

In implementing the derivatives title, Congress encourages the CFTC to clarify through rulemaking that the exclusion from the definition of swap for "any sale of a non-financial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled" is intended to be consistent with the forward contract exclusion that is currently in the Commodity Exchange Act and the CFTC's established policy and orders on this subject, including situations where commercial parties agree to "book-out" their physical delivery obligations under a forward contract.

Congress recognized that the capital and margin requirements in this bill could have an impact on swaps contracts currently in existence. For this reason, we provided legal certainty to those contracts currently in existence, providing that no contract could be terminated, renegotiated, modified, amended, or supplemented (unless otherwise specified in the contract) based on the implementation of any requirement in this Act, including requirements on Swap Dealers and Major Swap Participants. It is imperative that we provide certainty to these existing contracts for the sake of our economy and financial system.

Regulators must carefully follow Congressional intent in implementing this bill. While Congress may not have the expertise to set specific standards, we have laid out our criteria and guidelines for implementing reform. It is imperative that these standards are not punitive to the end users, that we encourage the management of commercial risk, and that we build a strong but responsive framework for regulating the derivatives market.

Sincerely,

CHAIRMAN CHRISTOPHER  
DODD,  
*Senate Committee on  
Banking, Housing,  
and Urban Affairs,  
U.S. Senate.*

CHAIRMAN BLANCHE  
LINCOLN,  
*Senate Committee on  
Agriculture, Nutri-  
tion, and Forestry,  
U.S. Senate.*

#### JUDICIAL NOMINATIONS

Mr. LEAHY. Mr. President, earlier this week, I came to the Senate with the respected senior Senator from Tennessee and sought a time agreement to consider Jane Stranch of Tennessee, a judicial nomination that has been stalled by the Republican leadership for more than 8 months. It is one of more than 20 judicial nominations being delayed from Senate consideration by Republican objection. Despite the support of Senator ALEXANDER, the senior Senator from Tennessee who is part of the Republican leadership, the Republican leader objected to a time agreement to consider the Stranch nomination to the Sixth Circuit. I was disappointed, as I have been repeatedly by Republican obstruction since President Obama was elected.

Senate Republicans have further ratcheted up the obstruction and partisanship that have regrettably become commonplace this Congress with regard to judicial nominees. We asked merely for a time agreement to debate and vote on the nomination. I did not

foreclose any Republican Senator from voting against the nominee or speaking against the nominee but simply wanted a standard agreement in order to allow the majority leader to schedule the debate and get to a vote. This is for a nomination reported favorably by the Judiciary Committee over eight months ago with bipartisan support. Yet the Republican leader objected and blocked our consideration.

No one should be confused: the current obstruction and stalling by Senate Republicans is unprecedented. There is no systematic counterpart by Senate Democrats. In fact, during the first 2 years of the Bush administration, the 100 judges confirmed were considered by the Democratically controlled Senate an average of 25 days from being reported by the Judiciary Committee. The average time for confirmed Federal circuit court nominees was 26 days. The average time for the 36 Federal circuit and district and circuit court judges confirmed since President Obama took office is 82 days and the average time for Federal circuit nominees is 126 days. So when Republicans say that we are moving faster than we did during the first 2 years of the Bush administration they are wrong. It was not until the summer of 2001 that the Senate majority shifted to Democrats, but as soon as it did, we proceeded on the judicial nominations of President Bush, a Republican President. Indeed, by this date during the second year of the Bush administration, the Senate had confirmed 58 of his judicial nominations and we were on the way to confirming 100 by the end of the year. By contrast, Republican obstruction of President Obama's judicial nominees has meant that only 36 of his judicial nominees have been confirmed. We have fallen dramatically behind the pace set for consideration of President Bush's nominees.

With respect to Senate Republican leadership's current practice of holding, delaying and obstructing Senate consideration of judicial nominees reported favorably by the Judiciary Committee, this is a tactic they reserve for nominees of Democratic Presidents. Indeed, when President Bush was in the White House, Senate Republicans took the position that it was unconstitutional and wholly inappropriate not to vote on nominees approved by the Senate Judiciary Committee. With a Democratic President, they have reverted to the secret holds that resulted in pocket filibusters of more than 60 nominees during the Clinton years. Last year, Senate Republicans successfully stalled all but a dozen Federal circuit and district court nominees. That was the lowest total number of judges confirmed in more than 50 years. They have continued that practice despite the fact that judicial vacancies continue to hover around 100, with more than 40 declared judicial emergencies.

