

EXECUTIVE SESSION

NOMINATION OF MARSHA L. BERZON, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

NOMINATION OF RICHARD A. PAEZ, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the time between 2:15 and 5 o'clock is equally divided between the proponents and opponents of the Berzon and Paez nominations.

The Senator from Utah.

Mr. HATCH. I ask unanimous consent that the debate now occur concurrently on the two nominations, as under the previous order; however, that any votes ordered with respect to the nominations occur separately.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Mr. President, it is my understanding that has been cleared with the minority on the Judiciary Committee.

Mr. HATCH. That is my understanding.

Mr. REID. That being the case, Senator LEAHY having approved this, we have no objection.

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

Mr. HATCH. Mr. President, I rise today to speak on the nomination of federal district Judge Richard Paez to the Ninth Circuit Court of Appeals.

Judge Paez was first nominated for this judgeship during the second session of the 104th Congress—a time when all nominees to the Ninth Circuit got bound up with the difficulties we were having in deciding whether to divide the Circuit. Once we established a Commission to study the matter, we were able to begin processing nominees to that court.

Judge Paez was renominated at the beginning of the 105th Congress, but due to questions surrounding his record on the bench and comments he made about two California initiatives, his nomination elicited heightened scrutiny.

Some have attributed this delay in Judge Paez's consideration by the full Senate to sinister or prejudicial motives. And I can only respond by stating what those very critics already know in their hearts and minds to be true: such aspersions are utterly devoid of truth, and are grounded in nothing more than sinister, crass politics.

As we all know, before any judge can be confirmed, the Senate must exercise its duty to provide assurance that those confirmed will uphold the Constitution and abide by the rule of law. Sometimes it takes what seems to be an inordinate amount of time to gain these assurances, but moving to a vote without them would compromise the integrity of the role the Senate plays in the confirmation process.

And so, it has taken a considerable amount of time to bring Judge Paez's nomination up for a vote. Indeed, it was not before a thorough and exhaustive review of Judge Paez's record that I have become convinced that questions regarding Judge Paez's record have, by and large, been answered.

Because such questions have been answered does not, in all instances, mean they have been answered to my complete satisfaction. But on the whole, I am persuaded that Judge Paez will be a credit to the Ninth Circuit Court of Appeals. In so concluding, I do not want to diminish the seriousness of the concerns raised about certain aspects of Judge Paez's record.

I was troubled by comments Judge Paez made about two California initiatives on April 6, 1995, while sitting as a U.S. District Court Judge. At that time, Judge Paez gave a speech at his alma mater, Boalt Hall School of Law, criticizing the passage of Proposition 187 and criticizing the ballot measure that would later be known as Proposition 209. He described Prop 209 as "the proposed anti-civil rights initiative" and said it would "inflamm[e] the issues all over again, without contributing to any serious discussion of our differences and similarities or ways to ensure equal opportunity for all." Judge Paez went on to opine that a "much more diverse bench" was essential in part because how "Californians perceive the justice system is every bit as important as how courts resolve disputes."

When questioned at his hearing about these and other comments contained in the speech, Judge Paez stated that he was referring only to the potential divisive effect Prop 209 would have on California. He acknowledged that the Ninth Circuit had in fact upheld the constitutionality of Prop 209 and that this ruling resolved any question as to the legitimacy of the initiative. He also stated that he disagreed with the use of proportionality statistics in Title VII or employment litigation. And, perhaps most telling of his judicial philosophy, Judge Paez stated that federal judges must "proceed with caution, and respect that the vote of the people is presumed constitutional."

Legitimate questions have been raised concerning whether his comments were consistent with the Judicial Canon governing judges' extra-judicial activities, and Judge Paez maintains that his remarks fit within the exception set out in that Canon that permits a judge to make a scholarly presentation for purposes of legal education.

I also raised concerns about a decision of Judge Paez's that would allow liability to be imposed on a U.S. company for human rights abuses committed by a foreign government with which the U.S. company had engaged in a joint venture. But it is a single moment in a lengthy catalog of cases in which Judge Paez appears to have handed down solid, legally-supported, precedent-respecting decisions.

Moreover, Judge Paez has earned a good deal of bipartisan support within his home state of California and his native state of Utah, and has given me his word that he will abide by the rule of law and not engage in judicial activism.

