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Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

The PRESIDENT pro tempore. Once again, we are privileged to have our guest Chaplain, Rev. Charles V. Antonicelli, of St. Joseph's Catholic Church on Capitol Hill, lead us in prayer.

PRAYER

The guest Chaplain offered the following prayer:

Heavenly Father, we give You thanks this day. With the Psalmist we proclaim:

Praise the Lord, all you nations; glorify him all you peoples! For steadfast is his kindness toward us, and the fidelity of the Lord endures forever.

We ask Your continued blessing on us as we seek to do Your will. Protect those who risk their lives to keep us free, Lord, and keep us always grateful for their sacrifice.

Bless the women and men of this Senate. Enkindle in them Your Spirit of justice and compassion; of service and sacrifice; of love and understanding, so that they may be Your instruments of peace in our world.

We ask this in Your holy name. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore 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.

RESERVATION OF LEADER TIME

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

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. Under the previous order, the majority leader is recognized to speak as in morning business.

SCHEDULE

Mr. FRIST. Mr. President, this morning the Senate will resume consideration of the energy bill. When we return to the energy bill, I will be offering the first amendment. That amendment will be the ethanol amendment that a number of Senators referred to during yesterday's session. This amendment will be offered on behalf of myself and Senator DASCHLE as a leadership amendment.

Today, Members are welcome to speak on that amendment or the energy bill in general. However, as I announced, there will be no rollcall votes during today's session.

On Monday, the Senate will begin consideration of the jobs/growth bill. The order allows for up to 2 hours of consideration during Monday's session, but there will be no rollcall votes on Monday as well.

I will have more to say on next week's schedule later today, but looking over that schedule this morning, at this juncture I do want to tell my colleagues it is going to be a very busy week that likely will go late Friday. Although I am not planning to go into Saturday, in looking at what we need to accomplish next week in terms of the jobs and growth package, in addressing, on Thursday, HIV/AIDS, and then during the week, on Friday or sometime during the week addressing the issue surrounding the debt limit—all three of those issues we need to complete next week. I do want to notify my colleagues, it is going to be a long week that will likely extend late into Friday.

At this time I have a statement on another subject. The subject is being introduced and talked about in terms of the backdrop of what we have seen occur in the last 5 months on the floor of the Senate in terms of the use of a filibuster being used in an unprecedented way with regard to the nominations for judicial vacancies.

AMENDING SENATE RULES

Mr. FRIST. Mr. President, with some regret but determination, and along with 11 Senators, I submit today—let me read the list of Senators at this juncture who are cosponsors of this resolution, a resolution to amend the Senate rules. The cosponsors are: Senators MILLER, MCCONNELL, STEVENS, SANTORUM, KYL, HUTCHISON, ALLEN, LOTT, HATCH, CORNYN, and CHAMBLISS.

I submit a resolution to amend the Senate rules. At this point I will send the resolution to the desk. I ask it be referred to the appropriate committee.

The PRESIDENT pro tempore. The resolution will be received and appropriately referred.

Mr. FRIST. Mr. President, this amendment will change the way the Senate concludes debate on Presidential nominees. No longer will it be necessary to overcome a 60-vote barrier before Senators can exercise their power to consent to a nomination.

Five months into the 108th Congress, we confront multiple filibusters of highly qualified and intellectually superior judicial nominees, filibusters that are unfair to the nominees, unfair to the President, and unfair to the majority of Senators—Senators who are ready to confirm them.

Of course, we all fully respect and honor the views of any Senator who differs from our own assessment on the quality of any particular nomination, and I think if he or she finds a particular nominee unfit for any reason, they should vote to reject. But by denying the right of an up-or-down vote on a nominee and choosing, rather, to filibuster, they deny the Senate and each Senator the right to vote at all.

The remedy is filibuster reform. Over time, many Democrats as well as many Republicans have proposed changes to

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

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introduce greater fairness in the Senate rules. It is to these proposals that I have looked in crafting this resolution.

My proposal is similar to S. Res. 85, proposed in March by my distinguished Democratic colleague from Georgia, Senator ZELL MILLER. It also tracks a recommendation offered in 1995 by the distinguished Democratic Senators from Iowa and Connecticut, TOM HARKIN and JOE LIEBERMAN. Both the Harkin-Lieberman and the Miller resolutions provide for declining cloture requirements of 60, 57, 54, and 51 on successive cloture motions. They represent a wholesale reform of the cloture rule, applying to every debatable proposition.