Since the nomination of Jane Stranch of Tennessee is for a vacancy

in the Sixth Circuit, when the Republican leader blocked consideration of her nomination earlier this week, I provided the history of how nominees to the Sixth Circuit by Presidents Clinton and Bush had been treated. Despite the fact that Senate Republicans had pocket filibustered President Clinton's nominees, Senate Democrats proceeded to consider President Bush's.

Today I would like to outline the recent history of the Fourth Circuit. Two nominees from North Carolina to the Fourth Circuit were the subject of a request for a time agreement by the Senator from North Carolina last week. The Republican leader objected to any agreement to debate and vote on those nominations, as well. I note that one of those North Carolina nominations was reported unanimously by the Judiciary Committee, and the other received six Republican votes in favor and only one vote against. They are supported by both Senators from North Carolina, one a Republican and one a Democrat. Still the Republican leadership refuses to allow the Senate to consider them.

When I became chairman of the Judiciary Committee midway through President Bush's first tumultuous year in office, I worked very hard to make sure Senate Democrats did not perpetuate the judge wars as tit-for-tat. In fact, we did not. Senate Republicans had pocket filibustered more than 60 of President Clinton's judicial nominations and refused to proceed on them. Included among these was one of the nominees from North Carolina now pending before us again, Judge Wynn. Nevertheless, during the 17 months I chaired the Judiciary Committee during President Bush's first 2 years in office, the Senate proceeded to confirm 100 of his judicial nominees. The Fourth Circuit was problematic, as I will explain, but we were able to make progress there as well. It was not as much progress as I would have liked, but during the Bush administration we were able to reduce the number of vacancies in the Fourth Circuit.

In contrast to the Republican Senate majority during the Clinton administration that obstructed nominations and more than doubled circuit court vacancies, Senate Democrats contributed to the reduction of circuit court vacancies by two-thirds during the Bush administration. The Senator from Kentucky complained last week about two nominations made during the 7th and 8th years of the Bush administration, including one that did not have the support of home State Senators. He did not mention that, during the Clinton administration, Senate Republicans pocket filibustered five of President Clinton's nominations to the Fourth Circuit, resulting in a doubling of Fourth Circuit vacancies, which rose from two to five. The Republican leader did not mention that Senate Republicans did not proceed on even one of President Clinton's Fourth Circuit nominees during the last three years of his administration or the fact that, by

contrast, Senate Democrats did proceed to confirm Judge Agee of Virginia to the Fourth Circuit in the last few months of the Bush administration.

The fact is that Senate Democrats did not do what Republicans are apparently now doing—retaliating for perceived slights. We did not engage in tit-for-tat. When I became chairman of the Judiciary Committee midway through President Bush's first year in office, the first nominee the Judiciary Committee and the Senate considered was a Virginia nominee to the Fourth Circuit. Judge Roger Gregory had been pocket filibustered by Senate Republicans after being nominated by President Clinton. We also considered and confirmed the controversial nomination of Judge Dennis Shedd from South Carolina to the Fourth Circuit before the end of that Congress. Senate Democrats cooperated in order to break a longstanding logjam that had prevented any North Carolina representation on the Fourth Circuit for many years with the confirmation of Judge Allyson Duncan to the Fourth Circuit in 2003.

In 2008, under my chairmanship of the Judiciary Committee, we moved forward to confirm Judge G. Steven Agee of Virginia to the Fourth Circuit. The confirmation of Judge Agee was one more Fourth Circuit confirmation than Senate Republicans would allow during the last 3 years of the Clinton administration and allowed us to reduce the vacancies on the circuit during the Bush administration by one. While I would have liked to have been more productive, and would have been had the Bush administration not been intent on packing the court, we were able to reduce the vacancies on the Fourth Circuit during the Bush administration and reverse the effect of Senate Republicans' obstruction of President Clinton's nominees. That is a more accurate snapshot of the recent history of the Fourth Circuit than the isolated nominations at the end of the Bush administration that the Republican leader referenced as if they justified his objection to proceeding to debate and vote on the consensus nominations of Judge James Wynn and Judge Albert Diaz now.

