Let us take a look at the uses of these materials. Over 40 percent of the platinum used in the United States is used in the production and manufacturing of pollution-reduction mechanisms that we know as the catalytic converters used in automobiles. Palladium is used in the electronics industry and computers, but both can be found in the production of gasoline, fertilizer, and chemicals.

Again, I suppose that we can lose the catalytic converter business to a foreign country, but we should not. If we do lose it, along with it goes the jobs associated with it.

So I hope we will take a look at these businesses and determine the importance of the platinum and palladium mining business.

At the present time, the Stillwater Mine owners have invested a total of $146 million in exploration and developing the site, which is half of the mine. It employs almost 400 people, will expand that employment to 1,000 if the mine expands, and eventually produce 6 percent of the world's platinum and 20 percent of the world's palladium.

I want to ask all of my colleagues here in the Senate; what is it worth that we can hire American workers to produce these minerals at this one location in the United States rather than to pay a foreign country whatever the market can bear to import these materials as we need them? If there was a shortage of these materials in the world market, could we get along without the contribution these minerals make in terms of those products that we absolutely need. These questions can be extended to every mining operation throughout the United States.

I submit that we all know the answer to the jobs question; we need every one of them. As for the other questions that I have raised today, a minerals policy would provide many of the answers and stop us from floundering around in the muddy waters of this ambiguous mining law debate.

I urge all of my colleagues to see this issue for what it is. An assault on the mining law would lose the potential to disrupt State and local economies, deny every American the benefits of the uses of the strategic and critical materials mined in this country, and send more mining and workers beyond the borders of this country or into the unemployment line. A minerals policy would help us develop the economic potential that we have in this country, and the future of our country depends on this, especially the national security needs.

Thank you, Mr. President.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

The PRESIDENT pro tempore. I now recognize the ranking minority leader to speak for up to 1 hour and 15 minutes.

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 pro-pititious, 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 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 on the brink 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 nomination 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 asked him to succeed Bork as his nominee.

The fierce flight 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 confirmation changes 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 few years. If the 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 this point in the Presidential campaign, 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 this question of whether or not, 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 24 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 the case of these previous times, a sweeping nationwide consensus existed, as reflected by the election of both political branches of like-minded officials, which justified the sweeping changes that took place at the Supreme Court.

But over the past two decades, Mr. President, no such consensus has existed, unlike the era to which I point—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 13 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, nonetheless, have been required to act in light of 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 have been confirmed since 1850 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 Cardoza, after heated executive-Senate consultations.

Similarly, President Eisenhower’s choices for the Court included conservative John Harlan and Charles Whitaker, moderate Potter Stewart, and liberals Earl Warren and William Brennan. Even President Nixon, who showed no reluctance to take full advantage of his majority potential, balanced his choices of conservatives Warren Burger and William Rehnquist with those of moderate Republican Harry Blackman and conservative Robertexpires.

This, of course, has not been the model that Presidents Reagan and Bush have followed. Indeed, even lacking the broad support for their vision of the Court which Presidents Washington and Adams, Lincoln and Grant, and Roosevelt and Truman had, Presidents Reagan and Bush have tried to recast the Court in their ideological image, as these Presidents did.

But 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 President Reagan and Bush to attempt to recast the Supreme 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 party, which has ravaged the confirmation process.

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:

**ADVICE AND CONSENT: THE RIGHT AND DUTY OF THE SENATE TO ENDORSE THE INTRUST OF THE SUPREME COURT**

Mr. EIDEN. 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 nomination process and the terms of the debate. Arguing from constitutional history and Senate precedent, I want to address one question and one observation: 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 that the President is "the only person entrusted by the Constitu-
June 25, 1992

widely agreed that the Senate "would be composed of men nearly equal to the Executive and would of course have on the whole more wisdom." Moreover, "it would be less easy for candidates to intrigue with them, than with the Executive."

Obviously, we can see here the fear that was growing on the part of those at the Convention that was relatively small. If it is difficult to imagine that after four attempts to exclude the President from the selection process, the President himself would be the broadest role for the Senate—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, he means 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 so to why the Senate was intended to restrain the President and play an 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 is essential for the protection of the Constitution."

