'the futility and absurdity of the devious.' It was an effort to 'punish the justices' for their opinions and was 'an invasion of judicial power such as has never before been attempted in this country.'

But the committee report went further still. Executive attempts to dominate the judiciary lead inevitably to autocratic dominance, 'the very thing against which the American Colonies revolted, and to prevent which the Constitution was in every particular framed.' The report concluded with a final thundering sentence that, before the day was out, would be quoted in newspapers across the land: 'It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.'

It was a stinging rebuke to a beloved President--all the more remarkable in view of the fact its authors shared his legislative goals. The British Ambassador wrote to the British Prime Minister:

'Seven Democratic Senators have committed the unforgivable sin. They have crossed the Rubicon and have burned their boats; and as they are not men to lead a forlorn hope, one may assume that many others are substantially committed to the same action. One can only assume that the President is beaten.'

The formal verdict was delivered on the Senate floor on July 22, 1937. Though a meaningless 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. Arms outstretched, his 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 framers entrusted the Senate with the responsibility of 'advice and consent' to protect the independence of the judiciary. I have urged that the Senate has historically taken its responsibility seriously. I have argued that, in case after case, it has scrutinized Supreme Court nominees on the basis of their political and judicial philosophies. I have argued that, in case after case, it has rejected qualified nominees, because it perceived those views to clash with the interests of the country.

In future speeches I will make the case that today, 50 years after Roosevelt failed, 150 years after Jackson succeeded, we are once again confronted with a popular President's determined attempt to bend the Supreme Court to his political ends. No one should dispute his right to try. But no one should dispute the Senate's duty to respond.

As we prepare to disagree about the substance of the debate, let no one contest the terms of the debate--let no one deny our right and our duty to consider questions of substance in casting our votes. For the founders themselves intended no less.

I thank the Chair and thank my colleagues for their indulgence.

[Page: 58859]

Mr. BIDEN. Mr. President, at the time I first set forth this notion during the Bork confirmation debate it was a widely controversial notion; that is, that we, as well as the President, had a right to look at ideology. Yet scholarly works reaffirmed by the recent articles of Prof. David Strauss and Cass Sunstein have always found a solid basis for this view in the intentions of our Framers and in the history of our Nation.

In my view, the debate over the Senate's review of ideology has been fruitful. We have quashed the myth that the Senate must defer to a President's choice of a Supreme Court Justice, the men and women at the apex of the independent third branch of Government. As the Senate properly does for nominees in the executive branch, the role of the Senate as a vital partner in reviewing Supreme Court nominations has been enhanced. And the debate over this role caused even those who were initially skeptical, like Prof. Henry Monaghan, who outlined the grounds for his conversion in a 1988 article in the Harvard Law Review, to join in the broad consensus over the propriety of more active Senate participation in the process.

More fundamentally, Mr. President, the serious and profound debate that the Bork nomination sparked was among the most important national discussions about our Constitution, its meaning, and the direction of our Supreme Court in this century.

Before the Bork confirmation fight, the legacy of the Warren court was seen as tenuous by scholars and was ill supported by the public. The legal right thought that judicial activism was a rallying cry that would move America against the Court's projection of protection of personal freedoms, its one person/one vote doctrine, and other progressive decisions that the legal right thought had no popular support and less legal foundation.

And the legal left, prior to the Bork fight, feared that the right might be correct in its assessment of popular opinion; that is, that the Warren court and its major decisions were not popularly supported. But the public reaction to Judge Bork's views, its rejection to the right's legal philosophy and judicial notions, proved just the opposite.

And while some aspects of the Warren Court decisions remain under assault, particularly in the area of criminal law, others have been irrevocably secured in the hearts and minds of most Americans, such as the Court's 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. Nor do 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 Kennedy and Souter.

As I said when I supported their confirmations, neither man is one whom I would have chosen had I been President. But each reflects a balanced selection, a nonideological conservative that stands between the White House philosophy and the Senate.

I might just note parenthetically, in the decision yesterday on school prayer, or prayer before convocations in public schools, Justices Souter and Kennedy took a position diametrically opposed to that that has been proffered by this administration and the previous one for the past 11 years.

While I have disagreed with some of the decisions by each of these two Jurists, I know that President Bush must say the same thing: That he disagrees with some of the decisions of the two men, Kennedy and Souter. But I offer them as examples, Mr. President; that both men have issued some opinions that I sharply reject. But in a period of divided Government, both from the Court of compromise, candidates who are appropriate for consideration and whose confirmations I supported.

In my view, the contemporary confirmation process functioned well in rejecting Judge Bork and in 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 Thomas nomination and the destructive forces that were going to tear it apart.

