

hours ago had a sign held up: "I am going to watch 'The Bachelor'." That was funny. I chuckled. But true humor, good humor, really good and biting humor, always has an element of truth to it, doesn't it? It always has an element of truth. The element of truth here is that the other side does not want you to hear what is going on. They want you to go and watch "The Bachelor," tending to your business. We will take care of the business here. You need not mind what we do here. No, don't bother with us; we'll handle it. You could watch "The Bachelor." We will take care of the people's business here and don't bother with us.

Hopefully, some Americans paid attention. Hopefully, some Americans heard the debate that went on here in the Senate Chamber for the past 40 hours and heard very clearly that we have changed, potentially forever, the standard by which we will confirm judicial nominees. In so doing we eliminate those, not just from the right.

Let me assure you, my colleagues on the other side of the aisle, let me assure you we are not just eliminating those on the right, because what is good for the goose is good for the gander. When you twist and contort the law, it becomes the law for everybody. It is twisted and contorted in its ugliest sense, but it is there for all to see and there for all to use. Rest assured, it will be used. Whether it is by the Senator from Pennsylvania—I hope not because I hope never to be in the minority, and I hope never to have to serve under a Democrat President. That is obviously my objective. I hope I don't have the opportunity or the desire to ever use it. But I suspect someday, someone—either myself or someone who shares my philosophy and ideas of how this Government should be run and how the judiciary should behave—will take this tortured process that has been cemented today and use it against the very people you believe are mainstream, who the Democrats of the left believe represent the deep and wide channel that is the mainstream of American thought; people who believe that "under God" should not be in the Pledge of Allegiance, that deep, wide mainstream; people who believe this is a living document.

Let me interpret what that means. That is what you will hear a lot from those on the other side, that this is a living, breathing document. A living, breathing document? Yes. It is living and breathing, but it is not a document. It is a judge. When you hear "living and breathing," documents don't live and breathe. They say exactly what they mean. Documents written 214 years ago don't change by themselves. They don't breathe. They do not live. They were put there and put on paper for a reason—to provide stability to this country and certainty for those here in America who know their rights and who understand those rights throughout time. If we are to change these words, we do so through

the process where the people of America—not some unelected few—have input into that process. It is called the amendment process to the Constitution which requires the Congress to act and three-quarters of States to affirm and ratify. That is how we change this document—not by appointing and confirming living, breathing judges to make it their own. That is what they have done.

They think now that they have a sufficient number of these folks on the court that they don't want any conservative judges. What is a conservative judge? A conservative judge is not someone who changes this document to reflect their ideology. I would not call that a conservative judge. I would not call that a judge for whom I would vote. That is not a conservative judge. I don't want a judge who is going to come in and contort the Constitution to my thinking. I want a judge who is going to live by what this Constitution says. It reflects the will of the people. That is what a conservative judge is. A conservative judge is someone who abides by the Constitution—not someone who sees it as a living, breathing document. Judges who are conservative are called "strict constructionists"—to strictly and narrowly construe controversies that are before them and decide cases in the narrowest sense—not to use a dispute between parties as an opportunity to legislate.

The Senator from Kansas, Mr. BROWNBACK, said at about 4:15 in the morning that what is really happening here is this new test is being introduced by Senators on the other side of the aisle—this ideological test.

Your job as a judge is to look at the disputes between parties, see the applicable law that has been passed by Congress, the State legislatures, or provisions in the Constitution and apply those to the factual circumstances before you. That is your job. If that is your job, then why should we be concerned about your ideology? That is a pretty fair question. If all you are supposed to do is look at the statutes and use the rules and the statutory constructions which are laid out, or look at the Constitution and refer to the interpretations of the Supreme Court with respect to that area of the law, then why at the district court or on the appellate court level should we be concerned about your ideology? It should not be a factor because you are simply applying the law. A liberal can apply the law just as easily as a conservative can apply the law and look at ideology.

Why should your political ideology have anything to do with it if that is all your job is? I don't mean to demean by saying "if that is all your job is." It is a very important job. It is an adjudicatory process. It is a very important process in our country. It is one of the three branches of Government. It is their responsibility to do that. It is not the responsibility of the Senator from Arkansas or Nevada to settle disputes

and make decisions. We give that to people who study the law, understand it, and then make the decisions based upon it. We are the ones who create the law. We are the ones who have the great debates on what the law should be that they apply.