For these reasons, I am not willing to stand in the way of this nominee's confirmation. It was during the Committee's thorough review of his record that I became aware of Judge Paez's credentials and career of public service. He is a Salt Lake City native who graduated from Brigham Young University and he received his law degree from Boalt Hall.

Before becoming a Judge on the Los Angeles Municipal Court, he served as an attorney for California Rural Legal Assistance, the Western Center on Law and Poverty, and the Legal Aid Foundation of Los Angeles—and during that time provided legal representation to a Korean War veteran in danger of losing his home to foreclosure, victims of intentional racial discrimination, and others. In 1994, President Clinton nominated, and the Senate confirmed, Judge Paez to sit on the district court bench in the Central District of California.

Although I share many of my colleagues' concerns regarding the stability of the Ninth Circuit, none of us can in good conscience foist those concerns upon Judge Paez—an entirely innocent party with regard to that Circuit's dubious record of reversal by the Supreme Court—and force him into the role of Atlas in carrying problems not of his own making.

Indeed, that Circuit's problems—many of which appear to me to be structural in dimension—call for an altogether different solution than that which this body would seek to impose through its advice and consent powers. And to that end, I have just [this morning] introduced legislation with Senator MURKOWSKI that is being held at the desk so as to enable immediate action by the full Senate—that would divide the 28-judge behemoth of a circuit into two manageable circuits.

To return to the different subject of Judge Paez, I must concede that I have had concerns about his nomination. But on balance I do not believe that Judge Paez will contribute to the roguery that appears to have infiltrated this circuit. I would not, as Chairman of the Judiciary Committee, vote for the confirmation of any nominee who I believed would abdicate his or her duty to interpret and enforce, rather than make, the laws of this Nation.

For these reasons, I will cast a vote in favor of the nomination of Judge Paez to serve on the Ninth Circuit Court of Appeals. I hope a majority of my colleagues will do likewise.

Mr. President, I also rise to speak on behalf of the nomination of Marsha S. Berzon for a seat on the United States Court of Appeals for the Ninth Circuit. Based upon Ms. Berzon's qualifications as a lawyer, I support her nomination. I urge my colleagues to do the same.

It cannot be disputed that Ms. Berzon's training and experience qualify her for a life of public service as a federal appellate judge. Indeed, Ms. Berzon's qualifications are unimpeachable, and her competence is beyond question. Ms. Berzon completed her undergraduate studies at Harvard/Radcliffe College, and then was graduated from the Boalt Hall Law School at the University of California. After law school, Ms. Berzon served as a judicial clerk—first for Judge James R. Browning of the United States Court of Appeals for the Ninth Circuit, and then for Justice William J. Brennan, Jr. of the United States Supreme Court.

For the last 25 years, Ms. Berzon has built a national reputation as an appellate litigator at a private law firm in San Francisco. She has argued four cases and filed dozens of briefs before the United States Supreme Court, and has argued numerous cases before State and federal trial and appeals courts. In addition to representing private clients, Ms. Berzon also has represented the States of California and Hawaii, and the City of Oakland, California. Ms. Berzon is uniformly described as honest, intelligent and fair-minded. Attorney J. Dennis McQuaid, whom she opposed in a case, later stated that "unlike some advocates, she enjoys a reputation that she is devoid of any remotely partisan agenda and that her service on the court will be marked by decisions demonstrating great legal acumen, fairness and equanimity." Another opposing counsel, Carter G. Phillips, said that in a case involving delicate federalism issues, Ms. Berzon

... did an extraordinary job of presenting her clients' position aggressively without overreaching. She presented solid limiting principles that would allow the lawsuit to go forward without placing too much of a burden on the State. I thought her submissions, both written and oral, demonstrated a significant effort to balance the respective interests implicated by the legal issue. . . . Her advocacy demonstrated skill, integrity and sound judgment. These are precisely the traits I would want in a federal appellate judge.

Simply put, Ms. Berzon appears to have the intellect, integrity and impartiality to serve as a federal judge.

The fact that many of Ms. Berzon's clients have been unions should not disqualify her from being confirmed. That Ms. Berzon has advocated on behalf of unions—and, by all accounts, advocated well—cannot, I think, be determinative of her qualifications. In her testimony before the Judiciary Committee, Ms. Berzon testified that she is committed to following the Supreme Court's Beck decision, which sets forth the statutory rights of employees who object to their union dues being used for political activities. Moreover, Ms. Berzon testified that, if confirmed, she will make decisions based upon the law and the facts of the particular case before her. No one has shown me evidence why I should not take Ms. Berzon at her word.

