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## Senate

(Legislative day of Wednesday, February 7, 1996)

The Senate met at 11 a.m., on the expiration of the recess, and was called to order by the President pro tempore [Mr. THURMOND].

### PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Let us pray:

My door was opened wide  
Then I looked around  
If any lack of service might be found,  
And sensed God at my side!  
He entered, by what secret stair,  
I know not, knowing only He was there.

Lord, You always have a secret stair. You come in ways we least expect. You are Lord of circumstances, people, and possibilities we would never imagine. When problems mount and we wonder how we are going to make it, then You give us a thought that turns out to be the key to unlock the solution to some difficulty. We stumble on an answer to a problem and we discover You had guided us at the fork in the road. You give us friends to help us. But the greatest evidence of Your intervention comes inside us. Suddenly in a spiritual dry spell, the wells of strength begin to fill up again. We are aware of fresh courage to replace our fear. We are gripped by a new perspective: the only thing that matters is that we belong to You and that You are in charge. Your secret stair has led to our hearts. You have not given up on us. You have plans for us. You will use everything that happens for Your glory and our growth, and a life full of surprises.

We thank You for the officers who give us security and protection. Today we affirm Officer Matthew Lutomski as he retires. We pray this in our Lord's name. Amen.

### RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The acting majority leader is recognized.

### SCHEDULE

Mr. LOTT. Mr. President, today, there will be a period for morning business until the hour of 1 p.m. with the time equally divided between both sides of the aisle. No rollcall votes will occur during today's session. However, the Senate may consider any legislative items that may be cleared for action. As a reminder to all Senators, the next rollcall vote will occur at 2:15 on Tuesday, February 27. That vote will be on the motion to invoke cloture on the D.C. appropriations conference report.

The PRESIDING OFFICER (Mr. GRAMS). The Senator from Utah.

### FEDERAL JUDGE APPOINTMENTS

Mr. HATCH. Mr. President, as you know, I do not take the floor very often unless I consider it very important.

One of the most lasting legacies of a President are the Federal judges he appoints for life. These judges are every bit as much a part of the Federal anti-crime effort as FBI and DEA agents and prosecutors.

Mr. President, the American people are going to face stark choices on a range of issues in November. One of those choices will be whether we resume the appointment of hard-nosed Federal judges who are tougher on crime than we can expect from the incumbent.

President Clinton talks about cops on the beat. Yet, he appoints some judges who are too willing to put criminals back on the street.

Let me tell the American people about Timothy Sherman of Maryland.

He was convicted in Maryland State court for the brutal shotgun murders of his mother and step-father. The murder occurred in the middle of the night when Timothy Sherman, who was 17 at the time, was at home. There was no indication of forced entry. Indeed, the home had an alarm system. The 12-gauge shotgun used in the murder belonged to the Shermans. Timothy Sherman's fingerprints were on the shotgun's trigger mechanism. A box holding five 12-gauge shotgun shells was found under his mattress, with two of the shells missing. The police found two matching expended shells that experts concluded were fired from the shotgun. Police found the murder weapon in the branches of a large tree, where the younger Sherman had hidden objects before, and which is located between his own house and the house of his grandparents to which he ran to report the killings.

Sherman's conviction was upheld by Maryland courts and the U.S. Supreme Court denied certiorari. Sherman then sought to have his conviction overturned through a habeas corpus petition. Why? Because a trial juror had visited the crime scene, particularly the tree where the murder weapon was found. This was indeed improper. But criminal defendants are guaranteed a fair trial, not a perfect one. The trial judge found that the error was harmless and not prejudicial. The Federal district judge, William M. Nickerson, who heard the habeas claim, also found the error to be harmless, thereby upholding the conviction in a well reasoned opinion. Judge Nickerson is a Republican-appointed judge, appointed by President Bush. The prisoner appealed the denial of the writ of habeas corpus to the fourth circuit. A Carter judge, Francis Murnaghan, and a Clinton district court judge sitting by designation, James Beaty, reversed the

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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Federal district court judge in a per curiam opinion. These two judges believed that the juror's visit had so prejudiced the proceedings as to invalidate the conviction and they granted Sherman the right to a new trial.