The President is the one who executes the law, and in the case of the judiciary appoints those who prosecute it.

I will say in conclusion that what is happening now with this political test is a recognition by the other side—an admission by the other side—that no longer are judges just there to try facts and apply the law, but they are there—in fact, the other side wants them to be there to change the law—not to apply the law but to change the law to reflect the ideology that is dominant on their side of the aisle. They do not want judges who will apply the law. They want judges who will make the law. You would think they would not want to give up their legislative prerogative. That is our prerogative. It is our job to make the law.

What they have found over the years is that the public will not buy a lot of stuff they want to sell. They can't get it done. What they have figured out is a way to avoid having to go through this cumbersome process of writing the laws, getting the public to go along with it, and having to stand for things that are unpopular, which is to just find people who will do it for them and they don't have to stand for election. We can get them in there and they are there for life. They can do our bidding because we can't get it done.

A very dangerous thing happened here today. It will not serve this country well. It will politicize the branch of the Government that heretofore has stayed fairly apolitical. It is a mistake.

I hope and pray that Americans will write and talk to their Members of the Senate, ask them, plead with them to stop this. Put this genie back in the bottle and put it away—throw it away. It is not good for America. It is not right for America. It has never been America. For 214 years we have kept politics out of the judiciary. Let us not politicize it. People are so tired of politics. They complain and rail about it all the time. What have we done here today? We have now injected a healthy dose of it into the judicial system.

May God help this country for what we have done today.

I yield the floor.

The PRESIDING OFFICER (Mr. ENSIGN). The Senator from Arkansas is recognized.

NOMINATION OF J. LEON HOLMES

Mr. PRYOR. Mr. President, I want to again remind this Senate and my colleagues on both sides of the aisle about one of the judicial nominees who happens to be from my State of Arkansas, Mr. Leon Holmes.

Leon and I practiced law together in Little Rock for a few years in the late

1980s or early 1990s. He is a very fine person, a very fine man, and a very fine lawyer. I am proud to count him as a friend.

Let me emphasize that Leon Holmes and I don't agree on every single issue. There is no doubt that there are some things he and I disagree on. But I am very respectful of his views because I know that he has arrived at those views through long consideration. He is a man of great integrity and great judgment. President Bush nominated him in January of this year to be a district judge for the Eastern District of Arkansas.

Mr. Holmes is a practicing lawyer in Little Rock, and has been with a number of very prestigious law firms in his legal career. He is considered probably by most people one of the best lawyers in Arkansas, and certainly on certain types of cases would be considered among the best, if not the best. But at any rate, President Bush nominated him in January—if my memory is correct, January 25—and his nomination went to the Judiciary Committee. He came out of the Judiciary Committee on May 1.

For over 6 months now, Mr. Holmes has been languishing on the Executive Calendar. I am troubled as to why he has been languishing like that. I have talked to the Republican leader many times, to the Republican chairman of the Judiciary many times, and I have talked to my colleagues many times. Both Senators from Arkansas are quite puzzled as to why. We have had 30-plus hours of filibuster led by the Republican Party on some of these judicial nominations, and here we have a nomination that we want to proceed on. We want to move forward on that today. To date, there has not been anything scheduled.

UNANIMOUS CONSENT REQUEST

With that in mind, I would like to ask unanimous consent—I know that we will need a moment to allow someone to come out on the Senate floor—that at a time to be determined by the two leaders, the Senate proceed to executive session to consider Executive Calendar No. 165, the nomination of J. Leon Holmes of Arkansas to be U.S. district judge, that it be considered under the following time limitation: 5 hours for debate equally divided between the chairman and the ranking member, or their designees; that when the time is used or yielded, the Senate without any intervening action or debate vote on confirmation of the nomination; that the President be immediately notified of the Senate's action, and the Senate return to legislative session.

