CONFIRMATION OF JOHN ROGERS

Mr. MCCONNELL. Mr. President, the Senate last week confirmed Professor John Rogers to one of the seven vacant seats on the Sixth Circuit Court of Appeals. Professor Rogers' career has been marked by excellence and achievement, and he will be a fine addition to the Sixth Circuit.

He was elected to Phi Beta Kappa at Stanford. At the University of Michigan law school, he was a member of the prestigious Order of the Coif. He has twice served in the Appellate Section of the Civil Division of the Department of Justice, earning a Special Commendation for Outstanding Service. He has been on the faculty of the University of Kentucky College of Law since 1978, where he is the Thomas P. Lewis Professor of Law. Professor Rogers has also twice served as a Fulbright Professor in China. Finally, it is worth noting that Professor Rogers has dedicated a good part of his life to the service of his country as a member of the field artillery in the United States Army Reserves. He is retired with the rank of Lieutenant Colonel.

Professor Rogers, in addition to having the enthusiastic support of both Senator BUNNING and myself, has earned a unanimous rating of qualified by the American Bar Association. I am confident that he will make the citizens of the Commonwealth proud, and that he will provide badly-needed relief to the woefully understaffed Sixth Circuit Court of Appeals.

As I have said repeatedly, I appreciate the fair manner in which Chairman Leahy treated Kentucky judicial nominees, particularly nominees to the district courts in Kentucky. However, some of his statements on the floor Monday evidence a serious misunderstanding of the genesis of the Sixth Circuit vacancy crisis and of Professor Rogers' judicial record and philosophy.

As many people know, the Sixth Circuit has been in dire straits, and although some of my Democrat colleagues have tried mightily to do so, the blame for this sorry situation cannot be laid at the feet of a Republican-controlled Senate.

At the beginning of this year, half of the sixteen seats on the Sixth Circuit were vacant. But contrary to the assertions of my friend from Vermont, half of those vacancies arose in the first year of President Bush's presidency. Judges Gilbert F. Merritt, Alan E. Norris, Richard F. Suhrheinrich, and Eugene F. Siler all took senior status in 2001—after President Bush came into office.

With respect to another vacancy on the Sixth Circuit, my friend from Vermont notes that the Senate did not act on President Clinton's nomination of Mr. Kent Markus. Mr. Markus was nominated to fill the vacancy that arose from Judge David A. Nelson taking senior status. The Senate was unable to act on this vacancy, however, because President Clinton did not nominate Mr. Markus until his final year in office, when only nine months remained until the presidential election.

As to a sixth vacancy, that created by the retirement of Judge James L. Ryan, President Clinton did not even submit a nomination.

As to the remaining two vacancies, it is my understanding that the Republican Senate could not confirm the nominees to these seats, Ms. Helene White and Ms. Katherine McCree Lewis, because the Clinton Administration did not properly consult on their nominations. As a result, these nominations faced home-state opposition that prevented the Senate from moving them forward.

I ask unanimous consent that an article from the Wall Street Journal on the subject of these nominations be printed in the RECORD at the end of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered. (See exhibit I)

Mr. MCCONNELL. Mr. President, the situation with Ms. White and Ms. Lewis is obviously quite different from the situation of Mr. Jeffrey Sutton and Justice Deborah Cook, whom President Bush has nominated to fill two of the six remaining vacancies on the Sixth Circuit. Both Mr. Sutton and Justice Cook have strong home-state support. Furthermore, they are part of the President's first group of judicial nominees that he submitted to the Senate in May of last year. Nevertheless, neither has been able to obtain a hearing. I am confident that in the next Congress the Judiciary Committee will promptly act on their nominations.

Far from treating President Clinton poorly with respect to his judicial nominees, the Republican Senate treated him quite well, particularly on nominations to the Sixth Circuit. President Clinton got three hundred and seventy-seven of his judicial nominees confirmed, only five shy of President Reagan's all-time record. This is quite impressive in and of itself. It is even more impressive when one considers that President Clinton got these nominees confirmed when Republicans controlled the Senate for seventy-five percent of his term. By contrast, President Reagan got his judicial nominations confirmed when his own party controlled the Senate for seventy-five percent of his term. Thus, a Republican Senate treated Presidents Reagan and Clinton equally well.

As part of his near-record total, President Clinton got five Sixth Circuit nominees confirmed. Judges Martha Craig Daughtery, R. Guy Cole, Jr., Karen Nelson Moore, Ronald Lee Gilman, and Eric L. Clay were all Clinton nominees who were confirmed to the Sixth Circuit. This is also a fairly impressive statistic, particularly when compared to President Bush, who has only gotten two of his Sixth Circuit nominees confirmed, including Professor Rogers. But President Clinton's Sixth Circuit accomplishment is even more impressive when one considers that a Republican Senate confirmed four out of the five, or eighty percent, of those nominations. Only Judge Daughtery was confirmed by a Democrat Senate.

