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Senate

The Senate met at 10 a.m. and was called to order by the Honorable BEN RAY LUJÁN, a Senator from the State of New Mexico.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal God, listen to our cries for help. Guide our lawmakers, empowering them to act with integrity. Lord, give them wisdom to test their motives as they become more aware of Your mercy. Keep them from drowning in shallow water. Inspire them to resolve to cultivate an unwavering trust in the unfolding of Your prevailing providence.

Lord, we thank You that Your mercies are new each day. Great is Your faithfulness.

And, Lord, we continue to pray for Ukraine.

We pray in Your merciful Name. Amen.

PLEDGE OF ALLEGIANCE

The Presiding Officer 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.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. LEAHY).

The senior assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, April 6, 2022.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby

appoint the Honorable BEN RAY LUJÁN, a Senator from the State of New Mexico, to perform the duties of the Chair.

PATRICK J. LEAHY,
President pro tempore.

Mr. LUJÁN thereupon assumed the Chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session and resume consideration of the following nomination, which the clerk will report.

The senior assistant legislative clerk read the nomination of Ketanji Brown Jackson, of the District of Columbia, to be an Associate Justice of the Supreme Court of the United States.

RECOGNITION OF THE MINORITY LEADER

The Republican leader is recognized.

NOMINATION OF KETANJI BROWN JACKSON

Mr. MCCONNELL. Mr. President, yesterday, I explained how Democrats created the current norms around judicial appointments.

These days, the Senate takes an assertive role. In particular, most Senators do not merely check resumes and basic legal qualifications but also look into judicial philosophy.

This is a discussion Republicans welcomed because judicial philosophy is not a routine policy disagreement, like debates over spending or tax rates or

energy. These are the sorts of normal policy differences that our system of government is built to handle.

But if judges misunderstand the judicial role, that damages the system itself.

Our genius Founding Fathers set up three branches of government. Two of them get to make policy. Congress writes and passes laws, Presidents sign or veto them, and they are both accountable through frequent elections.

The third branch responsibilities are completely and totally different. The courts exist not to rewrite laws but to apply them as written; to protect every American's right to the consistent, impartial rule of law. So the judiciary is insulated and independent.

Republicans want to uphold the separation of powers the Framers left us. We want judges to honor their limited role in our Republic, stick to the text, rule impartially, and leave policymaking to policymakers. And then we want those judges to have total freedom from political threats and bullying.

The political left has long held exactly the opposite. They believe the Framers got the judicial role wrong. They want the Supreme Court to be another forum where progressives can pursue policy outcomes and social changes.

When liberals fail to convince 218 House Members and 60 Senators of a position, they want to cross the street and try to persuade five lawyers instead. They want judges going beyond the text, roaming through policy questions and moral judgements.

So this is a huge difference. It has consequences for American families on issues from crime to border security, to religious liberty, and to the health of our institutions.

So the key question for the Senate is this: Where does Judge Jackson come down? Where does her record land along this spectrum?

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



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Well, before the nominee was announced, President Biden gave a troubling hint. He said whomever he nominated to the Court would have to "have an expansive view of the Constitution," acknowledge rights that our founding documents leave unsaid, and guarantee specific outcomes in certain categories of cases. The President promised he would only nominate a judicial activist for the job.

So I could only support Judge Jackson if her record and testimony suggested President Biden actually made a mistake; that he had accidentally chosen a nominee who was not the kind of liberal activist that he promised.

But, unfortunately, Judge Jackson's record and testimony suggests she is exactly the kind of liberal activist that the President promised. In case after case, when statutory text, standards, or guidelines pointed in one direction, Judge Jackson set them aside and charted a course for a different outcome.

As a district court judge, the nominee heard the case of a liberal activist group challenging the Federal Government's authority to deport illegal immigrants. The statute in question plainly gave the Department of Homeland Security "sole and unreviewable discretion" to enforce the policy.

But, apparently, it didn't lead to the policy outcome Judge Jackson wanted. So she ignored the statute, sided with the activists, and used a nationwide injunction—a nationwide injunction—to impose her new policymaking on the entire country.

This was such a blatant act of judicial activism that even the liberal DC Circuit overturned her ruling.

Or take another case involving a fentanyl trafficker. If you read the initial trial transcripts, Judge Jackson editorialized and expressed regret that the law forced her to punish him somewhat harshly. She literally apologized to this self-described "kingpin" that she wasn't allowed to go softer.

But the next time she saw this criminal at a compassionate release hearing, Judge Jackson was ready to legislate from the bench to give him the sentence she wished that she could have given him before.