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 climate of political winds, is the point to the same conclusion: The Senate has historically taken seriously its responsibilities in restraining 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.

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tations 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 Ju-
diciary, the Framers devised three important checks: life tenure, prohibition on reduction of salaries, and the Senate's independent method of selection. As they relied on the Court to check legislative encroach-
ments, 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.

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 climate of political winds, is the point to the same conclusion: The Senate has historically taken seriously its responsibilities in restraining the President. Over and over, it has scrutinized the political views and the constitutional philosophy of nominees, in addition to their judicial competence.

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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 1878. In only one case, George Williams—a Grant nominee whose nomination was withdrawn in 1880—did the Senate explicitly disapprove. Even that nomination played no role whatever. The rest were, in whole or in part, rejected for political or philosophical reasons.

The precedent was set as early as 1855, 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 "leaving too much toward monarchy." Well Old John would come to wish he had not uttered those words.

Rutledge was first nominated to the Court in 1790, and he had little trouble being confirmed. As one of the principal authors of the first draft of the Constitution, he was clearly qualified to judge original intent. In 1791, however, he resigned his seat to become chief justice of South Carolina, which—as our two South Carolina Senators probably still think—he considered a far more important post. But then, Chief Justice John Jay re-signed from the Supreme Court in 1795, and Washington nominated Rutledge to take his seat. The President was so confident in a speedy confirmation that he had the commission in his pocket 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 (as dearly as he loved him) than he should sign that treaty." Another paper reported that Rutledge had said that "the party of the Whigs and the Senate were fools or knaves, duped by British sophistry or bribed by British gold, prostituting the dearest rights of freedom and laying them at the feet of royalty."

Debate raged for 5 months, and Rutledge was ultimately rejected, 14 to 10. To the screams of many Senators, Rutledge’s opposition to the treaty called into question his judicial judgment in taking such a strong position on an issue that polarized the Nation. Some even feared for his mental stability and made no mistake: the first Supreme Court nominee to be rejected by the Senate—one of the framers, no less—was rejected specifically on policy 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 Wollcott, a Madison (and Jackson) nominee, was rejected at least in large part because of his vigorous endorsement of embargo legislation and nonintercourse laws. His rejection was fortunate for our legal system, for sooner, he had endorsed the view that any Judge deciding a law unconstitutional should be immediately expelled from the Court. In 1836, 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 acquiescences in the science of politics in its relation to the government upon 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 Presidents, no fewer than 16 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 was far from dead, most of the struggles were specifically partisan. John Tyler set a Presidential record: the Senate refused to confirm the nominations of 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.

Twelve subsequent debates have been on the whole more civilized but no less political. The last nominee to be rejected on exclusively political or philosophical grounds was John Marshall Harlan, 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 was simple, and the contentions—I have this right, by the way; it is Republican and Republicans in those days were not so persuasive in presenting precedents—were well known from my perspective—that, first, that Parker was unfriendly to labor; second, that he was opposed to voting rights and political participation; 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. His speech would be quoted for years to come:

“[O]ur 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 are 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 what he represents and approaches these great questions of human liberty.”

Parker was denied a seat on the Court by a vote of 41 to 20. Justice Owen Roberts, the man appointed in his place, was less wedded to the wisdom of the past: he was the famous ‘switch in time’ that helped defuse the Court-packing crisis in 1937—but 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 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:
June 25, 1992

CONGRESSIONAL RECORD—SENATE

II. STATEMENTS OF SENATORS CONCERNING
RELEVANCE OF NOMINEE'S SUBSTANTIVE
VIEWS—FORBES HEARINGS AND DEBATES

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


Senator Ervin, Hearings on the Nomination
of Abe Fortas and Homer Thornberry
Before the Senate Comm. on the Judiciary,


Senator Thurmond, 1968 Hearings at 180.

B. SENATORS WHO DEBAT ED THE NOMINEE'S
VIEWS


Senator Hart, 1968 Hearings at 276.


Senator Murphy, 114 Cong. Rec. 26394 (1968).