My resolution is different. My resolution, by contrast, is more narrowly tailored, tailored to respond to the problem at hand. My resolution applies only to nominations. It leaves the rest of rule XXII unamended. It addresses the very specific defect that needs repair.

There are other differences, however minor, from these other cloture reform efforts. Unlike these earlier proposals, mine would not allow a cloture motion to be filed until a nomination had been pending before the Senate for at least 12 hours. This provision tracks language that the distinguished Democratic leader inserted into S. Res. 8, the power-sharing resolution he introduced in the last Congress.

I share his purpose to ensure that there exists an adequate foundation of debate before cloture is sought.

My resolution also provides for a step below constitutional majority of 51 votes on the fourth cloture attempt. Under my proposal, further cloture motions will require a majority of all Senators present and voting. This provision is included in response to colleagues who believe that supermajority voting requirements on nominations are unconstitutional. If 95 Senators are present, a 51-vote threshold is still a supermajority. Cloture by a majority of Senators present and voting has deep historical roots among Senate Democrats.

In past years, such a change was offered by eminent and distinguished Senators such as Hubert Humphrey of Minnesota, Paul Douglas of Illinois, and Wayne Morse of Oregon. These Senators proposed to reach all Senate debate, not just nominations.

Under the proposed new procedures, cloture cannot be precipitously invoked. Not only is there a 12-hour waiting period, but in addition, the resolution tracks the provision from the Harkin-Lieberman and Miller initiatives that one cloture motion cannot be filed until disposition of the prior cloture vote. This is contrary to the present operation of rule XXII which permits multiple cloture motions to be advanced without waiting for the outcome of the cloture motion previously filed. Between the time a nomination is brought to the floor and the moment that it can be confirmed by a simple majority vote, the elapsed time would be 13 session days.

I stated that I regret having to introduce this resolution. The right to debate is not unlimited but, indeed, it is precious and important. My first vote as a U.S. Senator was in 1995 to table the Harkin-Lieberman resolution even though I was a freshman in a newly elected majority, and the cloture amendment they proposed would have advanced our party. By contrast, in the Senate today are nine Democratic Senators who voted in favor of the sweeping Harkin-Lieberman reform. I ask: Will they now support my more narrow remedy?

I was presiding when the distinguished Democratic Senator from West Virginia, ROBERT BYRD, took to the floor to contend that Harkin-Lieberman was unnecessary because it was primarily aimed at controlling filibusters on motions to proceed. ''No need to change the rules,'' said the Senator, ''because a leader could avoid such filibuster by offering nondebatable motions in the morning hour.'' The Senator did not argue the absence of a problem but, rather, the presence of an alternative solution, a safety valve so further limiting of debate was not required.

I was persuaded by his logic. I opposed then, and would oppose now, comprehensive change in rules governing Senate debate.

However, in the case of nominations, the safety valve of an alternative solution is not as readily at hand. Under existing cloture rules, the filibuster of a nomination is the last word and it is fatal.

Filibustering nominations is a relatively new phenomenon, even as to the nominees for the executive branch, and it has emerged in this Congress as a particular problem relative to Federal judges. Prior to this year, the record number of cloture votes on any nominee was three, and on a judicial nominee the record was two. Already, we have had six cloture votes on the nomination of Miguel Estrada to the District of Columbia Circuit Court of Appeals, two cloture votes on the nomination of Priscilla Owen to the Fifth Circuit Court of Appeals, and indeed threats from the minority for additional filibusters on other nominees. Clearly, we have entered upon a new era, damaging to the Senate as an institution, where a majority will be denied its right to consent to a nomination because a minority will filibuster to hold that nomination hostage.

The need to reform the filibuster on nominations is obvious, and it is now urgent. Many will contend that the Senate should not rubberstamp Presidential appointments. I fully concur. The Senate's responsibility under article II to advise and consent is critical to maintaining the checks and balances of our constitutional system. For reasons sufficient unto itself, the Senate may reject any nominee. Brought forward to a vote, the Supreme Court nominations of Clement Haynsworth, G. Harrold Carswell, and Robert Bork all failed on the Senate floor, and not by filibuster. Scholars may argue whether these nominees should have been turned aside, but no one can dispute the Senate's right to reject them. The Senate's constitutional role must never be diminished.