The Fourth Circuit is a good example of how much time and effort was wasted on ideological nominations by President Bush. For example, there was the highly controversial and failed nomination of William "Jim" Haynes II, to the Fourth Circuit. Senator GRAHAM of South Carolina criticized that nomination just recently during the Judiciary Committee consideration of the nomination of Elena Kagan to the Supreme Court. As general counsel at the Department of Defense, he was the architect of many discredited policies on detainee treatment, military tribunals, and torture. Mr. Haynes never fulfilled the pledge he made to me under oath at his hearing to supply the materials he discussed in an extended opening statement regarding his role in developing

these policies and their legal justifications.

The Haynes nomination led the Richmond Times-Dispatch to write an editorial in late 2006 entitled "No Vacancies," about the President's counterproductive approach to nominations in the Fourth Circuit. The editorial criticized the Bush administration for pursuing political fights at the expense of filling vacancies. According to the Times-Dispatch, "The president erred by renominating . . . and may be squandering his opportunity to fill numerous other vacancies with judges of right reason." The Times-Dispatch editorial focused on the renomination of Mr. Haynes, but could just as easily have been written about other controversial Fourth Circuit nominees.

Another example is President Bush's nominations of Duncan Getchell, over the objections of both his home State Senators, a Republican and a Democrat. That nomination was later withdrawn.

Another example is President Bush's nomination of Claude Allen to a vacancy in Maryland, despite the fact that he was opposed by both Maryland Senators. That nomination was withdrawn and Allen was later arrested and convicted of fraud.

The President insisted on nominating and renominating Terrence Boyle over the course of 6 years to a North Carolina vacancy on the Fourth Circuit. This despite the fact that as a sitting U.S. district judge and while a circuit court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. The President should have heeded the call of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and Paramedics of North Carolina, as well as the advice of the Senator from North Carolina who opposed the nomination. Law enforcement officers from North Carolina and across the country opposed the nomination. Civil rights groups opposed the nomination. Those knowledgeable and respectful of judicial ethics opposed the nomination. President Bush persisted for 6 years before withdrawing the Boyle nomination.

I mention these ill-advised nominations because Senate Republicans seem to have forgotten this recent history and why there are continuing vacancies on the Fourth Circuit. The efforts and years wasted on President Bush's ideological nominations followed in the wake of the Republican Senate majority's refusal to consider President Clinton's Fourth Circuit nominees. All four nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. These outstanding nominees included U.S. District Court Judge James Beaty, Jr., U.S. Bankruptcy Judge J. Richard Leonard, North Caro-

lina Court of Appeals Judge James Wynn, and Professor Elizabeth Gibson. The failure to proceed on these nominations has yet to be explained. Had either Judge Beaty or Judge Wynn been considered and confirmed, he would have been the first African-American judge appointed to the Fourth Circuit.

In contrast, I worked to break through the impasse and to confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her. I also worked to reduce Federal judicial vacancies in North Carolina by confirming eight district court judges during the Bush administration. By contrast, during the entire 8 years of the Clinton administration, only one district court judge was allowed to be confirmed for North Carolina.

Overall judicial vacancies were reduced during the Bush years to less than 4 percent. Federal judicial vacancies are now over 10 percent. During the Bush years, the Federal circuit court vacancies were reduced from a high of 32 down to single digits after Senate Republicans had more than doubled circuit court vacancies during the last 6 years of the Clinton administration. Our progress has not continued with President Obama. Instead, Republican obstruction is putting that progress at risk. During the Bush years, we reduced vacancies on nine circuits. Since then, vacancies on six circuits have risen and circuit court vacancies have doubled from their low point.