Judge J. Harvie Wilkinson dissented: "In light of all the evidence presented at trial, [the juror's] unauthorized excursion to the crime scene was harmless." Judge Wilkinson was appointed to the fourth circuit by President Reagan, over vigorous opposition by the other side of the aisle. Indeed, the other side of the aisle conducted a filibuster against this nominee at the time.

The two Republican appointed judges, then, would have rejected this convicted murderer's effort to overturn his conviction. The two Democratic-appointed judges have given him a new trial, which, if not undertaken within 6 months, will result in the prisoner's release.

Not to worry, say Judges Murnaghan and Beaty: "If the State of Maryland elects promptly to retry him, a jury, acting properly, may well again convict. It also may not, however, [convict him again] \* \* \*," but, at least the second trial will meet their standard of justice, and at the taxpayers' expense.

Fortunately, the entire fourth circuit will rehear this case. Mr. President, who do you think the American people would prefer to rehear this criminal case: a majority of judges appointed by Presidents Carter and Clinton, or judges appointed by Presidents Reagan and Bush? I should point out that President Clinton wishes to promote Judge Beaty to the Fourth Circuit Court of Appeals.

Let me turn to another recent, disturbing case. The New York Times of January 25, 1996, tells the story of Carol Bayless, who confessed to charges of possession of 75 pounds of cocaine and 4.4 pounds of heroin. She faced a minimum sentence of 10-years in jail and as much as life imprisonment.

According to the police officer's testimony, on April 21, 1995, he was patrolling in an unmarked car in plain clothes with his partner, both 10-year police veterans, in Washington Heights, an area he said was known as a hub for the drug trade. At about 5 a.m., he noticed Ms. Bayless' car, which had an out-of-State license plate, moving slowly down the street. She then double parked her car.

Four unidentified males then emerged from between parked cars and crossed the street in single file. Ms. Bayless popped open the car's trunk, and the men placed two large duffel bags in the trunk and closed it. The police officer did not observe any conversation between the males and the car's driver, and the entire episode took mere seconds. Ms. Bayless drove off and the police officer and his partner pulled up behind her at a stop light. As the two officers stared at the four men, two of the men noticed the police officers, spoke briefly to each other, and split up, rapidly moving in

different directions, with at least one of the men running from the area.

Do my colleagues find these circumstances suspicious? The police officer did. He pulled Ms. Bayless over, searched the car, and found the nearly 80 pounds of illegal drugs.

But according to Judge Harold Baer, Jr., appointed by President Clinton, the police officer is out of step and out of line. Judge Baer ruled that the police officer violated the Constitution's ban on unreasonable searches. Why? According to Judge Baer, the police officer did not have reason to be suspicious of the four men and Ms. Bayless. Oh no. Instead, according to this bleeding heart judge, the four men had reason to be suspicious of the police officer.

Here is what the Judge said: "Even before this prosecution \* \* \* residents in this neighborhood tended to regard police officers as corrupt, abusive and violent \* \* \* had the men not run when the cops began to stare at them, it would have been unusual."

Whose side is this judge on?

Understandably, "Ms. Bayless reacted with glee \* \* \* over the ruling \* \* \*" according to the New York Times. I am absolutely sure she did. As a practical matter, the judge's ruling, if it stands, lets her off the hook—free to run more dope into the veins of our people. Her lawyer called Judge Baer courageous. I would say he lacks common sense and judgment.

By the way, Ms. Bayless' 40-minute videotaped confession was also thrown out by Judge Baer because it resulted from the stopping of the car. In that confession, Ms. Bayless said she had made over 20 trips from Michigan to New York City to buy cocaine for her son and others beginning in 1991. Judge Baer found this drug runner's statement about what happened the morning of her arrest to be credible, and he rejected the police officer's testimony.

The President speaks about cops on the beat. This police officer was on the beat. He was risking his life on behalf of decent, law abiding citizens in Washington Heights and for all of us. He made a good arrest. He took nearly 80 pounds of deadly dope off the street, worth—well, it is incalculable how much that 80 pounds is worth.

But what is the use of cops on the beat if the President appoints soft-headed judges who let the criminals they catch back on the street? It just seems a waste of taxpayers' money. We might as well just let them do whatever they want to do. At least that is the conclusion one would draw from what Judge Baer did in this case.