Indeed, because the Republican Senate confirmed so many nominees to the Sixth Circuit, Democrat appointees outnumbered Republican appointees by a ratio of three to one at the beginning of this year: there were six Democrat-appointed judges on the Sixth Circuit and only two Republican-appointed judges. President Clinton might have had even more judicial nominees confirmed to the Sixth Circuit if his administration had consulted properly on the White and Lewis nominations.

With respect to the Rogers' nomination, Professor Rogers has not been a judicial activist, as the Chairman claims. The law review article on which my friend from Vermont relies for this sweeping assertion was a theoretical piece discussing an esoteric subject that scholars have debated since the great Learned Hand. It was Professor Rogers' lone foray into the topic.

Far from arguing that inferior courts should somehow try to overrule higher court precedent—if that were even possible—Professor Rogers argues just the opposite: that lower courts have a duty to follow all precedent, including precedents with which they disagree. My friend from Vermont may want to read page 185 of the article where Professor Rogers writes that our legal system ''would not work well if lower courts persisted in their own sincere legal analyses regardless of the decisions of higher courts.'' Professor Rogers goes on to write that it ''follows that judges may, indeed should, follow the law as appellate courts determine it, in order to apply—per their oaths—the law of the system that set up their courts.''

Over the course of his long and distinguished career, Professor Rogers has consistently demonstrated a strong and abiding fidelity to precedent. A judicial activist, by contrast, would be a label more appropriately applied to someone like Clinton appointee William Sessions, a district court judge from Vermont, who recently declared that the federal death penalty statute is unconstitutional in all its applications, which would preclude using it against mass murderers and serial killers. Or it could apply to Clinton appointee Jed Rakoff, a district court judge who also ruled the federal death penalty unconstitutional, which prompted even the Washington Post to complain about such judicial activism in a piece entitled ''Right Answer, Wrong Branch.''

Or that label might apply to Clinton appointee Shira Scheindlin. According to the Wall Street Journal, in an article entitled ''Osama's Favorite Judge,'' a Jordanian named Osama Awadallah knew two of the 9/11 hijackers and met with one at least forty times. His name

was found in the car parked at Dulles Airport by one of the hijackers of American Airlines Flight 77. Photos of his better-known namesake—Osama bin Laden—were found in Mr. Awadallah's apartment. Under the law, a material witness may be detained if he has relevant information and is a flight risk.

Federal prosecutors thought that Osama Awadallah easily met both parts of that test and therefore detained him. While detained Mr. Awadallah was indicted for perjury. But Judge Scheindlin dismissed the perjury charges and released Mr. Awadallah. She reasoned that the convening of a federal grand jury investigating a crime was not a ''criminal proceeding'' and therefore it was unconstitutional to detain Mr. Awadallah. This was quite a surprise to federal prosecutors who for decades had used the material witness law in the context of grand jury proceedings for everyone from mobsters to mass murderer Timothy McVeigh.

Or that label might apply to Clinton appointees Tashima, Hawkins, Paez, and Berzon, all of whom discovered in the Constitution the right of prisoners serving life sentences to procreate via artificial insemination. Fortunately, there were enough judges on the Ninth Circuit to conclude that the Constitution does not include a ''right to procreate from prison via FedEx.''

There are other Clinton nominees to whom one could apply the label ''judicial activist.'' That label cannot, however, fairly be applied to Professor Rogers.

The Chairman also implies that Professor Rogers is an activist because of his views on the Supreme Court's opinion in Roe v. Wade. But Professor Rogers has never ruled on that subject. In fact, he has never even written on it, except for his one assignment as a line attorney in the Justice Department in helping draft an amicus brief. If daring to note some of the flawed analytical underpinnings of Roe makes one a judicial activist, then Justice Ruth Bader Ginsburg must be one. In a 1985 article, she noted that ''Roe sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action.'' She also recognized that in Roe ''heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.'' Other liberal scholars have also recognized serious flaws in Roe's analysis.

In conclusion, Professor Rogers possesses the intellect, integrity, and commitment to public service that will make him a fine addition to the Sixth Circuit. His confirmation will provide some badly-needed relief to my constituents and other citizens in the Sixth Circuit, and I am confident that he will make Kentucky and his country proud. And while I believe my friend from Vermont misapprehends the cause of the vacancy crisis on the Sixth Circuit and Professor Rogers' judicial philosophy and record, I appreciate him moving the Rogers' nomination and other Kentucky nominees through the process. He correctly notes that there are now no judicial vacancies in Kentucky, and I thank him again for helping the Commonwealth in that respect.