The PRESIDING OFFICER. The Chair informs the Senator from Arkansas that the leaders are trying to work out an agreement to bring this nominee to the floor, and at the current time, unfortunately, I will have to object in my capacity as a Senator from Nevada.

Mr. PRYOR. Thank you, Mr. President.

I have worked for months on this nomination.

Let me emphasize that Mr. Holmes was not my nomination. He is President Bush's nomination. I wasn't consulted in any form or fashion before the nomination was put forward. I wasn't brought into the loop at all. The nomination was handed to me. Unfortunately, I continue to work on this and for whatever reason my efforts seem to be falling on deaf ears on the Republican side.

Mr. DASCHLE. Mr. President, will the Senator from Arkansas yield for just a moment?

Mr. PRYOR. Absolutely.

Mr. DASCHLE. Mr. President, I appreciate the request made by the distinguished Senator from Arkansas. This is a matter that he and his colleague from Arkansas, Senator LINCOLN, have been involved in and supported for a long period of time. He and I have had a number of conversations.

I want to make sure that the record is clear there will be no objection on this side to having votes on the nomination. We have had now 40 hours of debate where one Republican after another has come to the floor in an outcry that we haven't been able to have a vote on a judge, that we are denied the opportunity to have an up-or-down vote on a judge.

As we have said on 168 occasions, let us have the up-or-down vote. This one would be the 169th.

We are prepared this afternoon within the next hour to have a vote on the judge referenced by the distinguished Senator from Arkansas.

I appreciate very much his request. I certainly understand his frustration after all of the outcry that we have heard from our colleagues on the other side. It is amazingly ironic after all of that on a nominee for which there is absolutely no objection to moving to. I will oppose the nominee. I will vote against the nominee when it is presented to the Senate, but there is certainly no opposition within our caucus.

I want the record to be clear with regard to that point. Again, as I have on other occasions, I want to work with the majority leader for a very short time and have a vote. Let us have the vote. After all of this, you would think that the Republican caucus and the majority leader and others responsible for these decisions would jump at the chance of having a vote on the Holmes nomination.

We are ready. We will certainly not object to a time limit or to ultimately have an up-or-down vote, as the Senator from Arkansas has proposed.

Mr. PRYOR. Mr. President, I would like to reiterate what the minority leader has just said. There is no hold on the Democratic side on this nomination. All systems are go on this side. I have talked to my Democratic colleagues and we are ready to vote Mr. Holmes up or down.

Quite frankly, I know on a personal level that Mr. Holmes is ready to be voted up or down.

Again, thank you, Mr. President, for the time. I yield the remainder of my time. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SESSIONS. 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. SESSIONS. Mr. President, we have had a good 39 hours, I guess, of debate. It is great to see my friend from Texas here, Senator CORNYN, who served on the Texas Supreme Court and understands these issues and chairs the constitutional law subcommittee of the Judiciary Committee. I say it is good because we have had a very bad and very historic change in the procedures of the Senate.

After all this debate, I think it is doubtful anyone could maintain today that in previous years we did not have filibusters. And I don't think anyone could doubt that we now have sustained filibusters as an organized, systematic way to change the number of votes necessary to confirm a President's nomination from a majority of 51 to 60 votes. This is a big deal. It is not a good deal. It is not good for the Senate. It changes the historic balance of power. It enhances of power of the Senate.

Now the Senate can block a nomination with only 40 votes. It weakens the President, and it weakens the courts. It is a classical alteration of the balance of power established by our Founders when this country was created. It is not good. It was driven by politics. It is a further decline in civility and debate, and it is a greater increase in the influence of politics in the confirmation process. This Senate is not and should not be proud of what has occurred to date.

I am glad it was brought about with some pain. I am glad it just didn't slide in a banal way without any thought. I am glad there are Senators who stayed here all night last night. I was here past midnight. Some stayed here all night because they wanted to be sure they were on record and Americans understood what we have done. I think it ought to be seared on our souls what occurred here. Every Member of this body needs to think about it. We need to realize that this was not lightly done. There is no doubt that in the spring after the election of President Bush, Democratic Senators met in retreat and they had a conference with some liberal law professors. And as the New York Times reported on that retreat, the Senators decided to change the ground rules for confirmation. We have absolutely seen that.