As I said earlier, the root of the current collapse of the confirmation process is the administration's campaign to make the Supreme Court an agent of an ultraright conservative social agenda which lacks support in the Congress and in the country.

I would just point out again, parenthetically, Mr. President, that the entire social agenda of the Reagan

administration 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 11 years. So failing the ability to do that, both Presidents have concluded, and did conclude, that the avenue to that change was to remake the Court.

In describing how the reactors of different forces and factions have brought about the difficulty we now have to face, I do not want anybody to lose sight of the fact that it is the administration's nomination agenda that is the root cause of this dilemma. That is, if you will, the original sin which has created all of the problems that plague the process today: The administration's desire to placate the rightwing of its party, which is driven by a single issue--overturning Roe versus Wade.

To the members of this Republican faction, no mere conservative such as Justice O'Connor or Justice Powell is safe, to use the word they often use. The administration has urged us to reach for a Scalia, a Bork, a Thomas. But if this is the original sin behind today's woes, it is not the only cause of the confirmation deadlock. And here are three consequences of the Reagan-Bush nomination strategy that have contributed to the problem.

First, Democrats and moderate Republicans have placed it into the hands of the Republican right by accepting Roe as the divining rod in reverse, making a nominee's views or refusal to state his views on this question the overriding concern in the confirmation process.

Yet, in enjoying the right to permit the single issue to dominate the debate, the center and the left have lost sight of the fact that nominees are chosen by Republicans, ultraconservatives. They tend to embrace other constitutional and jurisprudential views unrelated to abortion, but equally at the far end of the spectrum.

To put it another way, the center and the left, which won such broad public support for the position against Judge Bork's nomination, have allowed themselves 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 committee from exploring many 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:

[Page: 58860]

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 just 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.

Simply put, 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 Republican Senators 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, panel 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 inconceivable to the legal right, they have been on a hunt for villains ever since.

They have attacked the press, as in a recent, intemperate 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 clothed 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 other has its philosophical fulcrum resting 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 9 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 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 and had not a whit to do with whether or not he had a beard, a camera angle, an ad by an outside group, or the order of witnesses.

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 alliance, the extreme right and the extreme left, to undermine public confidence in a process aimed at moderation--hoping, perhaps, to foment 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 played little or no role in the outcome, 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 level of personal bitterness that may be typical of our modern political campaigns but is destructive to any process dependent upon consensus, as is the confirmation process. After the nomination was announced, one of the opponents of Judge Thomas outside the Senate threatened to 'Bork him'--a menacing pledge that served no purpose. And then, as the hearings were about to begin, the same conservative group that produced the infamous Willie Horton ads ran television commercials attacking members of the Judiciary Committee, including myself, with the intent to intimidate--and they so stated--intimidate our review of the nomination.

I find it ironic, Mr. President, that we could recognize the cost--if not find the answers--for this nastiness in the context of Presidential elections, but lack 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, spitefully transferred a whistleblower at EEOC, or was friends with a proapartheid lobbyist--many of these critics of our committee are among the first to bemoan the fact that the Presidential campaign of 1992 has been dominated by questions of personal wrong-doing 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 was centered on disputes over 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 is enriched when we explore their jurisprudential views; it is debased 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 their ideology, because it is their philosophy and their ideology that will affect how I am able to live my life, how my children will be able to live their lives, not whether or not when they were 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 lesser allegations 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--at my direction--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--an attempt to provide a means for dealing with 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.

A legitimate 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 dialog 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 what came before Judge Thomas' nomination--even if it was desirable--a practical impossibility.

[Page: 58862]

THE UNIQUE HISTORY OF ELECTION YEAR NOMINATIONS

Having said that, we face one immediate question: Can our Supreme Court nomination and confirmation processes, so racked 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 rejections of nominees Badger and Black by lameduck Presidents Fillmore and Buchanan, in the mid-19th century; and the narrow approvals of Justices Lamar and Fuller in 1888 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 filled with mean-spirited anti-Semitic attacks on the nominee--is an example of how election year politics can pollute Senate consideration of a distinguished candidate. And the 1968 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 pundits 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 entangled in 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--the latest--being the August 1846 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 repeat 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, 1828, 1864, and 1956--the President himself withheld making a nomination 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 1952 and Abe Fortas in 1968, the Senate refused to confirm these selections.

Thus, as we enter the summer of the Presidential 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 conflagration 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 how, Mr. 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 my view that if a Supreme Court Justice resigns tomorrow, or within the next several weeks, or resigns at the end of the summer, President Bush should consider following the practice of a majority of his predecessors and not--and not--name a nominee until after the November election is completed.

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 am sure, Mr. 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 our 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 see it, 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 several weeks.

