there will be no further recorded votes during the day.

Mr. KYL addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Madam President, might I inquire, is it appropriate to begin debate on the subject of the unanimous consent request, S. 1892? And is it correct that the time would be under my control and then Senator LEAHY would have time on the other side?

The PRESIDING OFFICER. Yes, that's the order.

JUDICIAL ANTINEPOTISM ACT

The PRESIDING OFFICER. The clerk will report the bill.

The legislative clerk read as follows:

A bill (S. 1892) to provide that a person closely related to a judge of a court exercising judicial power under article III of the United States Constitution (other than the Supreme Court) may not be appointed as a judge of the same court, and for other purposes.

The Senate proceeded to consider the bill.

Mr. KYL addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, let me thank Senator LEAHY for his cooperation in allowing us to get this bill up at this time and deal with it in an expedited fashion. I will describe briefly the reason for the legislation, what it does. I will ask unanimous consent to submit further remarks for the RECORD.

Under existing law, section 458 of title 28 of the U.S. Code reads: ''No person shall be appointed to, or employed in, any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court.''

I will read the words that pertain to judges: ''no person shall be appointed . . . to any court who is related . . . to any justice or judge of such court.'' That language seems pretty straightforward on its face—that you can't have relations on the same court, nominated by the President or appointed by the Senate. Notwithstanding that relatively clear language, there has arisen a controversy over whether it means what I suggest it says. The administration has actually interpreted it in a way that could mean that it applies only to employees of the court, not to judges of the court themselves.

This bill clarifies that it applies to both, which I think was both the original intent and the best public policy. I note that the issue has arisen because of the nomination of Professor Fletcher to be a judge on the Ninth Circuit, since his mother sits on the circuit currently. Frankly, most people were not aware of the statute, Madam President. But, in my view, we should not do something that is not permitted under the law. Therefore, while I acknowledge that the administration has raised a question about the interpretation of the statute, I think the statute is pretty clear. This bill makes it crystal clear that it applies to both employees of the court and judges of the court.

In effect, what the legislation would do is to say that on the same court, like the same circuit or the same district court, you would not be able to have a father and son, two brothers, two sisters, that sort of thing. But you could have people related on different circuits or different Federal district courts. For example, you could have a brother in the Fifth Circuit and a brother in the Second Circuit. You could have two sisters serving in different circuits or different districts in the State of Maine, or of the State of Pennsylvania, or of the State of Vermont. But you would not be able to have two close relatives in the very same court.

The public policy reasons for that are fairly obvious. When a litigant is before the court, the litigant wants to know that he or she is being treated fairly. When a relative who is that close to a judge that may have decided a case on a panel of judges is then being called upon to review the decision of that close relative, the litigant clearly is going to have a question as to whether his or her case can be treated fairly. Here is an example: A circuit court judge sits on a panel of three judges who decide against a plaintiff. That case is then given to the en banc panel of the circuit court in which the father, or the brother, or the sister of that judge is also a member of the panel; the litigant might well be a little skeptical that the brother, sister, father, or whoever it is, is going to be treating him fairly, given the fact that the question is whether or not he will overturn the decision of his brother, or his son, or whoever the relative is.

So it is historic that we have tried to avoid that kind of conflict of interest. In most cases, it can be avoided. The kinds of situations in which this will arise are very rare. But since it has arisen in the context of this particular nominee, and since we think we can make the statute crystal clear to apply to both judges and employees, it seemed like a good thing to do.

I have two final points. One, this does not apply to the U.S. Supreme Court. Constitutionally, we have the ability to set the criteria or qualifications for circuit and district courts, but we don't have that ability for the Supreme Court. That is fixed in the Constitution. We could not apply it there.

Secondly, it only applies to nominations made after the effective date of the statute. For those interested in the nomination of Professor Fletcher, this statute or change would not adversely affect his nomination or confirmation by the Senate.