I, for one, hope the U.S. attorney in this area appeals this decision, and I am going to be burned up if he does not.

In 1994, by a vote of 61 to 37, the Senate confirmed a Florida State judge, Rosemary Barkett, for the eleventh circuit, that no Republican would have appointed to the Federal bench.

Time and again, Judge Barkett, as a State judge, erroneously came down on the side of lawbreakers and against po-

lice officers and law enforcement. The full record of my concerns is set forth in the March 22, 1994, CONGRESSIONAL RECORD. But I cannot refrain from reminding my colleagues of one shocking and outrageous dissent she joined in a brutal murder case, in which she would have reduced a vicious killer's death penalty to life imprisonment, with eligibility for parole in 25 years.

Dougan versus Florida involved a terrible, racially motivated murder. The killer bragged about the murder in tape recordings which he mailed to the victim's mother. The dissent which Judge Barkett joined had the gall to say, in part:

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic action of murder. His frustration, his anger, and his obsession of injustice overcame reason. The victim was a symbolic representation of the class causing the perceived injustices.

This opinion reeks of moral relativism and excuse making that is totally unacceptable in a judge. And this opinion, which she joined, is just the tip of the iceberg regarding Judge Barkett's very liberal record as a State judge. Yet, President Clinton found her record to be within his mainstream and promoted her to an important judgeship.

Why is this so important? Why am I raising cain here today? As a practical matter, the Senate gives—and certainly I give—every President deference in confirming judicial candidates nominated by the President. A Republican President would not nominate the same judges that a Democrat would, and vice versa. Although the Senate has a constitutional duty to advise and consent to the nominees, the Senate, as a practical matter, gives the President leeway. The President has been elected by the whole country and, while this President has been unable to put all of his choices on the bench, he has filled many judgeships, as have his predecessors. We on the Judiciary Committee have gone along with him because we want to give this President deference. He did win the election. But let us not miss the point of this. We have to be concerned about what kind of judges this President is going to appoint.

I respectfully submit, therefore, that the American people must bear in mind that when they elect a President, they get his judges too—and not just for 4 years, but for life.

And, while the Senate has served as a check on the President, there is no substitute for holding, and exercising, the power to nominate Federal judges.

Indicia of judicial activism or a soft-on-crime outlook are not always

present in a nominee's record. Not every nominee who turns out to be a judicial activist or soft on crime can be ferreted out in the confirmation process. Indeed, as I mentioned earlier, every President is able to obtain confirmation of most of his nominees.

The general judicial philosophy of nominees to the Federal bench reflects the general judicial philosophy of the person occupying the White House—the Oval office, if you will. And differences in judicial philosophy have real consequences for the safety of Americans in their streets, homes, and workplaces.

I want to say that I believe the next President of the United States, whether it be President Clinton or whoever, is probably going to have the opportunity to nominate at least two Supreme Court Justices, maybe three. If President Clinton is reelected, he will have appointed better than 50 percent of the total Federal judiciary. It is something we all have to think about. I decry these kind of decisions made by the Clinton judges that I have named so far, and Carter judges—one.

I believe you could probably point out deficiencies in judges of every President. But I am really concerned, in this day of rampant criminal activity, with the flood of drugs into our society, that we have judges who are being appointed on a daily basis who have a philosophy like Judge Barkett's, who do not blame the acts of these criminals on themselves but blame them on society, blame them on their environment, on anything but their own volition and their own desire to do wrong.

I believe there are wrongs in our society. I believe that there are injustices. I believe that there is still discrimination in our society against certain people. I believe these things are wrong.

On the other hand, when people who are not insane commit heinous murders and heinous crimes and are spreading drugs among our young people and are destroying the youth of this Nation and doing it with full intent to do so and to profit from their decisions, or because they are murderers, then I think we ought to come down pretty doggone hard on them; that is, if we want to have a civil, humane, free, and fair society.

I will have more to say about these judges in the future, but I have become so alarmed about some of these decisions that I just felt I had to come to the floor today and make this point, since we on the Judiciary Committee have this very important honor of working with these judges. I do not think anybody can say that I have not done my very best to try to accommodate this administration, to try to help them in the appointment of judges. I am going to continue to do that as long as I can. I want to be fair to this President.