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


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 DEBAT ED THE NOMINEE'S VIEWS


Senator Ervin, Hearings on the Nomination
of Clement Haynsworth Before the Senate


Senator Hart, 1969 Hearings at 463.
recent times, few have questioned the Sen-
ate’s right to consider the judicial philos-
ophy of nominees. The Founders intended it and the
Senate has exercised it. Over and over, the
Senate has rejected nominees who possessed
other qualifications such as professional creden-
tials but whose politics clashed with the
Senate majority or whose judicial philoso-
phies were out of step with the times or
circumstances in the land.

It is easy to see why the Senate has
subjected nominees to the Supreme Court to
most exacting standards when nominees are
not only selected by the highest court in the
land, the Supreme Court dictates the judi-
cial precedents that all lower courts are
bound to respect as an assent to the law.
In the upholding of this appeal, the Supreme Court itself is the only
court with unreviewable power to change
precedents. Thus, only the Senate can guard
candidates—by attempting to engage the
philosophies of Justices before placing
them on the Court.

But to say that the Senate has an undis-
pensable right to consider the philosophy
of Supreme Court nominees does not mean
that it has always been prudent in exercis-
ing that right. After all, some of the
most distinguished Justices—such as Harlan
Fiske Stone, Charles Evans Hughes, and
Louis Brandeis—have been opposed unac-
knowledgedly by the Senate.

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. There are costs to poli-
tical fights over judicial nominees. There are only costs to political fights over
Supreme Court seats. 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. Before supporting the nomination
of Justice O’Connor, whose views are more
conservative than my own, I warned of the
dangers of applying political Himma tests to
Presidential nominees. I agreed with Justice
O’Connor that to answer questions about
specific decisions would jeopardize her inde-
significance. I considered the portends that if
every Supreme Court nomination became a
political battle, then we would run the risk of
damaging our capacity to handle the inter-
cewars 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 consent. Instead, they have
been inclined to restrict their standards for
Presidential nominees to questions of char-
acter and of competence. These are the three
questions we have preferred to ask:
First. Does the nominee have the intellec-
tual capacity, competence and temperament
to be a Supreme Court Justice?
Second. Is the nominee of good moral char-
acter and free of conflicts of interest?
Third. Will the nominee faithfully uphold
the Constitution and the laws of the United
States as well as the Constitution and the
laws of the nation?

These were the questions asked by the Sen-
ate when President Eisenhower nominated
Justice Brennan, when President Kennedy
nominated Chief Justice Burger, when Presi-
dent Nixon nominated Justice Powell and when
President Reagan nominated Justice O’Con-
nor. These are the recent examples.

But during what times and under what cir-
cumstances can this narrow standard be
confidently applied? For obvious reasons, the
narrow standard presumes a spirit of biparti-
sanship between the President and the Sen-
ate, complete confidence in the President’s
list 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 public opinion. Under those circum-
sances, a Justice will demonstrate his good faith by seek-
ing two qualities, above all, in his nomi-
nees—first, detachment and second, states-
manship.

Judge Learned Hand wrote of the necessity
detachment. He said that a Supreme
Court nominee must have the capacity to
reconstruct the whole setting which evoked
the law; the contentions which it resolved;
the purposes behind it; and the court itself
led up to it. But all this is only the begin-
ning, for he must possess the far more excep-
tional power of divination which can peer
from knowledge of the stream of life, but men
bring to fruition that which lay only in flow-
er. * * * He must approach his problems with
as little preconception of what should be the
outcome as is practicable. 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 out-
standing lawyer in the ordinary profes-
sional sense, the general practitioner of
the courtroom, ready to decide the acut-
est beginning. With the great men of the
Court, constitutional adjudication has al-
ways been statecraft. The deepest signifi-
ance of their positions is their recogni-
tion of the practical needs of govern-
ment, to be realised by treating the Con-
sitution as the living framework of
the nation, rather than as a book to
which the nation and its problems would freely
move through the inevitable changes
wrought by time and inventions. Those of
his successors whoso thought the Court
had dated have been who brought to their
task insight into the problems of their
generation.

Anointed priests, restored from the knowledge of the stream of life, but men
with proved grasp of affairs who have devel-
oped resilience and vigor of mind through
seasoned and diversified experience in a
world and a life that guide the judges who
have wrought ably 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 to 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 particu-
lar provisions of the Constitution.’’