There did come a time in the 108th Congress when President Bush and Senate Republicans were intent on packing the courts with ideologues, and the Republican chairman of the Judiciary rewrote or broke our rules and practices in his attempt to assist that effort. They forced filibusters of nominees. Most of those were ultimately confirmed and some withdrew, including Miguel Estrada who withdrew when the Bush administration would not accommodate Senate requests for access to information about his work. Senate Democrats did not replicate or retaliate for Republican excesses during the Clinton years. As chairman I proceeded on judicial nominees I opposed, I made blue slips public and Senate Democrats debated judicial nominees in public and gave their reasons for opposition rather than relying as Senate Republicans had on secret holds and pocket filibusters.

I have not done what the Republican chairman did. I have respected and protected the rights of the minority. I have followed our rules and practices. President Obama has not done what President Bush did by making nominations opposed by home State Senators. Instead, President Obama has reached out and worked with home State Senators from both parties. He has identified well-qualified nominees. Despite our efforts, the qualifications of the nominees, and the support of home State Senators, including Republican

Senators, Senate Republicans have filibustered, obstructed and delayed consideration of President Obama's judicial nominees favorably reported by the Judiciary Committee.

I have tried to ratchet up the cooperation between parties and branches in my role as chairman. It is disappointing to see the Senate Republican leadership take the opposite approach. They are holding up for no good reason consideration of nominees reported from the Judiciary Committee for weeks and months. Their pattern is to stall and obstruct. Republicans' sense of injury is misplaced in my view. Moreover, the disproportionateness of their response to perceived slights disserves the American people and our Federal justice system.

I was interested to see the Republican leader in his statement last week claim credit for the confirmations of Judge Andre Davis of Maryland and Judge Barbara Keenan of Virginia to the Fourth Circuit. I would be delighted to praise the Republican leader were he to work with us, and I look forward to doing so were he to agree without further delay to debates and prompt votes on the more than 20 judicial nominees now being stalled by Republican objection.

Let us remember what happened with the two nominees he now mentions: the nomination of Judge Andre Davis was stalled for 5 months after being reported by the Judiciary Committee with a strong bipartisan majority by a vote of 16 to 3. Some would say this nomination was delayed for 10 years since Judge Davis had been nominated by President Clinton toward the end of his administration in 2000 and was not confirmed until 2010. Judge Davis was a well-respected judge who had served for 14 years as a Federal district judge and before that for 8 years as a Maryland State court judge and had received the highest rating by the ABA. I understand why the Republican leader ultimately voted for him, along with more than 70 other Senators who provided a strong bipartisan majority once Republicans allowed the vote to proceed. It is up to each Senator how he or she chooses to vote. My concern is that the debate and vote on the nomination was needlessly stalled for 5 months.

The case of Judge Barbara Keenan is even more troubling. Judge Keenan had been a judge for 29 years and served on each of the four levels of Virginia State courts. The ABA awarded her its highest rating as did the Virginia State Bar. Judge Keenan's nomination was reported unanimously by the Judiciary Committee on October 29, 2009. It took until March 2, more than 4 months, to get the Senate to debate and vote on this nomination after it was unanimously reported. And even that does not fully indicate the Republican obstruction. It also took the majority leader's filing a cloture petition to bring the nomination to a vote. Having refused to agree to a time agreement

on this consensus nomination, the Senate had to invoke cloture to end the stalling. When the vote was finally taken, it was unanimous. No Senator voted against this nomination or spoke against it. So, I asked, why the stalling? Tragically, that stalling and obstruction has continued and is continuing. I said then that even when Republicans cannot say no, they nonetheless demand that the Senate go slow. This is wrong. Judge Keenan's nomination is just one example from several where after stalling and delaying consideration for weeks and months for no good reason, Senate Republicans do not vote against the nomination.

I suspect that will happen again with the North Carolina nominees to the Fourth Circuit whose consideration the Republican leader objected to last week. After all, they were reported 18 to 1 and 19 to 0. Judge James Wynn of North Carolina and Judge Albert Diaz of North Carolina are examples of the judicial nominees being stalled who would be confirmed by the Senate if the Senate Republican leadership would agree to debate and vote on them. The list includes not only the 21 Federal circuit and district court nominees currently stalled by Republican objection from final Senate consideration, but also many of the 36 confirmed but who were needlessly delayed. What is being perpetuated is a shame that does harm to the American people and the Federal courts.