In the case of Miguel Estrada and Priscilla Owen, it is plain that the votes to confirm are present. They have the support of a majority of Senators. But the votes to confirm cannot be taken because these debates have been tainted by filibuster. Without filibuster reform, a disciplined minority can cast an ever-lengthening shadow over the confirmation process. Through reform, we will respect the right of all Senators to act upon a nomination brought to the floor. In so doing, we will strengthen the Senate as an institution and enhance its constitutional purpose.

It is unfortunate that we have come to this point. I would have far preferred that nominations be given a floor vote after full and free debate. As the filibuster strategy emerged, I tried many times without success to secure agreements to vote at a time certain. Wanting to respect minority rights and, indeed, the right of all Senators, I withheld filing for cloture on the Estrada nomination until it had been pending for 13 days.

But just as I act with regret, I act with determination. For almost all our Nation's history, filibustering nominations was unheard of and unknown. It was unknown when the cloture rule was adopted in 1917. It was unknown when the rule was extended to nominations in 1949. The renowned filibusters of the 1950s and 1960s never involved filibustering a judge. Senator Richard Russell of Georgia led both filibusters, but even in the face of glowing judicial activism neither he nor his allies ever filibustered a judge.

Obviously, some respected traditions have changed. Senate rules are not immutable. Senate norms have altered over time, and our rules have changed in response. The initial cloture rule of 1917 was a reaction to cumulative and growing consternation over years of uncontrolled filibusters. The 1949 expansion reflected frustration that the original rule was too narrow and applied only to pending measures. In 1959 and 1975, the rule was amended because the hurdle for cloture was thought to be too high. In 1979, Senator BYRD successfully amended the rule to eliminate the abuse of postcloture filibuster. Before the practice of filibustering nominations takes deeper root and damages the Senate even more, it is time to amend our rules again. I act now as a first step to ensure we have a confirmation process that is fair to the nominees, that is fair to the President, and that is fair to all Senators. If we achieve that, we will also be fair to the American people.

THE ENERGY POLICY ACT OF 2003

The PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of S. 14, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 14) to enhance the energy security of the United States, and for other purposes.

The PRESIDENT pro tempore. The majority leader.

AMENDMENT NO. 539

(Purpose: To eliminate methyl tertiary butyl ether from the United States fuel supply, to increase production and use of renewable fuel, and to increase the Nation's energy independence)

Mr. FRIST. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Tennessee [Mr. FRIST] for himself and Mr. DASCHLE, Mr. INHOFE, Mr. DORGAN, Mr. LUGAR, Mr. JOHNSON, Mr. GRASSLEY, Mr. HARKIN, Mr. HAGEL, Mr. DURBIN, Mr. VOINOVICH, Mr. NELSON of Nebraska, Mr. TALENT, Mr. DAYTON, Mr. COLEMAN, Mr. EDWARDS, Mr. CRAPO, Mr. CONRAD, Mr. DEWINE, and Mr. BAUCUS, proposes an amendment numbered 539.

Mr. FRIST. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

(The text of the amendment is printed in today's RECORD under ''Text of Amendments.'')

Mr. FRIST. Mr. President, I am pleased to offer this renewable fuels amendment on behalf of myself and Senator DASCHLE, as well as a number of other Senators on both sides of the aisle who have worked on this important issue for a number of years.

I think the fact that the Democratic leader and I have joined together to offer this amendment demonstrates the significance of this particular issue as well as the broad bipartisan support that this compromise package enjoys.

I do want to take this opportunity to commend all of the cosponsors of the amendment, many of whom came to the floor yesterday morning to speak, for their hard work, their dedication over the years in forging this agreement. I also note that the President has made passage of this amendment a priority, and I commend him for his commitment to getting this done.

This particular amendment will enhance America's energy independence and energy security by increasing the use of domestically produced, clean, renewable fuels. As the chairman of the Energy Committee has pointed out many, many times, America is dangerously dependent on foreign oil. We currently import 60 percent of the oil we consume, and that number is increasing. One of the major goals of this energy bill we are debating on the floor of the Senate is to reduce our dependence on foreign oil. This amendment is a critical component of that effort.