We had nominees blocked in committee on a party-line vote in the Judiciary Committee when the Democrats had their brief period of majority. JIM JEFFORDS switched parties. We had

nominees not brought up for hearing in committee. And we had filibusters on the floor to a remarkable degree.

I will just say that this is unhealthy. One of the things we had in the Judiciary Committee, in the courts subcommittee that I chaired and then Senator SCHUMER chaired after JIM JEFFORDS switched parties, and he began to have hearings on a number of things. He said the burden of proof should be on the nominee. That has not been the issue. So we had a hearing on the fact that the burden of proof should be on the nominee. We had a hearing that the Supreme Court was an extremist, activist, conservative court, which is so far from the truth, it is hard to believe it. That was the agenda of that.

The third thing most threatening to us and to our classical understanding of law was a hearing to say: Well, politics is involved in everything. We ought to ask judges all about their ideology, their politics. That should be openly a part of the confirmation process.

I felt so strongly against that. Lloyd Cutler, the White House counsel under President Carter and President Clinton, clearly and unequivocally rejected that. He said it would lead to the politicization of the courts. I practiced before Federal judges for nearly 15 years as a Federal prosecutor. I will just say that we have to believe—criminal defenders, civil litigants, prosecutors have to believe—that the judge who sits on their case will be able to set aside his or her personal political biases and ideas and beliefs, faithful beliefs, whatever; he will set them aside. When they go to that court, there will be a fair and objective trial, and they will be judged on the merits of the law and the facts and not what the judge thinks, not the politics of the judge.

Lloyd Cutler was correct, as every other witness was who testified at that hearing. We do not need to politicize the courts. We are heading in that way.

Senators are so political. They are driven so much by the special interest groups that they think and believe everything can be settled by political deal. They think courts operate that way. That is not the way they do. I practiced in court. You go to court. You offer to put evidence. Somebody objects. The judge reads the law, and he decides, well, if it meets the standard to come in or it is excluded. You don't admit half of it. It is either admitted or it is not admitted, as Judge Cornyn so ably knew, both as attorney general and as a member of the Texas Supreme Court. Those are things that go to the core of the heritage of law we have been given.

The whole world knows that America and the British have a magnificent legal system. The average citizen can borrow \$100,000, buy a house, a \$200,000 house, pay it back at 6 percent interest over 30 years. The money, the guy who loaned them \$100,000 can believe he is

going to collect it. If he doesn't pay it, he can foreclose, and there are procedures, and he pays off the debts and gets out and gets himself paid off. That is why he can afford to loan the man the money at this incredibly low rate.

You go to undeveloped countries around the world, and you see houses half built and you say: Why? They say, well, they saved up enough money to put up the walls and roof, but not enough for the insides. There is no way for them to borrow money. They don't have a legal system that works like ours. We need to cherish and protect the system.

Investors come from all over the world to America because they believe if they have to go to court, they will get a fair shake even though they are a company from Japan or South Korea or Singapore or China or Germany or France. That is something we need to protect. We do not need to allow it to be politicized. We need judges who follow the law as written, who will not impose their personal agendas in the decisionmaking process.

All of these things are matters that President Bush talked about in his election campaign. He believes them deeply. The American people share those beliefs by a substantial number. But they are not shared to the degree they should be by others in this Chamber who are blocking these nominations.

I hope that somehow, some way, this filibuster procedure can end. I hope that somehow, some way, we can avoid the collision we are engaged in now, the obstruction and the delay we are facing today, and get on with the classical way we have always handled judicial nominations in America. It is just unfortunate.

So it has been good that we have had a painful, tough 39 hours. A lot of things have been said. I hope that as we go forward, we can work our way through it. It may take litigation. It may take rules changes. It may take other things. I hope we will continue to back an independent judiciary of men and women of quality and integrity.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I express my gratitude to the Senator from Alabama for his leadership on these issues. He and I share an experience in common, having been attorneys general of our respective States, I in Texas and he in Alabama. I guess that experience, together with the fundamental values we have all come to believe in, enshrined in the Constitution, that elevate the rule of law over the political maneuverings of men and women, is something about which we feel very strongly. I know he does, and I appreciate his eloquence and his passion and his commitment to those values and that ideal.

