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Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore [Mr. THURMOND].

The PRESIDENT pro tempore. Today's prayer will be offered by our guest Chaplain, Dr. Terry Harter, First United Methodist Church, Champaign, IL.

PRAYER

The guest Chaplain, Dr. Terry Harter, offered the following prayer:

Almighty God, What is a nation without You? Indeed, who are we without You at the center of our lives? What value is all that we know, vast accumulation though it be, but a chipped fragment if we do not know You, Author of wisdom? What is the sum of all our stirring and working, even in this mighty Chamber, but a half-finished work if we do not know You, Creator of galaxies, and Star-spark of life within us?

We know, Lord of all nations, that You have always taken more than a passing interest in the ways and works of all those women and men to whom You have granted stewardship of government and leadership in the nations of the world.

So it is, that at the beginning of this day, we pray for all who serve here; from the President pro tempore and Senators, to the pages and staff, from the reporters and Capitol police to the people who raise the flags over us.

We call upon You, Gracious God, that these persons whom You love may on this day be encountered by the glad surprise of Your Grace, and come to know You in the midst of their work on behalf of the Nation.

Today, in the press of the calendar and stress of the schedule; grant them moments of Your peace.

Today, under the burden of issues which rearrange human destiny; grant them a clear vision of Your zeal for truth and justice.

Today, amidst the seductiveness of their power; grant them courage to live and work on the side of Your power.

Today, as they labor here, guard their families, heal their wounds, restore their relationships to health.

And as the day wanes, revive their sagging spirits and forgive their shortcomings. Turn them away from the temptation of bitterness and blame, so that in the darkest hour of the night they might trust Your ever-present redeeming grace and come to know that You love them. O Lord of all nations, hear our prayer. Amen.

PLEDGE OF ALLEGIANCE

The Honorable MIKE CRAPO, a Senator from the State of Idaho, led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The Senator from Idaho is recognized.

SCHEDULE

Mr. CRAPO. Mr. President, the Senate this morning will begin postclosure debate on the nominations of Marsha Berzon and Richard Paez. By previous order, back-to-back votes on the confirmation of the nominations will occur at 2 p.m.

Following the votes, the Senate will resume morning business for the introduction of bills and statements. The Senate may also turn to any legislative or executive items cleared for action.

I thank my colleagues for their attention.

The PRESIDENT pro tempore. The Senator from Nevada is recognized.

Mr. REID. I thank the Chair.

LEGISLATIVE COOPERATION

Mr. REID. Mr. President, we look forward to today's activities. We hope we can move forward with an up-or-down vote on these two nominations. We also are looking forward to the legislative skills of the chairman of the Banking Committee, Senator GRAMM, to get us to the point where we can again work on the Export Administration Act, which was considered yesterday for a brief period of time. This legislation is extremely important to the country. It is important not only to the high-tech industry but our economy generally. There is not a piece of legislation that is more important to move along than this one as it will allow us to compete with foreign nations in the exportation of computers and other high-tech equipment. This is something that needs to be done, and we hope that in the week we get back from our break, we can move into a very productive session, taking care of the Export Administration Act, doing something about prescription drugs, and other waiting legislative matters, also recognizing that the minority is willing to work in conjunction with the majority in any way to move all legislation. I think we showed our good faith last week when we were able to move such a large amount of legislation including amendments on the education tax initiative that was put forth by the majority.

So we look forward to completing today's work and, after next week, doing the many things that burden us legislatively.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER (Mr. CRAPO). Under the previous order, leadership time is reserved.

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



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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. The Senate will now return to executive session and resume postcloture debate on the two Ninth Circuit judicial nominations which the clerk will report.

The legislative clerk read the nominations of Marsha L. Berzon, of California, and Richard A. Paez, of California, to be United States Circuit Judges for the Ninth Circuit.

The PRESIDING OFFICER. Under the previous order, the Senator from New Hampshire, Mr. SMITH, shall be in control of up to 3 hours of total debate on both nominations and the Democratic leader or his designee shall be in control of up to 1.5 hours of total debate on both nominations.

Mr. SMITH of New Hampshire. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SMITH of New Hampshire. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SMITH of New Hampshire. Mr. President, as we have gone through this debate, although my name was not attached to anything in terms of a filibuster, it is no secret that I have been the person who has filibustered these two nominees, Judge Berzon and Judge Paez. The issue is, why are we here? What is the role of the Senate in judicial nominations?

The Constitution gave the Senate the advise-and-consent role. We are supposed to advise the President and consent if we think the judge should be put on the court. We do not get very much opportunity to advise because the President just sends these nominations up here—he does not seek our advice—and then we are asked to consent.

Based on some of the comments that have been made to me privately and some of the things I have read publicly, it seems as if the Senate should be a rubber stamp, that we should just approve every judge who comes down the line and not do anything with the advise-and-consent role. That is not the way I read the Constitution.