With that explanation, I yield to Senator LEAHY for such comment as he may want to make. I know he is in opposition to the bill.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. I thank my friend from Arizona. As he knows, I have opposition to this bill coming forward. I am not in favor of the bill. It will pass, I understand, but I am not in favor of it. I know of no problem created by the appointment of judges who are from the same family. Indeed, the three historical example of which I am aware lead me to the opposite conclusion. Justice David Brewer served with his uncle Justice Stephen Field on the United States Supreme Court after being appointed by President Harrison in 1890. Learned and his cousin Augustus Hand served together in the Southern District of New York and on the Court of Appeals for the Second Circuit. Richard and Morris Arnold are brothers currently serving on the Court of Appeals for the Eighth Circuit. All served with distinction.

I do not know why the country should be deprived of the judgment and wisdom of someone because a relative proceeded him or her to the bench. We have had relatives serve simultaneously in government before and now. Should one of the LEVIN brothers or HUTCHINSON brothers not serve in Congress? Should one of the Breyer brothers be barred from the federal bench? For that matter, should federal judges be prohibited who are related to Senators who recommend them to the President and then voted for their confirmation?

I believe that S. 1892 is an unnecessary and unwise bill. Moreover, it could lead to appointment barriers against daughters and nieces of current judges. With people living longer and women as well as men having been practicing law and entered public service in the last decades, I fear that the prohibition envisioned by the bill will serve as yet another barrier to keep qualified women from being appointed to the bench. This may be an unintentional consequence of the bill, but a likely consequence nonetheless.

Senator KYL's bill is intended to do what section 458 of title 28, United States Code, does not; namely, prohibit the appointment to a federal court of a relative of a judge already serving on that court. The bill would amend the law to add a prohibition against the appointment of a person to a federal court on which a first cousin or closer relative of that nominee was an active or senior judge.

In 1914 President Woodrow Wilson appointed Augustus Hand to the United States District Court for the Southern District of New York where he joined his distinguished first cousin and close friend Judge Learned Hand. In 1927, President Calvin Coolidge elevated Judge Augustus Hand to the United States Court of Appeals for the Second Circuit, where he rejoined his cousin Judge Learned Hand, who had been elevated three years before. Had the Kyl bill been in force, neither of these appointments would have been in accordance with law.

The service of the Hand cousins on the Second Circuit was central to the development of the law in our Circuit

and to its reputation as the finest federal appellate court in the country.

More recently, just six years ago in 1992, President George Bush appointed Judge Morris Arnold to the United States Court of Appeals for the Sixth Circuit, where he joined his brother Judge Richard Arnold on that court. In our confirmation proceedings, a number of Senators commented favorably on the fact that Judge Arnold was joining his distinguished brother.

When it was a brother being nominated by a Republican President, the familial relationship was seen as a plus, a benefit for the public. Now that we have a Democratic President nominating a son to join a bench that has included his mother, a new danger of possible appearance of conflict of interest is being conjured up as an excuse to delay and oppose confirmation of a distinguished scholar and decent person.

I worry that we are raising something that we don't need to raise. I realize this affects Professor Fletcher's appointment. But I think we may have legislated beyond where we need to legislate.

There are problems with the appointment of judges to the federal judiciary, but nepotism in the appointment of judges does not appear to be one of them. After all, it is the President who nominates and the Senate that consents. If we really wanted to do something about the evils of nepotism, we would prohibit Presidents from nominating their relatives or the Senate from confirming theirs. Other judges, relatives or not, do not have a role in the appointment process.

The bigger problem with respect to the judiciary is the assault on the judiciary by the Republican majority and its unwillingness to work to fill longstanding vacancies with the qualified people being nominated by the President. Professor Fletcher's nomination has been a casualty of the Republican majority's efforts. Forty-one months and two confirmation hearings have not been enough time and examination to bring the Fletcher nomination to a vote.

Professor Fletcher is a fine person and an outstanding nominee has had to endure years of delay and demagoguery as some choose to play politics with our independent judiciary. The Ninth Circuit continues to function with multiple vacancies among its authorized judgeships, although we have five nominees to the Ninth Circuit pending before the Senate for periods ranging from four to 41 months. Two await hearings, one awaits a Committee vote, and two have been on the Senate calendar awaiting final action for many months.