EXHIBIT 1

[From the Wall Street Journal, Dec. 4, 2001]

JUDGES AND GRUDGES

MICHIGAN'S DEMOCRATIC SENATORS SEEK PAYBACK

(By Thomas J. Bray)

On Thursday, the Sixth U.S. Circuit Court of Appeals, which handles federal appeals from Kentucky, Michigan, Ohio and Tennessee, will meet en banc to hear oral arguments on whether the University of Michigan's use of racial preferences in administrations is constitutional. Such a hearing, in which all of the court's active judges, rather than the usual three-judge panel, hear the case, is highly unusual.

But then the number of judges on the Sixth Circuit is bit unusual, too. Though there are normally 16 active judges assigned to the appeals court, only nine of the seats are currently filled. Moreover, the number will fall to eight at the end of the year when one judge retires.

Nominations to fill seats in the Sixth Circuit have are being stymied by bitter partisan wangling in the Senate. And there appears to be little prospect of breaking the deadlock. Michigan's two Democratic senators, Carl Levin and Deborah Stabenow, have put a hold on three of President Bush's nominees from that state. (Mr. Bush hasn't yet named a candidate for a fourth seat traditionally held by a Michiganian.) Judiciary Committee Chairman Patrick Leahy has refused even to hold hearings on the nominations.

Echoing their party's rationale for foot-dragging on judicial nominations from all across the country, Sens. Levin and Stabenow complain that when Republicans controlled the Judiciary Committee in the warning days of the Clinton administration, they arbitrarily refused to act on the nominations of state appellate judge Helen White and Detroit lawyer Kathleen McCree Lewis. ''This was despite the fact that no concerns were raised about either woman's qualifications,'' the two senators wrote in a letter last weekend to the Detroit News.

That leaves the implication that the White and Lewis nominations were stalled because of sheer partisanship, thus justifying retaliation now that the Senate is in Democratic hands. But the story is a bit more complicated.

Helene White happens to be the wife of Carl Legion's cousin Charles Levin, a former member of the Michigan Supreme Court. In 1996, Judge White was threatening to run as an independent for the state Supreme Court. This horrified Michigan Democrats, who feared that she might draw off a big chunk of the liberal vote. The White House, according to state political sources, was persuaded to forestall that possibility by nominating her for a seat on the Sixth Circuit. (The Democratic candidate went on the lose anyway.)

But her nomination outraged then-Sen. Spencer Abraham, a Michigan Republican who is now secretary of energy. Mr. Abraham traded his help for getting three Michigan nominees to the federal courts approved by the GOP Senate in exchange for Clinton-judge pickers holding off on further nominations.

When the White House was ahead with the White nomination anyway, sen. Abraham made no secret of his feeling that he had been double-crossed. He then placed his hold on the White nomination and later the Lewis nomination.

All of this came well into the Clinton tenure. Newly elected presidents, including Mr. Clinton, have generally received speedy accommodation for their initial nominees. Blocking nominees so early makes it appear the Democrats are motivated by little more than partisanship stemming from disappointment at the outcome of the 2000 election and the desire to impose an ideological litmus test on judicial nominees.

Sen. Charles Schumer of New York, a member of the Judiciary Committee, let the cat out of the bag shortly after the Democrats took over the Senate. The committee, he announced, would be justified in opposing nominees ''whose views fall outside the mainstream''—in other words, anybody with whom he and his Democratic colleagues disagreed.

The three blocked Bush nominees to the Sixth Circuit include a highly qualified federal district judged from western Michigan, a female state trial judge and a state appeals-court judge of Arab descent. At a time when Democrats are loudly complaining about insensitivity toward Arab and Muslim visa-holders, the last nomination might seem particularly timely. A federal district judge in Detroit is now hearing charges against three Arab aliens charged with visa violations who authorities say may have connections to al Qaeda.

There currently are 110 vacancies among the nation's 862 district and appeals courts judgeships. The gap has so far been filled by semiretired senior judges, through they aren't allowed to join in en banc court proceedings.

An indignant Sen. Leahy is hauling Attorney General John Ashcroft before his committee this week to answer questions about the constitutionality of his investigative techniques as well as the use of military commissions to conduct speedy trials of captured foreign terrorists. If Mr. Leahy and his colleagues are so keen on having the regular courts do this job, maybe they should be asked why they are still sitting on so many of the president's nominations.

OPPOSING THE LONG-TERM CONTINUING RESOLUTION

Mrs. LINCOLN. Mr. President, I rise in opposition to the continuing resolution because I believe it is irresponsible for Congress to adjourn without fulfilling our constitutional obligations. I have in the past allowed short-term continuing resolutions to fund our Government in order to give my colleagues time to complete the appropriations process. But I cannot support the long-term continuing resolution which will simply allow Congress to go home for the rest of the year before our job is complete.

As our Nation stands on the verge of going to war, it is beyond me how we can simply pass a bill to keep government spending at last year's levels. Yesterday's Washington Post reports that fire crews, police officers, emergency workers and others who would be the first on the scene in the event of a new terrorist attack haven't received any of the money that the President's budget promised them. I ask unanimous consent that this article be printed in the RECORD.