I believe that is wrong. We have an obligation under the Constitution to review these judges very carefully. I have certainly voted for more than my share of judicial nominations this

President has put forth. But I point out that the two nominees before us, in terms of their legal opinions—and that is all we are talking about; we are not talking about any personal matters other than their legal opinions—I believe are activist judges; they are out of the mainstream of American thought, and I do not think either one should be put on the court. The bottom line is they are controversial judges.

I was criticized by some for filibustering, that “we are on a dangerous precedent” of filibustering judges. The filibuster is over. We are now on the judges. The filibuster is a nonissue.

Filibuster in the Senate has a purpose. It is not simply to delay for the sake of delay. It is to get information. It is to take the time to debate and to find out about what a judge’s thoughts are and how he or she might act once they are placed on the court.

I was told by some of my colleagues yesterday that we are going down “a dangerous path” to debate these judges and slow them down, whether it be through a filibuster or debate in this Chamber. My colleagues will find there will be very few people who will speak in the roughly 3 hours on our side under my control. That is sad. I believe we should air the concerns we have.

As far as the issue of going down a dangerous path and a dangerous precedent, that we somehow have never gone before, as I pointed out yesterday and I reiterate this morning, since 1968, 13 judges have been filibustered by both political parties appointed by Presidents of both political parties, starting in 1968 with Abe Fortas and coming all the way forth to these two judges today.

It is not a new path to argue and to discuss information about these judges. In fact, Mr. President, Chief Justice William Rehnquist sat in your chair about a year ago finishing up the impeachment trial of President William Jefferson Clinton. When William Rehnquist was nominated to the Court, he was filibustered twice. Then after he was on the Court, he was filibustered again when asked to become the Chief Justice. In that filibuster, it is interesting to note, things that happened prior to him sitting on the Court were regurgitated and discussed. So I do not want to hear that I am going down some trail the Senate has never gone down before by talking about these judges and delaying. It is simply not true. I resent any argument to the contrary because it is simply not true.

I will talk a bit about the Ninth Circuit on which these two judges are about to go. Make no mistake about it, this is going to be a tough vote to win. I know that. But it does not mean the fight should not be made. We are all judged as Senators based on what we do, what we say, and how we act. History will judge us, as it has judged the great Senators such as Clay, Calhoun, and Webster who debated the great issues before and during the Civil War. We are judged on what positions we

take. Maybe history will prove a Senator is right; maybe history will prove a Senator is wrong. When it comes time to make that vote, one does not have anyplace to hide. One has to make it and take the consequences one way or the other. I do what I do with the best information I have.

I can assure my colleagues that I have researched both of these judges very carefully. I have looked at the Ninth Circuit very carefully, and I have grave concerns about two very controversial judges being placed on a very controversial circuit court, the ninth. This is a renegade circuit court that is out of the mainstream of American jurisprudence. It has been reversed by the Supreme Court 90 percent of the time. It is important to let that sink in. Ninety percent of the decisions this Ninth Circuit has made have been overturned by the U.S. Supreme Court.

I want to repeat some of those statistics. From 1999 to now, 7 of 7, 100 percent of their cases, have been reversed. In 1998 to 1999, 13 of 18 were reversed, 72 percent.

From 1997 to 1998, 14 of 17, or 82 percent, were overturned. We can go on and on. From 1996 to 1997, 27 of 28 cases this court gave a decision on were overturned, 96 percent. From 1995 to 1996, 10 of 12 were overturned, 83 percent—and on and on and on. The average is: 90 percent of the cases were overturned in the past 6 years. There have been 84 reversals in the last 98 cases. That is an abysmal record, to put it mildly.

The Ninth Circuit is routinely issuing activist opinions. While the Supreme Court has been able to correct some of these abuses, the record is replete with antidemocratic, antibusiness, and procriminal decisions which distort the legitimate concerns and democratic participation of the residents of the Ninth Circuit. Some of the more outrageous opinions include striking down NEA decency standards, creating a “right-to-die,” blocking an abortion parental consent law, and a slew of obstructionist death penalty decisions.

I hope the American people and my colleagues understand that when you hear these terrible stories about prisoners getting out after 5 years, or people committing terrible crimes and never going to jail or getting pardoned or getting lenient sentences, this is not an accident. This happens because of the people we put on the court.

We are here as Senators to advise and consent, or not to consent, on the basis of these nominees. How many times do you read in the paper some judge let some criminal out, and the guy committed a crime again and again, and he got out again and did it again? It goes on and on—stalking, rape, murder, robbery, armed robbery, assault, over and over and over again. Time after time after time we hear about that happening. We sit around our living rooms at night, we watch television, we talk to each other, our families, and ask: Why did this happen? What in the world is the matter with the judges?