The Frist-Daschle amendment establishes a national renewable fuels standard of 5 billion gallons per year by the year 2012, nearly tripling the use of ethanol and biodiesel over the next decade. It phases out the use of MTBE over a 4-year period and authorizes funding to prevent and clean up MTBE contamination from leaking underground tanks. And it repeals the Federal oxygen content requirement for reformulated gasoline, with strong antibacksliding language to ensure that air quality is not compromised.

Mr. President, as I said, this amendment is the product of a great deal of work by many Members of the Senate over the last several years. It is a compromise that has broad, bipartisan support. It will reduce our dependence on foreign oil. It will protect the environment. It will create jobs. It will increase farm incomes. It will stimulate investment in rural communities.

I look forward to working with Senator DASCHLE and all of the other supporters of this package to get it adopted as expeditiously as possible.

Mr. President, I yield the floor.

The PRESIDENT pro tempore. The minority whip.

JUDICIAL NOMINATIONS

Mr. REID. Mr. President, I know the schedule of the majority leader is burdensome. I do wish to say a few words while he is here regarding the proposed rule change.

First of all, I have said, on a number of occasions in recent weeks, that I understand the intensity of the feeling of members of the majority—some members, not all—on the Miguel Estrada nomination and that of Priscilla Owen. But I do say, that for people to lament that the process is broken regarding judges is simply without foundation or fact. Mr. President, 124 judges have been approved for President Bush—124. Two have been held up.

The number of cloture motions that have been filed, for those of us who have served in the Senate for some time, is somewhat meaningless. The reason you continually file new cloture motions is if there is a change in the vote. And for Priscilla Owen and Miguel Estrada, there has not been a single vote change—not one. They are all the same. So filing those cloture motions is just for show; it has no basis in substance.

Now, I do say to the leader that I think this is being approached in a proper fashion. I think that to go to seek a rules change is the way it should be done. If you don't like what is going on here, try to change a rule.

I have been personally—and I am sure it has not gone without the notice of others—concerned about some of the statements made by Members of the majority saying they are going to have this rule changed regardless of what the Rules Committee does; that if it does not work out in the Rules Committee, they are going to come here and have the Presiding Officer just say what we have been doing is unconstitutional.

Now, one of the newspapers announced that this would be nuclear. I think, legislatively, nuclear is the proper term.

I have no problem—I say this to the majority leader—seeking to change the rules. If the rules are changed by a procedure we have always used here in the Senate, I will go along with that. But to have something done, that is to say suddenly that you cannot have a filibuster because it is unconstitutional, creates many different problems. Does that mean if 11 members of the Judiciary—a majority—holds up a judicial nominee, that that is unconstitutional and it can come immediately to the floor? I think not.

So I recognize—I have been as frustrated as anyone trying to get cloture motions filed and cloture determined on a vote. I can remember when I was a relatively new Member of the Senate—I was not too new then—during the Clinton administration and we were trying get grazing changed in the western part of the United States. We had four or five cloture motions filed. We got up to 57 or 58 Senators on that occasion. And we were moving, filing the cloture motions that seemed to be gaining status.

Then suddenly GEORGE MILLER from the House and HARRY REID from the Senate were called to the White House, and the President of the United States, Bill Clinton, said: We are not going to support you on this anymore. It is over with. He had made some arrangements with House Members, and our trying to get cloture invoked on something we believed was very important was, in effect, pulled out from under us. I can still remember that.

But in those, I say to the majority leader, when cloture motions were filed by Senator BYRD, we kept gaining votes. In relation to Miguel Estrada and Priscilla Owen, that is not the case.

So again, I say, that the majority leader is approaching this in the Senate way, the right way. I do say—and I know he has had conversations with the Democratic leader, and I have spoken to other Members on the other side—I hope it will be done in that fashion and not by some jury-rigged fashion to change the rules by some ''constitutional'' matter.

I even understand one of the Republican Senators is filing a lawsuit. Fine. More power to them. Let them file a lawsuit. I think that is the way it should be determined. But don't change the Senate rules in some other fashion because it would really damage our ability to move forward on legislation.

The PRESIDENT pro tempore. The majority leader.

Mr. FRIST. Mr. President, just in closing, on my behalf, the whole purpose of submitting this resolution today is to further elevate the debate in recognition that things change in