When the President selects nominees on
the basis of their detachment and their
statesmanship, with a sensitivity to the bal-
ections of the Court and the needs of the
country, then the Senate should be inclined
to respond in kind. Individual Senators are
bound to have individual objections. But at
the same time, the Senate, most of us, have
made an effort to put aside our personal
biases and to support even nomi-
nees with whom we were inclined to dis-
agree.

But in recent years, it has struck many of
us that the ground rules have been changed.
Incrementally, nominees have been selected
with more attention to their judicial philos-
ophy and less attention to their detachment
and statesmanship. When, and how, should
a Senator respond when this happens? Con-
stitutional scholars and Senate precedents
suggest the Senate may not have the right
to respond by carefully weighing the nomi-
nee’s judicial philosophy and the con-
cerns of the country. What are these
circumstances?

One circumstance is when a President at-
ttempts to remake the Court with his own
philosophy and less attention to the detec-
hion and statesmanship. When, and how,
should a Senator respond when this happens?
Constitutional scholars and Senate precen-
ts suggest the Senate has not the right
but the duty to respond by carefully weighing the nomi-
nee’s judicial philosophy and the con-
cerns of the country. What are those
circumstances?

If a President should desire, and if chance
should give him the opportunity, to change
tally the character of the Supreme Court,
then the Senate has nothing that 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
philosophy will make it harmful to the country for him to
sit and vote on the Court. * * * .

I think that is a very important quote.

Presidents 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 schol-
ar, wrote in 1972:

- 'Obviously, when the President and the Senate are out of sync, there is nothing likely to be a conflict over ap-
pointees. When their views are essentially disparate, suggesting an absence of consen-
sus among the nation—a situation more likely to occur at the time of greatest constitutional change—it will become the obligation of the Senate to reach appropriate com-
mromise. It cannot satisfy the Senate, that the nominee is an able barrister with a record of unimpeachable ethical conduct. He

receives a Supreme Court appointment to 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 ap-
pointment 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 opportu-
nity 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
Hayesworth, our former distinguished col-
league from the state of Tennessee, Muskie of
Maine spoke movingly of the Sen-
ate’s duty to consider the impact of a nomi-
nee’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
views of the Court. This is his opinion, this field
by his appointments to the Court. It is my pror-
ogative and my responsibility to disagree
with him when I believe, as I do, that such a

The Supreme Court of the United States had ordered Duane to take the Treasury Department to the Bank of the United States. 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, Duane said, "Congress confers a discretionary power and requires reasons if I exercise it." Obviously, Duane was right. The laws of 1832 stated that the Bank of the United States 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 August, General Roger Taney, Jackson's friend and one of the shining lights of the Whig Party, was appointed to the post. He was a man of great learning and integrity. But he had never been a politician, and he was not sure how to handle the situation. 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 insufficiency of the Court.

The President wanted new judges—Republicans and Democrats—searched for a way to thwart the "nine old men." They proposed a wide range of constitutional amendments to expand the Court's power. But President Jackson was impatient for a quick remedy, and suspicious of indirect methods. In his view, the President had the power to change the composition of the Court itself. Fresh from his landslide victory over Al Fland, FDR sprang his Court-packing proposal. But the President was healthy, and the Court was just what he needed. Jackson's earlier appointments to the Court had been in 1819, when he was in his prime. He had always been a controversial figure, and his appointment to the Supreme Court had been a source of great contention.

When Jackson appointed Taney, the Senate confirmed him by a vote of 50 to 15. Unfortunately, the Whig Party had only 50 votes out of 150, so the appointment had to be confirmed by the Senate. But, even so, the appointment had been widely criticized. The Senate's nominees to the Court had been rejected by the Whig Party, and the President's nominees to the Senate had been rejected by the Whig Party. This was a clear indication that the President was not popular, and that his appointees were not accepted by the public.
substantially committed to the same action. One can only assume that the President is being true.