In addition to having excellent legal training and experience as a lawyer, Ms. Berzon also has experience in legal academia. She has taught law students as a practitioner-in-residence at Cornell University Law School and at Indiana University Law School, and has published articles on various legal topics. In my view, she will bring to the Ninth Circuit a significant measure of intelligence, experience and legal scholarship.

In conclusion, Ms. Berzon is well-qualified to assume a seat on the United States Court of Appeals for the Ninth Circuit. She enjoys a reputation among colleagues and opposing counsel for being a fair-minded, well-prepared, and principled advocate. I therefore will cast my vote in favor of Ms. Berzon's confirmation.

The PRESIDING OFFICER. The majority leader is recognized.

UNANIMOUS CONSENT REQUEST— S. 761

Mr. LOTT. Mr. President, I ask unanimous consent to appoint the conferees to S. 761, the Millennium Digital Commerce Act.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Mr. President, reserving the right to object, has the leader cleared this with someone on this side of the aisle?

Mr. LOTT. Mr. President, if I could respond to the distinguished Democratic whip, this is for conferees on this Millennium Digital Commerce Act. We have tried, over the past couple of weeks, to get clearance to appoint conferees.

The recommendation was that we have, I believe, 11 from the Commerce Committee, 3 from Banking—6 and 5 and 2 and 1. For some reason, there have been objections to that. There continue to be objections, but this is a bill that has broad support in the industry and on both sides of the aisle. So I am confused and perplexed about why we can't get these conferees appointed and move forward to this conference. So it has not been signed off on, as I understand it. But since I talked to the Democratic leader last week twice, I thought perhaps we had reached a point where this could be done.

Mr. REID. I am confident we can work it out. But at this stage, I will have to object.

The PRESIDING OFFICER. Objection is heard.

Mr. LOTT. Mr. President, if I could be heard on this issue at this time.

I don't understand, again, what the objection is to this procedural motion. The House appointed conferees to this bill 2 weeks ago, and they have been calling over saying, "What is the deal?" I understand that perhaps there are other Senators who would like to be conferees from other committees. There is some indication that maybe the problem is they don't like the fact

there are some Banking conferees. The House bill has several provisions that are clearly in the Banking jurisdiction, and that is why we have recommended having three from Banking—two and one—so we can get this into conference and get it worked out.

There are a lot of us who realize there are Silicon Valley interests in this. We also have the Dulles corridor high-tech industry in Northern Virginia that really wants this legislation completed. I don't think it would be a long conference. So I want to highlight the fact that we are anxious to get to conference.

I have addressed concerns as best I could. I don't think we can take Banking members off the conference. Maybe there is another way to solve this problem. But since I was getting questions both from the high-tech industry and from the House as to why we weren't going on to conference, I had to point out or emphasize what the problem was.

I would be glad to yield to the Senator from Michigan, the author of this legislation. He probably knows more about it than any other Senator.

Mr. ABRAHAM. If the majority leader will yield briefly, I thank him for making another attempt to appoint conferees on this legislation.

Mr. President, I share the majority leader's frustration over our inability to really move anywhere with this bill. This bill, the Millennium Digital Commerce Act, is a bipartisan bill. This legislation passed the Senate by unanimous consent. We worked together here to try to craft the legislation in a bipartisan fashion. The House companion legislation passed by an overwhelming margin.

I understand—and the majority leader has just indicated it again—there may be some Members who have concerns with the bill. But, obviously, going to conference is the usual procedure for moving legislation. As I understand the request that has been put forward, there would be six Democratic Senators on the conference committee, which is about 15 percent of the entire Senate Democratic caucus who would then be able to participate in the proposal.

Mr. LOTT. If the Senator will yield on that point, I also note at this time that I think the House only has perhaps five conferees. I don't believe I have ever been to a conference where the House has one-third as many conferees as the Senate. So we have already tried to include as many Senators as we possibly could.

Mr. ABRAHAM. I do think that is a sufficient number to guarantee the views reflected by each side. They would be adequately represented in the conference.

Mr. LOTT. Let me ask the Senator something, if I may. This is a sophisticated title, the Millennium Digital Commerce Act. What does this bill do?

Mr. ABRAHAM. Essentially, the legislation is designed to address a problem we have now with respect to the