This is too reminiscent of the government shutdown only a couple of years ago and the numerous times of late when the Republican congressional leadership has recessed without completing work on emergency supplemental and disaster relief legislation, on the federal budget, campaign finance reform, comprehensive tobacco legislation, the patient bill of rights and HMO reform.

In his most recent Report on the Judiciary the Chief Justice of the United States Supreme Court warned that vacancies would harm the administration of justice. The Chief Justice of the United States Supreme Court pointedly declared: ''Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary.''

Once this bill is acted upon by the Senate, the Senate will finally be allowed to turn its attention to the longstanding nomination of Professor Fletcher. I have said from the outset of Senator KYL's effort that I would not hold up consideration of his bill but that I wanted an opportunity to note my opposition to it and to vote against it. Indeed, it was Senator KYL who held his bill over for a week before it was considered before the Judiciary Committee.

Despite the Committee reporting of the bill on May 21, 1998, the majority did not propose consideration of S. 1892 until Monday of this week, October 5, 1998. I responded without delay that I was prepared, as I had been all along, to enter into a short time agreement to be followed by a vote on the bill. Consistent with that undertaking I have noted my opposition and am prepared to vote.

Madam President, I am willing to yield the remainder of the time and go to a vote.

Mr. KYL. Madam President, I am happy to yield the remainder of my time and am prepared to vote.

The PRESIDING OFFICER. The bill is before the Senate and open to amendment. If there be no amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill (S. 1892) was ordered to be engrossed for a third reading, was read the third time, and passed as follows:

S. 1892

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LIMITATION ON CLOSELY RELATED PERSONS SERVING AS FEDERAL JUDGES ON THE SAME COURT.

(a) IN GENERAL.—Section 458 of title 28, United States Code, is amended—

(1) by inserting ''(a)(1)'' before ''No person''; and

(2) by adding at the end the following:

''(2) With respect to the appointment of a judge of a court exercising judicial power under article III of the United States Constitution (other than the Supreme Court), subsection (b) shall apply in lieu of this subsection.

''(b)(1) In this subsection, the term—

''(A) 'same court' means—

''(i) in the case of a district court, the court of a single judicial district; and

''(ii) in the case of a court of appeals, the court of appeals of a single circuit; and

''(B) 'member'—

''(i) means an active judge or a judge retired in senior status under section 371(b); and

''(ii) shall not include a retired judge, except as described under clause (i).

''(2) No person may be appointed to the position of judge of a court exercising judicial power under article III of the United States Constitution (other than the Supreme Court) who is related by affinity or consanguinity within the degree of first cousin to any judge who is a member of the same court.''.

(b) EFFECTIVE DATE.—This Act shall take effect on the date of enactment of this Act and shall apply only to any individual whose nomination is submitted to the Senate on or after such date.

Mr. KYL. Madam President, I move to reconsider the vote.

Mr. LEAHY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LEAHY. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. ALLARD). Without objection, it is so ordered.

SECTION 371 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1999

Mr. GRASSLEY. Mr. President, I would like to take a moment to clarify one section of the Strom Thurmond National Defense Authorization Act with my colleague, Senator THURMOND.

I want to clarify further the intent of the language in section 371. This section deals with the ability of the children of U.S. Customs employees living in Puerto Rico to attend the Department of Defense school in Puerto Rico. It is my understanding that the Customs Service will not be required to reimburse the Department of Defense for the cost of dependents attending the DOD school in Puerto Rico. Is this the Senator's understanding?

Mr. THURMOND. I appreciate the opportunity to clarify the intent of this provision. The Conference Report authorizes children of Customs Service employees to attend the Department of Defense school in Puerto Rico during the period of their assignment in Puerto Rico. Our intent was to remove the five-year limit on the eligibility for children of non-Department of Defense personnel to attend the DOD school in Puerto Rico since Customs employees are routinely stationed in locations like Puerto Rico longer than five years. The provision does not require the Customs Service to pay tuition costs for these children to attend the DOD school; however, the Secertary of Defense may work with the Secretary of the Treasury to provide reimbursement for the tuition costs for children of Customs Service employees.

Mr. GRASSLEY. That was my understanding as well. I would like to make one additional point which I believe