The formal verdict was delivered on the Senate floor on July 22, 1997. Though a meaningless event from a legal point of view, it was a novel event in history. I assume that Roosevelt’s effort to pack the Court, which for some time appeared destined to succeed, had come to an end. Arms outstr- stretched, on the Senate floor, Senator Hiram Johnson cried, “Glory to God!” But let us 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 rejected 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 the view of which 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 Presi- dent who attempted to bend the Supreme Court to his political ends. No one should dispute his right to try. But no one should granting 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 think the Chair and thank my colleagues for their indulgence.

Mr. BIDEN. Mr. President, at the time I first set forth this notion during the Bork confirmation debate it was a wild and frightening notion. I had not yet realized 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 Suneist have always found a solid basis in the courts and in the history of our Nation.

In my view, the debate over the Sen- ate’s review of ideology has been fruitful. 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 proper 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 Meza, 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 partici- pation 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 Su- preme Court in this century.

Before the Bork confirmation fight, the ideological conflict in the Senate 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 a proper mode of decision. The Constitution, the 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 popu- larly supported. But the public reaction to Judge Bork’s views, its rejec- tion to the right’s legal philosophy and judicial notions, proved just the opposite.

And while some aspects of the Warren Court decisions remain under ass-ault, particularly in the area of crimi- nal 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 sup- port 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 Ken- nedy and Souter.

As I said when I supported their con- firmations, neither man is one whom I would have chosen had I been Presi- dent. But each reflects a balanced sele- ction, a nonideological conservative who transcends the myth of the White House philosophy and the Senate.

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

While I have disagreed with some of the decisions by each of these two Ju- rists, 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 con- firmation process functioned well in re- jecting Judge Bork and in approving Justices Kennedy and Souter. And, yes, 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 destruc- tive forces that were going to tear it apart.

As I said earlier, the root of the cur- rent collapse of the confirmation process is the administration’s campaign to make the Supreme Court an agent of an ultraright conservative social agen- da which lacks support in the Congress and in the country.

I would just point out again, par- enthetically, Mr. President, that the entire social agenda of the Reagan ad- ministration has yet to be able to gain a majority support in the U.S. Senate or the U.S. House of Representatives, or among the American people over the past 11 years. So failing the ability to get support for both the两会 parties, the administration and the Senate, and did conclude, that the avenue to that change was to remake the Court.

In describing how the reactions of differ- ent 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 adminis- tration’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 administra- tion’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 more 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 to- day’s woes, it is not the only cause of the confirmation deadlock. And here are three consequences of the Reagan ad- ministration’s nomination agenda that have contributed to the problem.

First, Democrats and moderate Rep- publicans have placed it into the hands of the Republican right by accepting Bose as the divine rod in reverse, making a nominee’s views or record, or 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 de- bate, 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 unre- lated 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-them
selves to be divided as single-issue participants.

This has given rise to even more frustration about the process from both parties. The nomination by itself 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 nomination 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, just what I was trying to find out.

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.

But, 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 enganged 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, intertemporal speech by a conservative Federal judge bashing two New York Times reporters who are among the finest to cover Supreme Court proceedings. 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 philosophic vision—look at the 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 at least share this ideological goal, such as Justices Kennedy and Souter, who were approved by a combined total of 163 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 heard, 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 meaness 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 Thomas’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.

In reference to 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 thatJudge Thomas had improper travel expenses, euphemistically 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 centered on disputes over public policy rather than on gratuitous 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 the Supreme Court’s potential—this 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 less-than-serious charges against nominees Bork, Kennedy, Souter, and Thomas which the most extreme committee critics say we have done too little to pursue.

Some examples of what these critics want 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 virginity. 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 seemed ready to discuss these, any discussion was deflected into the more familiar attacks on the nominees—charges of 19th-century politics can pollute Senate consideration of a distinguished candidate. And the 1968 filibuster against Abe Fortas’ nomination was launched by 19 Republican Senators, before President Johnson had even named Fortas as his nomination—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. In Thomas’s case, the current 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 last—the legendary August 1936 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 1852.

Thus, more relevant for the situation we could be facing in 1992 is this statistic: six Supreme Court nominations have been rejected in the summer or fall of a Presidential election year, and never—not once—has the Senate confirmed a nominee for these vacancies before November 1. In four of these six cases—in 1900, 1828, 1894, and 1856—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 1852 and Abe Fortas in 1968, the Senate refused to confirm these selections.