Even after the judge explicitly acknowledged the First Step Act was not retroactive, she tortured its compassionate release provisions to make it retroactive anyway.

The fentanyl kingpin will be coming soon to a neighborhood near you, thanks to Judge Jackson. Congressional intent was no match for Judge Jackson's intent.

And then there is Judge Jackson's troubling record in a variety of cases involving child exploitation. On average, where these awful crimes are concerned, Judge Jackson's peers on the Federal bench fall within the stiff sentences Congress prefers a third of the time. But in 11 cases, Judge Jackson didn't fall within the guidelines even once.

At her confirmation hearing last month, the Judiciary Committee gave Judge Jackson a chance to clear up the activist track record. The nominee did not reassure.

She repeatedly declined to answer why her discretion slanted so dramatically and consistently in the direction of going soft on crime. She just kept repeating that she had the discretion. Clearly, what Senators wanted to know is why she used the discretion the way she did.

Judge Jackson did tip her hand on a few occasions. She acknowledged that her ignoring the guidelines amounted to "making policy determinations." Another time she referenced her personal "policy disagreements" to explain her jurisprudence.

So if you look at her sentencing transcripts, that is exactly right. Not only did the judge herself make frequent reference to her "policy disagreement" with the guidelines, but you can see the prosecutors in her courtroom knew they had to acknowledge her bias as well before arguing that she should finally get tough in their particular case. But always in vain, of course, because she never got tough once—not once—in this area. But prosecutors knew what policy bias they were going to get when they showed up in Judge Jackson's courtroom.

Of course, this is exactly, precisely what we do not want judges doing.

Senate Republicans gave the judge many opportunities to reassure, but in many cases, the nominee just dug deeper. At one point, the judge even echoed an infamous quotation from one of the most famous judicial activists in American history, the archliberal Justice Brennan used to say the most important rule in constitutional law was the "Rule of Five"—the "Rule of Five."

And Judge Jackson told the Senate "any time the Supreme Court has five votes, then they have a majority for whatever opinion they determine."

That is judicial activism summarized in one sentence.

So to summarize, Judge Jackson's nomination started off on the wrong foot because President Biden had promised he would only nominate a judicial activist. I hoped that maybe the judge's record and testimony would persuade us otherwise. Maybe she would persuade the Senate that she understands the proper judicial role. Unfortunately, what happened was just the opposite.

I opposed Judge Jackson's confirmation to her current post last year over these very same concerns, and this process has only made those concerns stronger.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. DURBIN. I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The majority whip.

NOMINATION OF KETANJI BROWN JACKSON

Mr. DURBIN. Mr. President, I listened to the Republican leader speaking about the Supreme Court nominee Judge Ketanji Brown Jackson, who is coming before the Senate either today or tomorrow, we hope, for a confirmation vote. We have solid support for her nomination on the Democratic side and three Republican Senators who have announced that they will join us to make it a bipartisan majority in her favor.

She is deserving of this. She has an extraordinary background. She has the kind of resume that every lawyer would dream of: to graduate from Harvard Law School and then to clerk at every level of the Federal judiciary, including clerk to the Justice she hopes to succeed, Stephen Breyer; and then to serve on the Sentencing Commission, which is considered one of the more prestigious assignments, trying to rationalize the sentencing under Federal law; and then, of course, to serve on the district court in the DC district and to issue some 570 or 80 different opinions—written opinions—during that time; to be elevated to the DC Circuit Court, often called the second highest court in the land, where she served as well with distinction; and now to be the first African-American woman nominated to serve on the U.S. Supreme Court. It is an incredible record.

And she has made the rounds, as they say, in the Senate, visiting 95 or 96 different Senators, sitting down with them privately in their offices, answering any questions or concerns that they wish to express.

So I think she is an exceptional person. If you look at her record in all of these cases that she has handed down written opinions in—as I said, it is close to 600, and 100 of them were criminal cases where she imposed sentences, and some 10 or 15 of those cases which have been highlighted by her Republican critics, relating to the issue of the exploitation of children and pornography, in every single case, she imposed a prison sentence.

So to argue that she is soft on crime is to ignore that reality and to ignore the reality that she is endorsed—endorsed—by the largest law enforcement organization in America, the Fraternal Order of Police. She is endorsed by the International Association of Chiefs of Police and other noteworthy organizations, the National Organization of Black Law Enforcement, former prosecutors in the District of Columbia.

She has made it very clear that when it comes to applying the law to the facts, she does it with evenhandedness, so much so that she is respected by both sides of the table—the prosecutor's side of the table and the defense side of the table. That takes some doing, but she has achieved it. And