#### REMEMBERING FIRST LIEUTENANT VERNON BAKER

Mr. BARRASSO. Mr. President, I rise today to pay tribute to 1LT Vernon Baker, a native of Cheyenne, WY. Our Nation has lost a son of Wyoming and hero of World War II.

First Lieutenant Baker not only fought the fascist Axis powers but he also fought to serve in a segregated U.S. Army. Vernon Baker's life story is a testament to no door or opportunity can be permanently shut in the United States.

As a young man, Mr. Baker made the decision to serve his country in World War II by joining the U.S. Army. He was initially told by Army recruiters he could not sign up because he was Black. His determination to serve his country was not deterred. Vernon returned to the Cheyenne recruiting office and found a recruiter who would sign him up.

First Lieutenant Baker went on to serve with the 92nd Infantry Division's 370th Regiment, an all Black unit in Italy. Throughout his World War II service, Mr. Baker was awarded the Bronze Star, Purple Heart, and the Distinguished Service Cross. Fifty years later, First Lieutenant Baker was awarded the Medal of Honor for his leadership and bravery in destroying a number of German positions near Viareggio, Italy, almost single handedly.

I thank Mr. Baker for his service. Mr. Baker is survived by wife Heidy, four children, and a grandson.

Mr. President, I ask unanimous consent to have printed in the RECORD First Lieutenant Baker's Medal of Honor citation and an article that appeared in the Casper Star Tribune.

There being no objection, the material was ordered to be printed in the RECORD as follows:

Citation: For extraordinary heroism in action on 5 and 6 April 1945, near Viareggio, Italy. Then Second Lieutenant Baker demonstrated outstanding courage and leadership in destroying enemy installations, personnel and equipment during his company's attack against a strongly entrenched enemy in mountainous terrain. When his company was stopped by the concentration of fire from several machine gun emplacements, he crawled to one position and destroyed it, killing three Germans. Continuing forward, he attacked an enemy observation post and killed two occupants. With the aid of one of his men, Lieutenant Baker attacked two more machine gun nests, killing or wounding the four enemy soldiers occupying these positions. He then covered the evacuation of the wounded personnel of his company by occupying an exposed position and drawing the enemy's fire. On the following night Lieutenant Baker voluntarily led a battalion advance through enemy mine fields and heavy fire toward the division objective. Second Lieutenant Baker's fighting spirit and daring leadership were an inspiration to his men and exemplify the highest traditions of the Armed Forces.

[From the Associated Press]

MEDAL OF HONOR HERO DIES

WYOMING NATIVE OVERCAME DISCRIMINATION,  
SEGREGATION IN MILITARY

(By Rebecca Boone)

ST. MARIES, IDAHO.—Wyoming native Vernon Baker, who belatedly received the Medal of Honor for his role in World War II, died at his home near St. Maries, Idaho. He was 90.

Baker died Tuesday of complications of brain cancer, Benewah County Coroner and funeral home owner Ron Hodge said.

Then-President Bill Clinton presented the nation's highest award for battlefield valor to Baker in 1997. He was one of just seven black soldiers to receive it and the only living recipient.

"The only thing that I can say to those who are not here with me is, 'Thank you, fellas, well done,'" Baker told The Washington Post after the ceremony. "'And I will always remember you.'"

In 1944, 2nd Lt. Baker was sent to Italy with a full platoon of 54 men. On April 5, he and his soldiers found themselves behind enemy lines near Viareggio, Italy.

When concentrated enemy fire from several machine gun emplacements stopped his company's advance, Baker crawled to one and destroyed it, killing three Germans. Continuing forward, he attacked an enemy observation post and killed two occupants.

With the aid of one of his men, Baker attacked two more machine gun nests, killing or wounding the four enemy soldiers occupying these positions. Then he covered the evacuation of his wounded soldiers by occupying an exposed position and drawing the enemy's fire.

On the following night, Baker voluntarily led a battalion advance through enemy mine fields and heavy fire.

In all, Baker and his platoon killed 26 Germans and destroyed six machine gun nests, two observer posts and four dugouts.