Thus, as we enter the summer of the President’s second term, it is no longer proper 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 confirmation 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 here, 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 distrust for the process. Senate consideration of a nominee under these circumstances is not fair to the President, to the nominee, or to the Senate itself.

Mr. President, where the Nation should be treated to a consideration of constitutional philosophy, all it will get in such circumstances is partisan bickering and political posturing from both parties and from both ends of Pennsylvania Avenue. As a result, it is
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my view that if a Supreme Court Justice resigns tomorrow, or within the next several weeks, or resigns at the end of the summer, President Bush should continue following the practice 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 dirtiest, dirtiest, Presidential campaigns we will have seen in modern times.

I am sure, Mr. President, after having read the news media's accounts of these negotiations, that they have, indeed, made those extraordinary bombings that occurred in the past week, and which I would 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 months to fill a vacancy. If the President, the cost of such a result, the need to rearrange three or four cases that will divide the Justices four to four are quite minor compared to the cost to the Court of an eight-month vacancy.

Mr. President, the Senate, and the Nation would have to pay for what would assuredly be a better 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 ultrconservative social agenda that the Congress and the public have rejected. In this way we would be confident 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 would not be able to hold this view, 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 protections of its use of "proprietary 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, separated Government, to move more power to the executive branch, imperiling the bipartisan, independent regulatory agencies and the modern regulatory State.

As I noted before, efforts to transform the confirmation process into a good-faith debate over these philosophical 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 American people. 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.

But 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 nominations, 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, the phrase "due deliberation 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 my consistent 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 outlier.

If the President works with a philosophically differing Senate or he modifies his choices to reflect the divergence, then his nominees deserve consideration and the 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. Their opinions are respected by 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 not vote 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 enti-
tled to say we reject the nominee 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 the Court has moved so far to the right already, it is too late for a progressive Senate to accept compromise candidates from a conserva-
tive administration. They would argue that the only people we should accept are liberal candidates, which are not going to come, nor is it reason-
able to expect them to come, from a conservative Republican President.

But I believe that so long as the public continues to split its confidence be-
tween 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 consult the President's right, then I will oppose his future nominees as is my right.

Once a nomination is made, the eval-
uation 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 sur-
rounding the nomination of Judge Bork have been 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 of
should be conducted and concluded.

Shortly after Judge Bork was nomi-
nated, after studying his records, writings and speeches, I announced my opposition to his confirmation and sev-
eral other members of the committee
did the same. What ensued was, I think, an educational and enlightening summer for everyone involved.

I laid out the basis for my position in two major national speeches and other Senators did likewise. The White House, as they should, have a very de-
tailed paper prepared to outline Judge Bork's philosophy; a group of respect-
ive consultants to the committee issued a response to this White House paper; and the administration put out a response to that response.

With those excesses in this de-
bate, as I mentioned earlier, by and large, it was an exchange of views and ideas between two major constitutional players in this controversy, the Presi-
dent 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 newspa-
pers accused me of rendering the ver-
dict first and trial later for the nomi-
nate. I say, that this was unfortunate be-
cause this criticism of our early posi-
tion on the Bork nomination has re-
sulted in, as I see it, four negative con-
sequences for the confirmation proc-
ess.

First, it gave rise to a powerful my-
thology that equates confirmation hearings to something closer to trials than legitimate legislative proceed-
ings. 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 Sen-
ators. Our decision on a nominee is not a neutral ruling as a judge would render. It is, as the Constitution de-
signed the process today, a political choice about val-
ues and philosophy.

We should junk, Mr. President, this trial mythology and the attendant matters that go with it. Arcane de-
bate over which way the presumption of error 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 pushing bills or voting on con-
stitutional amendments.