I know after this lengthy debate there will be those who will want to make a judgment on who won and who lost. That is what I want to talk about

for a few minutes because, frankly, I think the battle is not over. With the failure to achieve the necessary votes for cloture of these three nominees this morning, three highly qualified and distinguished individuals who, frankly, don't deserve the shabby treatment they have received during this confirmation process, there will be some who will say: Well, the majority was unable to get the minority to change their mind and so the majority must have lost. The stubborn, recalcitrant minority must have won.

I would say this is a case of perhaps having lost the battle but the war is still raging. The war is still going on. Frankly, it is a war, a battle, a metaphor for a war that has been going on since the inception of this country. It is a debate about what kind of country this is, what kind of country America is.

Indeed, it is also a question of what kind of country we will become. I believe that if our judicial confirmation process becomes so politicized, as it appears to have become, and the test for confirmation is political correctness and licking your finger and putting it in the wind to test which way public opinion is going, and to make sure that if you are a lawyer or a judge or an attorney general you have made decisions in a way that is consistent with public opinion polls rather than the law, I think we will risk losing that war because it is fundamentally a war of words, of ideas, about what kind of Nation we are and what kind of Nation we will become, whether we will become one ruled by politics and polls and special interest groups or whether we are a nation of laws and not men and women.

There is more to be said. There is more to be done in this ongoing war. Of course, we all know those who have followed this debate are aware that the majority leader and Senator ZELL MILLER from Georgia, a Democrat colleague of ours, have filed a rule change proposal which would allow for sufficient debate in the Chamber on nominees but ultimately allow what the Constitution itself commands, and that is that majorities ultimately rule. This is about a fundamental precept of our democratic form of government which says that after the debate, after everybody has had their say, after we have learned from each other in the give and take, ultimately there has to be a vote, and that when those votes are counted, majorities will rule and they will determine the outcome.

Of course, that is the rule everywhere where democracy is respected and practiced except, I am sad to say, in the Senate, when it comes to these judicial nominees, because what we have experienced here with this unprecedented obstruction is a tyranny of the minority. It is, frankly, a shame. I think we are poorer for it.

We could talk about this ongoing war of ideas and debate. We can talk about the battle we fought here this last day

and a half and how it is just one battle in this ongoing conflict of ideas and really debate about the nature of our country that we have had since the beginning of this country. But there is a judgment day. There is a judgment day under our form of government, and that is when ordinary citizens exercise their right to go to the polls and to say whether they approve or disapprove of what we are doing here in this Chamber.

Whether you are a city councilman, county commissioner, Governor, Senator, Congressman, President of the United States, we are subject to the ultimate judgment of those voters, of those citizens, because we are a country that believes in the sovereignty of the people. And it is the people who will have the last word.

I believe our friends on the other side of the aisle who have exercised this tyranny of the minority have made a very dangerous gamble. Their gamble is, what they are betting is, that not enough people are really paying attention. Of course, that is part of what we have been trying to do, to make sure that people who are interested have an opportunity to understand what is going on here and what is at stake.

But ultimately, under our form of government, there can be no division in this body or anywhere else in this country about the fact that, ultimately, the American people will exercise the final judgment and determine who wins and who loses. That has not been decided today on this issue.

This is just one battle in that ongoing war leading up to that day of judgment. Ultimately, for those of us who run for public office, that is what determines whether we will continue to serve here in this body or in any other elected office in this Nation or not; whether we maintain the confidence of the people; whether the people believe that what we are doing here represents their interests as opposed to special interests. And if, in fact, they have confidence in our judgment, our honesty, integrity, and what it is we are trying to accomplish here, then they will say so by returning us to this place, or any other office of public service. So, ultimately, this battle has really been a skirmish in this ongoing conflict.

There is an important difference between those who would obstruct a bipartisan majority who want to confirm these fine nominees, and that is really the nature of the judicial branch of our Government.

