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Senate

The Senate met at 9:45 a.m. and was called to order by the Honorable LISA MURKOWSKI, a Senator from the State of Alaska.

PRAYER

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

Let us pray.

Eternal spirit, You have said that the truth will set us free. We thank You that Your freedom leads to harmony and not discord, to consensus and not conflict. Liberate us from deceptions and distortions that caricature reality and misrepresent facts.

Empower our Senators to find freedom in being as true to duty as the needle to the pole. Continue to teach them the fine art of conciliation and motivate them to continue to choose rational roads instead of emotional dead ends. Lift them above partisan rancor, and give them power to walk in Your light, to act in Your strength, to think in Your wisdom, to speak in Your truth, and to live in Your love. Inspire each of us to stand for right, even though the heavens fall.

We pray in the Name of Him who is the truth. Amen.

PLEDGE OF ALLEGIANCE

The Honorable LISA MURKOWSKI 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. STEVENS).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, May 24, 2005.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable LISA MURKOWSKI, a Senator from the State of Alaska, to perform the duties of the Chair.

TED STEVENS,
President pro tempore.

Ms. MURKOWSKI thereupon assumed the Chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

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

SCHEDULE

Mr. FRIST. Madam President, this morning we will continue debate in executive session on the nomination of Priscilla Owen to be a U.S. Circuit judge for the Fifth Circuit, and today at noon we will have a cloture vote with respect to the Owen nomination. In light of the events of yesterday, I expect cloture will be invoked this afternoon. If that cloture vote is successful, it is my desire to proceed expeditiously to vote on that confirmation. Members have had the opportunity to speak for over 40 hours, and hopefully we will not need much time following cloture.

I am happy to yield to the Democratic leader. I have a brief statement commenting on the events of last night.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Democratic leader is recognized.

CLOTURE VOTE

Mr. REID. Madam President, I think it would be better—I haven't had a chance to discuss this with the majority leader—to vitiate the vote on cloture and then set a time to complete the debate on Priscilla Owen. We would be willing to do that. It would move things along. I wanted the leader to know that. We would be happy to talk about schedule, how much time people need, and what we are going to do the rest of the week. We haven't had time to talk this morning.

Mr. FRIST. Madam President, we will talk over the course of the morning because over the next 5 days, with the memorandum of understanding, we would like to move ahead and address many of the judges. At the same time, we have the nomination of John Bolton, whom the Democratic leader and I have briefly discussed. I do want to be able to continue with the cloture vote that is now on the schedule for noon today. It is important to do so in part because of the events of yesterday, and I want to follow regular order. With that memorandum of understanding, which is important—it is not what the Democratic leader or I asked for—it is important that we see how it is going to be implemented, and the first step will be that vote today.

We do have a lot to do this week. I want to keep things organized efficiently and well and use time wisely.

Mr. REID. Madam President, if I could direct another question to the distinguished leader, it was my understanding of our conversation late last night that we were not going to move forward on more judges this period but move forward to other matters. Do you now feel differently?

Mr. FRIST. Well, I think we need to think how much we can do realistically this week. With that understanding and the backlog we have on judges, if we can move those expeditiously—and we put in a plan or process to do so—we should do just that. We have had

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



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S5815

various offers from your side of the aisle on the Michigan judges and on Griffith, and now we have this memorandum of understanding for up-or-down votes on three other nominees we have been debating. Leadership to leadership, we ought to sit down and plan how we can deal with judges since we have waited a long time for these up-or-down votes and since offers have been made back and forth. In light of the understanding the 14 Senators came to, I think we should move expeditiously and address the judges who have been waiting a long time. At the same time, we have other very important business—John Bolton to be Ambassador to the U.N.—which we do need to address as well.

As I say that, I want to make an appeal to Senators. A lot has been said about many of the judges, and I don't believe we have to say it again. Whether it is on Priscilla Owen, who I am confident will get an up-or-down vote, or on to some of the other judges, I want to make sure everything gets said. But on a lot of these, we have had a lot of debate. I would like to sit down with the Democratic leader, in light of the events of yesterday, and plan out this week so it will be productive. We have a lot of other important business, such as an energy bill and a highway bill, that we need to also address.

THE MEMORANDUM OF UNDERSTANDING

Mr. FRIST. Madam President, I wish to briefly comment on the events of last night. The evening moved very quickly, and it did alter the course of what likely would have occurred over the course of today. Certain adjustments will be made and are being made, as we just heard in the colloquy between the Democratic leader and I, in terms of the schedule. Although I am not a party of the memorandum of understanding signed last night by 14 of our colleagues, I have had the opportunity to further review that agreement in more detail.

I do believe the memorandum of understanding makes modest progress in that three individuals will get up-or-down votes on the floor of the Senate. To me, it does stop far short of guaranteeing judicial nominees the fair up-or-down votes they deserve—other nominees, nominees in the future.