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

Second, a second unintended and un-
fortunate consequence of the criticism of early opposition based on specifi-
cally stated reasons: The criticism of taking early stands on nominees has pushed Senators out of the summer de-
bate over confirmation and left that debate to others, most especially the
interest groups on the left and the right. Instead of respected Senators on this side and others who would bring 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 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
divided worst. The nomination papers come down with briefers at the Justice Department pre-
paring for the hearing as a football team prepares for a game, watching films of previous hearings, studying the manerisms of each Senator, memorizing questions that have been asked, practicing and rehearsing non-
answers. Outside, the two branches' busy efforts are underway to form coal-
itions, launch TV attack campaigns, issue press releases, and shout loudly past one another.

This transformation hit its peak dur-
ing the Thomas nomination when by my count, there were twice as many media references to Thomas as to Bork. Most interest groups were lining up on the nomi-
nation than there were about the nomi-
nate's views. As with our Presidential campaigns, public attention in the pre-
hearing 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 pun-
dits 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 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 allowed the vacuum of this time to be filled by interest groups, and political parties fill the vacuum. The notion of 3 months of si-
lence 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, lobby-
ing groups, interest groups, ideological fringes, to define the debate and dictat-
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 existed 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 in their right, in a debate in a chamber, I am not criticizing that. Thus, my good friend, Senator RUDDIN for Judge Souter, and Senator DANFORTH for Judge Thomas, along with many other Senators became 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 a process that is not 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 time, American politics has changed the way we make confirmation hearings a far too significant forum for evaluating the nominee. 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 have gone too long, too fruitful, too thorough, too 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, 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.

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 is no 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 set 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 confirmation process, I 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, and voters 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 Constitution have tried to associate this frankness with the outcome. But this is a false lesson of the Bork nomination, I believe 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 fair and disinterested 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 background was 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, he 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.

Mr. BIDEN. Mr. President, I ask unanimous consent that I be able to proceed for 15 more minutes.

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 bitier exploration of the nominee's conduct and character.

In my view, 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. Just as I view Judge Thomas' confirmation, in part because of his evisceration, 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 the 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.

And I will 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 deem 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 investigatory 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. Of course, 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 with the difficult decisions we faced. We can debate these anguish 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, indeed, 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 all about the 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 investigatory 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 records.

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

This hearing will be conducted in all cases, even when there are no major investigatory 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 hope that they answer 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 will consider them as they are proposed.

But I hope that these three steps will increase confidence in our investigatory 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 the Games are 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 and their leaders.

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 ques-
tions that the confirmation process should force us to ask.

However this process operates, our institutions cannot be dealt with separately. But until 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 quite 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 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 its 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.

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

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

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

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

Senator BIDEN has stated previously that he will only support a President who nominates a Supreme Court nominee that the Senate constitutionally required role if the President chooses to compromise with the Senate before naming a nominee. I believe the Senate should ask itself just what this purported consultation and compromise process really amounts to. Is it supposedly necessary to ensure that the individual nominated is qualified and will be confirmed by the Senate? President Bush has already demonstrated with each of his previous nominations to the High Court, all of whom were qualified and confirmed, that such a consultation is unnecessary. In fact, in the last 10 years, the Senate has confirmed 97 percent of the over 600,000 nominations it has received. Although the chairman has focused his remarks on Supreme Court nominations, I wanted to note that figure for the RECORD. The net result of Senator BIDEN’s recommendation would require President Bush, or any President, to seek and obtain the approval of a small but vocal minority of Senators and special interest groups who have failed to defeat his previous nominees. If followed, the chairman’s suggestion would turn the current nomination process on its head.

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

I am aware that there have been administrations in the past that sought consultation with Members of Congress and party leaders prior to the actual nomination. That is understandable. That is as set forth in Section II of the Constitution. It is my firm belief that the role of the Senate in the confirmation process is to provide its advice and consent following a fair and impartial hearing. If this does not preclude a President, who is so inclined, from discussing a potential nominee with Members of the Senate.

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

For, it is this process—a process which should not be changed for election year expediency—which has signified the majesty of our system of government and underscores the brilliance of our Founding Fathers.

Indeed, I also want to point out that the fanfare surrounding the nomination hearings for Associate Justice Thomas was a result of confidential information coming out in the press. It is a far stretch to suggest that it could have been avoided if only President Bush had consulted with the Senate prior to Justice Thomas’ nomination.

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

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

THE PRESIDING OFFICER (Mr. BRYAN). Under the previous order the