On the other hand, these type of judges are giving me the chills, and I think they are giving the American people the chills as well. We have to consider just who we want appointing these judges in the future.

I yield the floor.

The PRESIDING OFFICER. The Senator from Ohio.

#### FINISH WORK BEFORE WE RECESS

Mr. GLENN. Mr. President, I am glad to see there are a few of us left in Washington this morning: The Presiding Officer, Senator HATCH from Utah, myself—maybe there are a few other Senators around Capitol Hill, but there are not very many. It is that situation I wish to address briefly this morning.

I do not come to the floor very often and give lengthy speeches. This will not be a very lengthy speech this morning either, but sometimes I think a sense of responsibility on how the Senate conducts its business or does not conduct its business is in order. It is that issue I want to address this morning.

Mr. President, the Senate conducted rollcall votes on Wednesday. And although we are not technically in recess, there are no plans to have votes until February 27. No vote of the Senate was taken to decide whether we would recess. It was just decided we would go through the charade of pro forma sessions, of looking like we are doing something when actually we are not. I think it is important for the American people to know about what is going on here, because we have not passed all the appropriations bills for the fiscal year that started last October.

We are 5 months into this fiscal year without having dealt with the unfinished business of the Senate.

Currently the following departments are operating without regular appropriations bills. The Department of Veterans Affairs; the Department of Housing and Urban Development; the Environmental Protection Agency, the Department of Commerce, the Department of State, the Department of Justice, the Department of the Interior, the Department of Labor, and the Department of Health and Human Services.

We passed a continuing resolution. That is what we call it. A continuing resolution means you are supposed to go ahead and continue your operations as they were in the previous year if we have not passed an appropriations bill. But this year there is a new angle to this because in order to get a continuing resolution passed on most of these departments, most of what we would normally have had as a continuing resolution is not there because we have reduced most of them by 25 percent over what their expenditure limits would have been. In other words, most of them are having to limp along and make reductions in their activities.

I want to spell some of these out in a few minutes. But let me just say that five appropriations bills remain unfinished, and funding for the District of Columbia is not complete. We have yet to agree on a plan to balance the budget over the next 7 years.

We do not have a welfare reform bill, nor Medicare reform, nor Medicaid reform, nor health insurance reform, nor product liability reform, nor Superfund reform, nor an Endangered Species Act, nor a Safe Drinking Water Act, nor a Clean Water Act, and we even face defaulting on the debt endangering the full faith and credit of the United States come March 15 if we have not acted. And, incidentally, all of these CR's also run out. So there would be no funding for these agencies or departments come March 15 unless we take action of the full Congress to correct it.

All of the above is what we were supposed to be doing back in the 1995 calendar year that would apply to fiscal 1996 which we are in right now and have been since last October. We have not even started yet on the 1996 agenda that will be for next year's budget. So we are completely behind.

This lack of achievement will not stand in the way, however, of a 20-day break in the Senate schedule. I know that recesses are scheduled during a legislative session. But I want to call the attention of the Senate and the attention of the people of this country to the fact that this election year the Senate schedule is already curtailed, and we are well behind even on this year's activity.

Mr. President, by my count, if we assume an Easter recess, a Memorial Day recess, a Fourth of July recess, an August recess for the party nominating conventions, and an October 4 sine die adjournment—and a not unusual Senate 4-day workweek. The norm here is that nothing of substance usually happens Monday morning and there is nothing of substance normally on Friday afternoon. There are only about 88 legislative days left in this 104th Congress this year to accomplish the business of last year as well as the business of this year.

It is probably more like 70 to 75 days when we know the actual number of days when Members are here in numbers to conduct business. Sometimes we put things off from one day to another because certain people are not here, or their schedule has been accommodated by leadership on both sides of the aisle. But I think even an optimistic count, if you look at the calendar, is that we will have about 88 days left this year. That may come as a shock to a lot of people because they think we are here in mid-February and we have all the rest of this year to get our job done. We do not. Of the legislative days here, we have about 88 days left for this year right now. I do not see how we accommodate our business that has to be done in that time period.

Let me point out some of the problems that the Nation faces and we avoid by not being here doing our work. I requested that some of the affected agencies tell me how they are