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 philosophic 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 nomination process and 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 ultraconservative 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 and 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 us make sure we 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 given to the interest of property 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 three branches of Government, divided Government, to move more power to the executive branch, imperiling the bipartisan, independent regulatory agencies and the modern regulatory State.

As I noted before, 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 thwarted 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 the Senate and the American people seems determined to continue to try to remake the Court and thereby remake 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 the Supreme Court nomination, or instead restore the common practice of Presidents who chose nominees who strode the middle ground between the divided political branches, then I shall oppose his future nominees immediately upon their 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 itself, its use of the phrase '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 desks 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 at the same time 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 nominees of a Democratic President who is attempting to remake the Court in a way with which we 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 Justices Kennedy and 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 observers have completely 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 concluded 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 proposing to outline Judge Bork's philosophy; a group of respective 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, as I mentioned earlier, by and large, it was an exchange of views and ideas between two major constitutional players in this controversy, the President and 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, though, 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 first and trial 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 conformation process.

First, it gave rise to a powerful mythology that equates confirmation hearings to something closer to trials than legitimate legislative proceedings. The result has been in the end even 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 philosophy.

We should junk, Mr. President, this trial mythology and the attendant matters that go with it. Arcane 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 inept for our decisionmaking on confirmation as they are for our decisionmaking on passing 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 the left and the right as is their right, 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 becomes Washington at its worst. The nominee hunkers 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 mannerisms 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 hit its peak during the Thomas nomination when by my count, there were twice as many 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 publicly 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 is, 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 learned 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 dictating 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 Smedlap' 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 that decision before the hearing? 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 Senator said, 'I am opposed.' 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 that for the first 125 years of our 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 that 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 role 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 of service, writings, and speeches, background collection and investigations, a review of the nominee's experience in credentials 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 that 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 at 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 discursive 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 garner support notwithstanding, 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 hour and a quarter previously set aside has expired.

[Page: 88865]

Mr. BIDEN. Mr. President, I ask unanimous consent that I be able to proceed for 15 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. Conservatives cannot have it both ways; they cannot ask us to refrain from rigorous questioning of judicial philosophy, and instead focus on the nominee's personal background, as they did during the early phases of the Thomas nomination, and then complain loudly when this examination of personal background turns into a bitter exploration of the nominee's conduct and character.

This turn in the process was the product of their disdain for our questioning on jurisprudential views more than anything else. The Senate cannot force nominees to answer our questions. But as I voted against Judge Thomas' confirmation, in part because of his evasiveness, I will not countenance any similar evasion on the part of any future nominees.

To make this point as clearly and as sharply as possible, I want to state the 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 Justice Marshall 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 render this process 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, and I will not.

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, investigated them thoroughly, and disseminated them appropriately.

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 disgust 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 anger is rooted, Mr. President, at bottom, in a justifiable 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 purposes of improving public confidence in our handling of investigative matters.

First, I do not want the committee ever again to be placed 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 restrictions 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 investigative 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 Court collide under the glaring klieg 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 unshaken, I know that the public's confidence in our institutions is not. Americans believe that their President is out of touch with their lives; their 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--rebuilding 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 respect? What powers do we cede to the Government? These are the questions that the confirmation process should force us to ask.

However this process operates, our institutions will endure. But unless this process is repaired, unless all three branches take their responsibilities to it, to each other, and to the American people and take them seriously, the credibility of these institutions will continue to suffer.

To some, this may be of little concern. Indeed, some may be quietly pleased to see the public further lose faith in its Government.

For those who, like I, still believe that the Government can be the agent for social change, that our institutions can be harnessed to make our Nation more just, safe, and prosperous, the growing division between the American people and their Government is a disheartening development.

For unless that fundamental trust is restored, there is no hope that the American people will put confidence in their elected officials to rebuild our economy, to provide for the needs of our children, to deal with the failures of our health care and education systems, and to clean up our environment and our inner cities.

This, at bottom, Mr. President, is what is at stake in reforming the confirmation process. For the crisis of confidence that plagues that process is symptomatic of the crisis of confidence which plagues our Government and institutions at large.

Mr. President, together we must resolve this crisis and restore the bond of trust that has been severed. Nothing we can do in the next 6 weeks, 6 months, or 6 years is more important for the long-term course of our political system and our country.

This is our challenge, Mr. President, and we must act today.

I thank my colleagues for their indulgence and their time.

[Page: S8866]

This Document: [Contents](#)

[Search Results](#) > Full Document from Senate Section (June 25,)

[Modify Search](#) | [New Search](#)

Printer Friendly: [HTML](#)

[Help](#) | [Contact Us](#)

1 of 1