I have had the honor for 13 years to serve my State in the judiciary before I was attorney general, and now in the Senate. I believe fervently that what the Framers intended by creating the judicial branch was not one where we had ideologues on the bench, or even politicians who were trying to advance a political or personal agenda. What they conceived and what has helped maintain the rule of law by determining the independence of the judiciary is that we will have rules that will

govern all of us, and there will be disputes about those rules and the facts will be decided by independent judges, not ideologues, not those politicians on the bench, not somebody who has run for a particular platform to be nominated and confirmed to lifetime tenure.

The Framers' genius really was that that is a role they left to the representative branches of Government, the Congress and the executive branch, represented by the President. They conceived of a judiciary that would interpret the law and not make the law; that would interpret what the legislature's intent was, not promulgate public policy from the bench, or legislate from the bench. The legislation, they said, should come from the Congress. Once the Congress has determined the laws, then the President has a responsibility to execute the law.

It is a judiciary that serves as the impartial "umpire." We all know that, in any sporting activity, an umpire who takes sides before the contest is inconsistent with the whole idea of fair play. We are talking about more than fair play here. We are talking about what kind of nation America is and what kind of nation America will become, whether we preserve this concept of an independent judiciary, unaffected by politics, that determines the law, not makes the law.

I believe James Madison, Alexander Hamilton, and others of the Founding Fathers, who so wisely conceived of this form of government, would literally roll in their graves if they heard some of the suggestions we have heard during this debate and elsewhere—that judges can, and perhaps should, be ideologues; and really what we are trying to do is achieve some sort of mythical balance to make sure we have enough conservatives and liberals and moderates on a multijudge bench, and somehow in this "witch's brew" we are going to come out with justice, with fairness; that people will know what the rules are ahead of time and be able to conform our conduct to what the rules are, so they can go about their business unafraid of being interfered with, molested, or sued.

Indeed, that is what we depend on, the knowledge of what the rules are, and that they will be administered by those who do not have a stake in the outcome, or have an ax to grind, or have a political or personal agenda. That is what our judges are supposed to be, not those who participate in a game of political football.

We do not want, as this process has seemed to degenerate into, judges who will precommit to the outcome of cases that may come before them before they have even heard the facts. In the Judiciary Committee, on which I serve, I have heard judicial nominees questioned about: How would you rule if such and so happened? What is your view of the 14th amendment or the 5th amendment? Assuming this given set of facts, how would you rule in that case?

Those questions are entirely inappropriate. We don't want judges, and we should not confirm judges, who would prejudge a hypothetical set of facts. We want judges who have an open mind and a commitment to the rule of law, and who will enforce that law impartially, without regard to who wins or loses.

If what we are doing here jeopardizes the rule of law, we will have done great damage not only to this body but to our country.

Mr. President, I thank my colleagues for patiently listening after this long debate. But I believed it was important to make some of these points.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ENSIGN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

PRAYER

The PRESIDENT pro tempore. The hour of 12 noon having arrived and the Senate having been in continuous session since Wednesday, pursuant to the order of the Senate on February 29, 1960, the Senate will suspend while the Chaplain offers a prayer.

Today's prayer will be offered by our guest Chaplain, Rev. Leroy Gilbert, Pastor of Mount Gilead Baptist Church in Washington, DC.

The guest Chaplain offered the following prayer:

Eternal God, the God of grace and glory, the God whose giving knows no ending, the God who stretched the spangled heavens and made us speechless at the sight of His magnificent handiworks, we pause to invoke Your blessing upon our Nation, our Senators, and all those who serve them.

Lord, we pray that the work of this Body will equip every household in America with the resources to build strong and stable families. We pray that the Senators' tireless efforts will enable the people of America to stand strong for the principles that undergird our rights, liberties, and the pursuit of happiness. We pray, when citizens observe how this Senate conducts the business of our Nation, they will be inspired by how those from different political parties can work together to achieve a common purpose for the good of America.

As one Nation under God, may we always be protected by Your divine promises as recorded in Chapter 54 of Isaiah, which declares: "This is the heritage of the servants of God . . . no weapon formed against you shall prosper . . . tyranny and terror will be far from you . . . whoever attacks you will surrender to you." To You, Almighty God who assures the faithful, "I will make your way prosperous and you shall have good success," we pray. Amen.