I say that and recognize that with civility and trust, which are two values I have tried to stress again and again, and with that memorandum of understanding being a starting point and the spirit in which it was generated, I believe we can successfully bring these nominees to the floor, after coming through the Judiciary Committee, debate them extensively, and ultimately bring them to a vote. I believe that is the spirit. It will be spun by the left and the right and conservatives and liberals in various ways. I did not sign off on the memorandum of understanding because it stops far short of

the principle, but it does put us in a position to move forward expeditiously without delay, without filibuster, giving these nominees the votes they deserve and the courtesy of a vote. It is our responsibility to vote and give them that advice and consent through that up-or-down vote.

On the agreement, first, it does begin to break the partisan obstruction we have seen over the last 2 years. Theoretically, it is important to get away from extreme partisanship. Parties are important, the clash of ideas is important, but where partisanship is injected into the system and brings advice and consent to a stop, it is wrong. I believe that is the spirit in which the memorandum of understanding, with seven Senators from both sides of the aisle, was written.

Indeed, Priscilla Owen will get an up-or-down vote later today. Janice Rogers Brown will get an up-or-down vote. William Pryor will get an up-or-down vote. They all will receive the courtesy and fairness of a vote.

Other qualified nominees who have been waiting deserve that same courtesy and fairness. Why just those three? Why exclude two others? Why be silent on others? That is where the agreement stops far short of the principle I have brought to the floor, a principle based on fairness.

Second, the agreement, if followed in good faith, will make filibusters in the future, including Supreme Court nominees, almost impossible. The words in that agreement of "will not filibuster except under extraordinary circumstances," obviously, I am concerned about because if extraordinary circumstances are defined as they were in the last Congress, which I believe is wrong, on people such as Miguel Estrada, who came to this country as an immigrant from Honduras, not able to speak English very well, who with hard work worked his way to the top of his profession, arguing 15 cases in the Supreme Court, if that is extraordinary circumstances, then this agreement will mean very little. We have to wait and see. The agreement will have to be monitored. The implementation of the memorandum of understanding is critical.

Third, let me be clear: The constitutional option remains on the table. It remains an option. I will not hesitate to use it if necessary. It should be used as a last resort. Nobody wants to use the constitutional option, but it is the only response if there is a change in behavior as we saw in the last Congress that is extraordinary, which is something that I believe has been absolutely rejected by the memorandum of understanding in saying that we are not going to be filibustering as we did in the last Congress.

My goal is restoring the principle of fair up-or-down votes, the principle that governed this body for 214 years until the last Congress.

I will say that if the other side of the aisle acts in bad faith, if they resume

that campaign of routine obstruction where one out of every three or four nominees coming from the President who make it through the Judiciary Committee, who make it to the Executive Calendar is filibustered, the constitutional option is going to come out again. I will bring it out. And once again, I will set a date to use it. If that is what it takes to move this body forward, we will do that once again.

The constitutional option is not a threat. It ought to be used as a response behavior which I believe is inappropriate to this body as we consider nominees. All the constitutional option does is it brings it to the floor. One hundred Senators can make the decision as to whether the fairness of up-or-down votes is a principle to which they agree.

I look at all of this today as having the opportunity to begin the execution of the memorandum of understanding, using regular order of business. The regular order is, as was set out several weeks ago, to debate Priscilla Owen extensively, exhaustively, which we have done, over 21 days of debate on the Senate floor on Priscilla Owen, and then bring it to closure. We had to file a cloture motion. We made an offer of 10, 15 hours, and that was turned down by the other side. So we filed a cloture petition, and we will have the cloture vote in regular order. Depending on the outcome, we will in all likelihood move to an up-or-down vote.

I expect this afternoon that we will confirm Priscilla Owen and, by the end of the week's process, Janice Rogers Brown, and William Pryor. I will work with the minority leader in terms of the best timing. I will work with the Judiciary Committee as well and other Senators to move forward expeditiously on other nominees.

We have had discussions and offers from the other side to move ahead with Tom Griffith, which I hope we can do shortly; offers on the Sixth Circuit nominees David McKeague, Susan Neilson, and Robert Griffin, all of whom deserve a vote on the floor of the Senate, an up-or-down vote. So all this has been a very significant, substantial debate.

I believe the injustice of judicial obstruction in the last Congress has been exposed, talked about, recognized, and I believe we have now—it is not guaranteed—the opportunity to return to the traditions of 214 years and precedents of 214 years to give these nominees fair up-or-down votes.

I hope that progress continues. I am confident it will. I am cautiously optimistic. Fair up-or-down votes is a principle I believe in and will continue to fight for on the floor of the Senate.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Democratic leader is recognized.